

REQUEST FOR § 150B-21.10 CHANGES

AGENCY: Industrial Commission

RULE CITATION: 11 NCAC 23G .0104

DEADLINE FOR RECEIPT: Monday, December 12, 2022

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

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 email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

In (a)(2)(D), how is the determination made regarding whether a representative is “necessary to resolve the matters in dispute” and what are the bases for such a determination?

In (a)(5), line 22, what individual “Board” is referenced? Does this refer to a specific board, as is suggested by capitalization, or generally applicable to a relevant governmental board?

Similarly, in line 24, what “Board” is referenced? Here, “the Board” is used, rather than “a Board”.

Also, in lines 24-25, the sentence seems to indicate when a settlement occurs in which G.S. 143-295 is triggered, by way of settlement less than \$25,000 between the Attorney General and claimant, the stated interested parties need not attend the settlement conference. Is this correct? If so, consider rewriting the sentence so as to clarify the triggering of a G.S. 143-295 settlement.

Additionally, in lines 26-27, what does it mean for the Attorney General to “attempt to make an employee or agent... available via telecommunication”? By what mechanisms and to what extent shall efforts be made?

In (a)(7), line 32, consider removing “each” or adding “of” preceding “each”.

Also, on page 2, line 1, are there any required methods or limitations on the form of “communicat[ion]” between the representative and decision making authority? For example, (a)(5) limits efforts to any delay and there are numerous conceivable methods of communication which are tedious or slow.

In (a)(8), remove the comma after “or carriers” to avoid breaking the dependent clause from the independent clause preceding it.

Also, in lines 6 and 11 of (a)(8), how is the determination of “necessary” made, similar to the request for change in (a)(2)(D)?

Lawrence R. Duke
Commission Counsel

Date submitted to agency: December 7, 2022

In (b), is the added second sentence and the sentence following referring to the Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions, as cited in Authority? Make clear what approved “method” is being required and incorporate such required method.

In (c), what is the criteria for determining whether an “appropriate case[]” exists for alternative methods of communication?

Also, in line 36, remove the semi-colon and capitalize “the”.

Additionally, on page 3, line 4, remove the parentheticals to avoid an ambiguity.

In (d), is there a manner by which a “copy” shall be provided to the employer and any carrier?

Also, what is a “related third-party tortfeasor claim[]”?

In (e), how is the “parties’ expense” calculated and what rule is the calculation pursuant to?

Does paragraph (f) do anything beyond 11 NCAC 23G .0107? Does this permit payment agreements when the mediator is not agreed to by the parties as is found in .0107(a)?

In (g), who is permitted to file an “application”? Who is subsumed by “any... person”?

Also, what is the criteria for the “order... to attend” issued in the “interest of justice”?

Additionally, what is the agency’s authority to make an order “regardless of the forum” which goes beyond a Commission case, based on the plain language of the Rule?

Furthermore, paragraph (g) does not reference “related” cases in the substance of the rule or detail what parties or cases can be ordered into attendance. This permits unrelated parties or persons to be ordered. Please revise.

In the History Note, Authority section, does Rule 4 of Rules for Mediated Settlement Conferences and Other Settlement Procedures in Superior Court Civil Actions provide authority for this Rule? Or, alternatively, is this simply reference to externally adopted rules the agency wishes to adopt or follow in a similar manner? See request for change in (b). Consider incorporating by reference.

*NOTE: Incorporation by reference statute, G.S. 150B-21.6, does not specifically permit incorporation by reference of a court’s adopted policy or rules, but does permit incorporation “(2) All or part of a code, standard, or regulation adopted by... a generally recognized **organization or association.**”*

Please retype the rule accordingly and resubmit it to our office electronically.

Lawrence R. Duke
Commission Counsel

Date submitted to agency: December 7, 2022

1 11 NCAC 23G .0104 is amended as published in 37:6 NCR 441-443 as follows:

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

4 (a) Attendance. The following persons shall 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 attendance is necessary to resolve matters in dispute in the subject action;
- 15 (3) an officer, employee, or agent of any party that is not a natural person or a governmental entity who
- 16 is not the party's outside counsel and who has the authority to decide on behalf of the party whether
- 17 and on what terms to settle the action;
- 18 (4) in a workers' compensation case, an employee or agent of any party that is a governmental entity
- 19 who is not the party's outside counsel or Attorney General's counsel responsible for the case and
- 20 who has the authority to decide on behalf of the party and on what terms to settle the action;
- 21 (5) when the governing law prescribes that the terms of a proposed settlement may be approved only
- 22 by a Board, an employee or agent who is not the party's outside counsel or Attorney General's
- 23 counsel responsible for the case and who has the authority to negotiate on behalf of and to make a
- 24 recommendation to the Board. Pursuant to G.S. 143-295, an employee or agent of the named
- 25 governmental entity or agency is not required to attend the mediated settlement conference. The
- 26 Attorney General shall attempt to make an employee or agent of the named governmental entity or
- 27 agency in a State tort claim available via telecommunication, and mediation shall not be delayed
- 28 due to the absence or unavailability of the employee or agent of the named governmental entity or
- 29 agency;
- 30 (6) the counsels of record. Appearance by counsel does not dispense with or waive the required
- 31 attendance of the parties listed in Subparagraphs (1) through (4);
- 32 (7) a representative of each defendant's primary workers' compensation or liability insurance carrier or
- 33 self-insured that may be obligated to pay all or part of any claim presented in the action. Each carrier
- 34 or self-insured shall be represented at the conference by an officer, employee, or agent who is not
- 35 the party's outside counsel and who has the authority to decide on behalf of the carrier or self-insured
- 36 whether and on what terms to settle the action, or who has been authorized to negotiate on behalf of

1 the carrier or self-insured and can communicate during the conference with persons who have the
2 decision making authority; and

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

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

34 (c) In appropriate cases, the Commission or the mediator, with the consent of the parties, may allow a party or
35 insurance carrier representative who is required to attend a mediated settlement conference in person under this Rule
36 to attend the conference by telephone, conference call, speaker telephone, or videoconferencing; the attending party
37 or representative shall bear all costs of the telephone calls or videoconferencing. In addition, the mediator may

1 communicate directly with the insurance representative with regard to matters discussed in mediation, and the
2 mediator may set a subsequent mediated settlement conference at which all parties and representatives shall attend the
3 mediated settlement conference in person, subject to Paragraph (b) of this Rule. The failure to appear by telephone or
4 videoconferencing in accordance with this Paragraph shall subject the responsible party(ies) or representative(s) to
5 sanctions pursuant to Rule .0105 of this Subchapter.

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

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

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

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

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34 *History Note: Authority G.S. 97-80; 143-296; 143-300; Rule 4 of Rules for Mediated Settlement Conferences and*
35 *Other Settlement Procedures in Superior Court Civil Actions;*
36 *Eff. January 16, 1996;*
37 *Amended Eff. October 1, 1998;*

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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. March 1, 2021;
Amended Eff. January 1, 2023.