

TEMPORARY RULE-MAKING FINDINGS OF NEED

[Authority G.S. 150B-21.1]

OAH USE ONLY

VOLUME:

ISSUE:

1. Rule-Making Agency: North Carolina Industrial Commission

2. Rule citation & name: 11 NCAC 23G .0104, Duties of parties, representatives, and attorneys.

3. Action: ☐ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☒ Yes ☐ No Effective date: June 16, 2020

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: June 8, 2020
- b. Proposed Temporary Rule published on the OAH website: June 12, 2020
- c. Public Hearing date: June 25, 2020
- d. Comment Period: Started June 15, 2020 and ended July 8, 2020
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): June 8, 2020
- f. Adoption by agency on: August 6, 2020
- g. Proposed effective date of temporary rule [if other than effective date established by G.S. 150B- 21.1(b) and G.S. 150B-21.3]:
- h. Rule approved by RRC as a permanent rule [See G.S. 150B-21.3(b2)]:

6. Reason for Temporary Action. Attach a copy of any cited law, regulation, or document necessary for the review.

- ☒ A serious and unforeseen threat to the public health, safety or welfare.
- ☐ The effective date of a recent act of the General Assembly or of the U.S. Congress.
Cite:
Effective date:
- ☐ A recent change in federal or state budgetary policy.
Effective date of change:
- ☐ A recent federal regulation.
Cite:
Effective date:
- ☒ A recent court order.
Cite order: North Carolina Supreme Court *Order Amending the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions* ordered by the Court in Conference on June 3, 2020. A copy of the relevant pages of this Supreme Court Order is attached to this submission.
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain: Adhering to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest because doing so would result in a significant period of time during which (1) participants in workers' compensation mediations would be at risk for contracting and spreading COVID-19; and (2) Rule 11 NCAC 23G .0104 would not be "substantially similar" to Rule 4 of the *Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*, as mandated by G.S. 97-80(c) (which requires the Industrial Commission's mediation rules to be "substantially similar" to the mediation rules approved by the Supreme Court for use in the Superior Court division). Immediate adoption of the rule (which changes the presumptive physical in-person attendance requirement to a presumptive remote attendance requirement whenever the mediation rules approved by the Supreme Court for use in the Superior Court division do so) is required by a serious and unforeseen threat to the public health, safety, or welfare and is required by a recent court order, namely the June 3, 2020 Supreme Court Order cited above.

7. Why is adherence to notice and hearing requirements contrary to the public interest and the immediate adoption of the rule is required?

Adhering to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest for two reasons. First, doing so would result in a significant period of time during which participants in workers' compensation mediations would be at risk for contracting and spreading COVID-19 because the rule, as currently written, requires physical in-person attendance of all parties and other persons required to attend a mediation, unless all such parties and persons and the mediator agree to waive the physical in-person attendance requirement, or unless the physical in-person attendance requirement is waived by order of the Industrial Commission upon a motion of a party and notice to all parties and persons required to attend the mediation. Mediations in workers' compensation cases are held indoors in offices where air may not circulate freely and where there may not be adequate space to allow mediation participants to stay 6 feet apart. These mediations often require the attendance of people who fall into a high-risk category for complications from COVID-19. And some mediations involve multiple defendants, thereby increasing the number of mediation participants to potentially more than 10 people. It is not uncommon for one party to refuse to agree to waive the physical in-person attendance requirement of the rule and it is not guaranteed that a motion to waive the physical in-person attendance requirement will be granted. Therefore, the current rule may result in gatherings contrary to the current social distancing and other health and safety recommendations of the Governor of North Carolina, NC Dept. of Health and Human Services, and Centers for Disease Control and Prevention. Second, adhering to the notice and hearing requirements of G.S. 150B-21.2 means that there would be a significant period of time during which Rule 11 NCAC 23G .0104 would not be "substantially similar" to Rule 4(a)(2) of the *Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions*, as mandated by G.S. 97-80(c) (which requires the Industrial Commission's mediation rules to be "substantially similar" to the mediation rules approved by the Supreme Court for use in the Superior Court division).

Immediate adoption of the rule is required for two reasons. First, the rule, as currently written, poses a serious and unforeseen threat to the public health, safety, or welfare because at this time physical in-person mediations (as presumptively required by the current rule) place the public at risk for contracting and spreading COVID-19. Second, immediate adoption of the rule is required by a recent court order (the June 3, 2020 NC Supreme Court order). Because the June 3, 2020 order changed the presumptive mediation attendance requirement in Superior Court civil actions to remote attendance, it is necessary to amend the Industrial Commission mediation rule attendance provisions as proposed so that the Industrial Commission mediation rule is "substantially similar" to the mediation attendance rule applicable in Superior Court civil actions, as required by G.S. 97-80(c).

8. Rule establishes or increases a fee? (See G.S. 12-3.1)

☐ Yes
Agency submitted request for consultation on:
Consultation not required. Cite authority:

☒ No

9. Rule-making Coordinator: Gina Cammarano

Phone: 919-807-2524

E-Mail: gina.cammarano@ic.nc.gov

10. Signature of Agency Head*:



*** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**

Agency contact, if any:

Phone:

E-Mail:

Typed Name: Philip A. Baddour, III

Title: Chair of the North Carolina Industrial Commission

E-Mail: philip.baddour@ic.nc.gov

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ **Date returned to agency:**

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER AMENDING THE RULES FOR MEDIATED
SETTLEMENT CONFERENCES AND OTHER SETTLEMENT
PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

Pursuant to subsection 7A-38.1(c) of the General Statutes of North Carolina, the Court hereby amends Rules 1, 4, 7, and 8 of the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions.

* * *

Rule 1. Initiating Settlement Events

(a) **Purposes of Mandatory Settlement Procedures.** These rules are promulgated under N.C.G.S. § 7A-38.1 to implement a system of settlement events, which are designed to focus the parties' attention on settlement, rather than on trial preparation, and to provide a structured opportunity for settlement negotiations to take place. Nothing in these rules is intended to limit or prevent the parties from engaging in settlement procedures voluntarily, either prior to, or after, those ordered by the court under these rules.

(b) **Duty of Counsel to Consult with Clients and Opposing Counsel Concerning Settlement Procedures.** In furtherance of the purposes set out in subsection (a) of this rule, upon being retained to represent any party to a superior court civil action, counsel shall advise his or her client regarding the settlement procedures approved by these rules, and shall attempt to reach an agreement with opposing counsel on an appropriate settlement procedure for the action.

(c) **Initiating the Mediated Settlement Conference by Court Order.**

(1) **Order of the Senior Resident Superior Court Judge.** In all civil actions, except those actions in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license, the senior resident superior court judge of any judicial district shall, by written order, require all persons and entities identified in Rule 4 to attend a pretrial mediated settlement conference. The judge may withdraw his or her order upon motion of a party under subsection (c)(6) of this rule only for good cause shown.

(2) **Motion to Authorize the Use of Other Settlement Procedures.** The parties may move the senior resident superior court judge to authorize the use of another settlement procedure

3. Any party that is a governmental entity shall be represented at the mediated settlement conference by an employee or agent who is not the entity's outside counsel and who: (i) has authority to decide on behalf of the entity whether and on what terms to settle the action; (ii) has been authorized to negotiate on behalf of the entity and can promptly communicate during the conference with persons who have decision-making authority to settle the action; or (iii) has authority to negotiate on behalf of the entity and to make a recommendation to the entity's governing board, if under applicable law the proposed settlement terms can be approved only by the entity's governing board.

Notwithstanding anything in these rules to the contrary, any agreement reached which involves a governmental entity may be subject to the provisions of N.C.G.S. § 159-28(a).

- b. A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier, which may be obligated to pay all or part of any claim presented in the action. Each carrier shall be represented at the mediated settlement conference by an officer, employee, or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of the carrier, or who has been authorized to negotiate on behalf of the carrier, and can promptly communicate during the conference with persons who have decision-making authority.
- c. At least one counsel of record for each party or other participant whose counsel has appeared in the action.

- (2) **Physical Attendance Required Through the Use of Remote Technology**. Any party or person required to attend a mediated settlement conference shall ~~physically attend until~~ attend the conference using remote technology; for example, by telephone, videoconference, or other electronic means. The conference shall conclude when an agreement is reduced to writing and signed, as provided in subsection (c) of this rule, or when an impasse ~~has been~~is declared. ~~Any party or person may have the attendance requirement excused or modified, including the allowance of the party or person's participation without physical attendance by~~Notwithstanding this remote attendance requirement, the conference may be conducted in person if:

- a. ~~agreement of all parties, persons required to attend, and the mediator; or~~ the mediator and all parties and persons required to attend the conference agree to conduct the conference in person and to comply with all federal, state, and local safety guidelines that have been issued; or
- b. ~~order of~~ the senior resident superior court judge, upon motion of a party and notice to the mediator and to all parties and persons required to attend the conference, so orders.

(3) **Scheduling.** Participants required to attend the mediated settlement conference shall promptly notify the mediator after designation or appointment of any significant problems that they may have with the dates for conference sessions before the completion deadline, and shall inform the mediator of any problems that arise before an anticipated mediated settlement conference session is scheduled by the mediator. If a scheduling conflict in another court proceeding arises after a conference session has been scheduled by the mediator, then the participants shall promptly attempt to resolve the conflict under Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina on 20 June 1985.

(b) **Notifying Lienholders.** Any party or attorney who has received notice of a lien, or other claim upon proceeds recovered in the action, shall notify the lienholder or claimant of the date, time, and location of the mediated settlement conference, and shall request that the lienholder or claimant attend the conference or make a representative available with whom to communicate during the conference.

(c) **Finalizing Agreement.**

- (1) If an agreement is reached at the mediated settlement conference, then the parties shall reduce the terms of the agreement to writing and sign the writing, along with their counsel. By stipulation of the parties and at the parties' expense, the agreement may be electronically recorded. If the agreement resolves all issues in the dispute, then a consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.
- (2) If the agreement resolves all issues at the mediated settlement conference, then the parties shall give a copy of the signed agreement, consent judgment, or voluntary dismissal to the mediator and to all parties at the conference, and shall file the consent judgment or voluntary dismissal with the court within

relinquished, or whose professional license becomes inactive due to disciplinary action or the threat of disciplinary action from his or her licensing authority. Any mediator whose professional license is revoked, suspended, lapsed, or relinquished, or whose professional license becomes inactive, shall report the matter to the Commission.

(c) A mediator's certification may be revoked or not renewed at any time it is shown to the satisfaction of the Commission that a mediator no longer meets the qualifications set out in this rule or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible for certification under this rule. No application for certification renewal shall be denied on the grounds that the mediator's training and experience does not meet the training and experience required under rules which were promulgated after the date of the applicant's original certification.

Comment

Comment to Rule 8(a)(2). Commission the applicant can demonstrate sufficient staff has discretion to waive the requirements set familiarity with North Carolina legal out in Rule 8(a)(2)(a)(2) and Rule 8(a)(2)(b)(1), if terminology, court structure, and procedure.

* * *

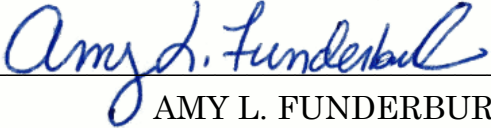
These amendments to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions become effective on 10 June 2020.

This order shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 3rd day of June, 2020.


For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this
the 4th day of June, 2020.


AMY L. FUNDERBURK
Clerk of the Supreme Court

TEMPORARY RULES
REQUEST FOR TECHNICAL CHANGE

AGENCY: Industrial Commission

RULE CITATION: 11 NCAC 23G .0104

DEADLINE FOR RECEIPT: Monday, August 17, 2020

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

In the supporting documentation, please include the first page of the Supreme Court's Order, and the last page if it has the effective date.

In (b), lines 21 and 27, I suggest putting "Attendance" in quotation marks where you say "Attendance shall mean..." That way it shows that you are defining the term here.

On lines 24 and 31, what do you mean by "modified"? Does your regulated public know?

On line 35, I suggest simplifying this language slightly by removing some language and saying, "... that are in effect at the time of the mediation for use in the Superior Court division."

On lines 2 and 7, do you need both "physically" and "in person"? I notice you only use "physical" on line 7. Also, I note that the definition of attendance in (b) now includes "physical in-person attendance" and "remote attendance" so it seems to me that use of both terms here is redundant.

In the History Note, Page 4, line 11, please insert a Temporary Amendment Eff. date. The earliest possible date will be August 28, 2020.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder
Commission Counsel
Date submitted to agency: August 10, 2020

1 11 NCAC 23G .0104 is proposed for 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 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-

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

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

(b) Any party or person required to attend a mediated settlement conference shall ~~physically~~ attend the conference until an agreement is reduced to writing and signed as provided in Paragraph (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 physical in-person attendance whenever the mediation rules approved by the North Carolina Supreme Court that are in effect, either temporarily or permanently, for use in the Superior Court division require physical in-person attendance. During any time that attendance means physical in-person attendance, any party or person, including the mediator, may have the physical in-person attendance requirement excused or modified by agreement of all parties and persons, including the mediator, required to attend the conference, or by order of the Commission in the interests of justice upon motion of a party and notice to all parties and persons, including the mediator, required to attend the conference. Attendance shall mean attendance using remote technology whenever the mediation rules approved by the North Carolina Supreme Court that are in effect, either temporarily or permanently, for use in the Superior Court division require attendance through the use of remote technology. During any time that attendance means attendance through the use of remote technology, any party or person, including the mediator, may have the remote technology attendance requirement excused or modified by agreement of all parties and persons, including the mediator, required to attend the conference, or by order of the Commission in the interests of justice upon motion of a party and notice to all parties and persons, including the mediator, required to attend the conference. All parties and persons, 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, either temporarily or 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 agency in which the related case is pending, provided that all
37 parties in the Commission case consent to the requested attendance.

1
2 *History Note:* *Authority G.S. 97-80(a),(c); 143-295; 143-296; 143-300; Rule 4 of Rules for Mediated Settlement*
3 *Conferences and Other Settlement Procedures in Superior Court Civil Actions;*
4 *Eff. January 16, 1996;*
5 *Amended Eff. October 1, 1998;*
6 *Recodified from 04 NCAC 10A .0616;*
7 *Amended Eff. July 1, 2014; January 1, 2011; June 1, 2000;*
8 *Recodified from 04 NCAC 10G .0104 Eff. June 1, 2018;*
9 *Emergency Amendment Eff. June 16, 2020;*
10 *Amended Eff. August 1, 2020;*
11 *Temporary Amendment Eff. _____.*
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13