

**SUBCHAPTER 23G – NORTH CAROLINA INDUSTRIAL COMMISSION RULES FOR MEDIATED SETTLEMENT AND NEUTRAL EVALUATION CONFERENCES**

**SECTION .0100 – MEDIATION AND SETTLEMENT**

**11 NCAC 23G .0101 ORDER FOR MEDIATED SETTLEMENT CONFERENCE**

- (a) Mediation Upon Agreement of the Parties. If the parties to a workers' compensation claim or state tort claim agree to mediate the claim, the parties may schedule and proceed with mediation on their own, or the parties may submit a request for a mediation order pursuant to Paragraph (d) of this Rule. No order from the Commission is necessary if the parties mutually agree to mediate the claim, but the mediator shall file a report of mediation with the Commission as required by Paragraph (g) of Rule .0106 of this Subchapter. If the parties proceed with mediation in the absence of an order from the Commission and the Commission thereafter enters a mediation order, the parties shall notify the Commission that the parties have agreed upon the selection of a mediator or, if the mediated settlement conference has been completed, that the parties request to be excused from any further mediation obligations pursuant to Paragraph (f) of this Rule.
- (b) Referral Upon Receipt of a Form 33 *Request that Claim be Assigned for Hearing*. In any case in which the Commission receives a Form 33 *Request that Claim be Assigned for Hearing*, the Commission shall order the case to a mediated settlement conference unless doing so would be contrary to the interests of justice.
- (c) By Order of the Commission. Commissioners, Deputy Commissioners, the Commission's Dispute Resolution Coordinator, and such other employees as the Commission Chair designates may, by written order, require the parties and their representatives to attend a mediated settlement conference concerning a dispute within the workers' compensation and state tort claim jurisdiction of the Commission. Requests to dispense with or defer a mediated settlement conference shall be addressed to the Dispute Resolution Coordinator. Unless the context otherwise requires, references to the "Commission" in the rules in this Subchapter shall mean the Dispute Resolution Coordinator.
- (d) Mediation Upon Request of a Party. If a case is not otherwise ordered to a mediated settlement conference, a party may move the Commission to order a conference. The motion shall be served on non-moving parties and shall state the reasons why the order should be entered. Responses may be filed in writing with the Commission within 10 days after the date of the service of the motion. Any motion for a mediation order shall be submitted on a form provided by the Commission.
- (e) 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 the Tort Claims Act.
- (f) Motion to Dispense with or Defer Mediated Settlement Conference. Mediation may be dispensed with by the Commission in the interests of justice or judicial economy. As used in this Rule, the term "dispensed with" means setting aside or rescinding the mediation order(s) entered in the case, or excusing the parties from their obligations under the applicable order(s) or the Rules in this Subchapter. Mediation may not be dispensed with by the parties or the mediator unless the parties have agreed, subject to Commission approval, on a full and complete resolution of all disputed issues set forth in the request for hearing filed in the case, and the parties have given notice of the settlement to the Dispute Resolution Coordinator. Within 55 days of the filing of a Form 33 *Request that Claim be Assigned for Hearing*, or otherwise within the deadline set forth in the Commission's order entered pursuant to Paragraph (c) or Paragraph (d) of this Rule, a party may move to dispense with or defer the mediated settlement conference. The motion shall state the reasons the relief is sought and must be received by the Dispute Resolution Coordinator within the applicable deadline.
- (g) Exemption from Mediated Settlement Conference. The State shall not be compelled to participate in a mediation or neutral evaluation procedure with a prison inmate.
- (h) Motion to Authorize the Use of Neutral Evaluation Procedures. The parties may move the Commission to authorize the use of a neutral evaluation procedure contained in Rule .0109 of this Subchapter in lieu of a mediated settlement conference. The motion shall be filed on a form provided by the Commission within 55 days of the filing of a Form 33 *Request that Claim be Assigned for Hearing*, or otherwise within the deadline set forth in the Commission's order entered pursuant to Paragraph (c) or Paragraph (d) of this Rule, and shall state:
- (1) that all parties consent to the motion;
  - (2) that the neutral evaluator and the parties have agreed upon the selection and all terms of compensation of the neutral selected; and
  - (3) the name, address, and telephone number of the neutral evaluator selected by the parties.
- (i) If the parties are unable to agree to the matters listed in Paragraph (h), the Commission shall deny the motion for authorization to use a neutral evaluation procedure, and the parties shall attend the mediated settlement conference

as originally ordered by the Commission. If the parties are able to agree on the matters listed in Paragraph (h), the Commission shall order the use of a neutral evaluation proceeding; provided, however, that the Commission shall not order the use of a neutral evaluation proceeding in any case in which the plaintiff is not represented by counsel.

(j) Cases Involving Plaintiffs Not Represented by Counsel. Unless an unrepresented plaintiff requests that the plaintiff's case be mediated, the Commission shall enter an order dispensing with mediation.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 1 of Rules Implementing Statewide Mediated Settlement Conference 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 .0101 Eff. June 1, 2018.

#### **11 NCAC 23G .0102 SELECTION OF MEDIATOR**

(a) By Agreement of Parties. The parties in a workers' compensation case or a state tort claims case may, by agreement, select a mediator certified by the North Carolina Dispute Resolution Commission within 55 days of the filing of a Form 33 *Request that Claim be Assigned for Hearing*, or otherwise within the deadline set forth in the Commission's order entered pursuant to Paragraph (c) or Paragraph (d) of Rule .0101 of this Subchapter, subject to the Commission's authority to remove the mediator selected by the parties due to a conflict of interest. The stipulation may be transmitted by either party, shall be dated as of the date it is transmitted to the Commission, and must be received by the Dispute Resolution Coordinator within 55 days of the filing of a Form 33 *Request that Claim be Assigned for Hearing*, or otherwise within the deadline set forth in the Commission's order entered pursuant to Paragraph (c) or Paragraph (d) of Rule .0101 of this Subchapter. The scheduled date of the mediated settlement conference shall be within 120 days of the mediation order. The stipulation shall include the date of the scheduled mediation, the name, address and telephone number of the mediator selected by agreement, and shall confirm that the mediator is certified by the Dispute Resolution Commission. The applicable deadline shall be extended by the Dispute Resolution Coordinator upon request of the parties. Any party may waive the applicable deadline for the selection and suggestion of mediators and request that the Commission appoint a mediator.

(b) Appointment by Commission. If the parties fail to notify the Commission of the parties' selection of a mediator within 55 days of the filing of a Form 33 *Request that Claim be Assigned for Hearing*, or otherwise within the deadline set forth in the Commission's order entered pursuant to Paragraph (c) or Paragraph (d) of Rule .0101 of this Subchapter, the Commission shall appoint a mediator to hold a mediated settlement conference in the case. The Commission shall appoint a mediator who meets the requirements in Paragraph (b) of Rule .0108 of this Subchapter. In the absence of any suggestions by the parties with regard to the appointment of mediators, the Commission shall select the mediator for the case by random order, unless the Commission determines that, because of unusual circumstances, a particular mediator should be appointed in a particular case.

(c) 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 this Rule. Nothing in this Paragraph shall preclude mediators from disqualifying themselves.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 2 of Rules Implementing Statewide Mediated Settlement Conference 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 .0102 Eff. June 1, 2018.

#### **11 NCAC 23G .0103 THE MEDIATED SETTLEMENT CONFERENCE**

(a) Where Conference Is to Be Held. Unless all parties in a workers' compensation case or a state tort claims case and the mediator otherwise agree, the mediated settlement conference shall be held in the county where the case is pending. The mediator shall reserve a place and make arrangements for the conference and give notice to all attorneys and unrepresented parties of the time and location of the conference.

(b) When Conference Is to Be Held. 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. In the interests of justice, the Commission may extend the deadline for completion of the conference upon the Commission's own motion, a motion or stipulation of the parties or the suggestion of the mediator.

(d) Recesses. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, 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 is not cause for delay of other proceedings in the case, including the completion of discovery and the filing or hearing of motions, unless ordered by the Commission in the interests of justice. 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 in the interest of justice.

(f) Inadmissibility of Negotiations by Parties and Attorneys. Evidence of statements made and conduct occurring in a mediated settlement conference or other settlement proceeding conducted pursuant to the Rules in this Subchapter, whether attributable to a party, the mediator, other neutral, or a neutral observer present at the settlement conference or proceeding, are not subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except:

- (1) proceedings for sanctions for violations of the attendance or payment of mediation fee provisions contained in Rule .0104 and Rule.0107 of this Subchapter;
- (2) proceedings to enforce or rescind a settlement of the action;
- (3) disciplinary proceedings before the North Carolina State Bar or any agency enforcing standards of conduct for mediators or other neutrals, including the Commission; or
- (4) proceedings to enforce laws concerning juvenile or elder abuse.

(g) No settlement agreement to resolve any or all issues reached at the settlement conference or proceeding conducted under this Subchapter or reached during a recess in the conference or proceeding shall be enforceable unless the settlement agreement has been reduced to writing and signed by the parties. No evidence otherwise discoverable shall be inadmissible solely because the evidence is presented or discussed in a mediated settlement conference or other settlement proceeding.

(h) Inadmissibility of Mediator Testimony. No mediator, other neutral, or neutral observer present at a settlement proceeding shall be compelled to testify or produce evidence concerning statements made and conduct occurring in anticipation of, during, or as a follow-up to a mediated settlement conference or other settlement proceeding conducted pursuant to the Rules in this Subchapter in any Commission case or civil proceeding for any purpose, including proceedings to enforce or rescind a settlement of the action, except:

- (1) to attest to the signing of any settlement agreements;
- (2) proceedings for sanctions for violations of the attendance or payment of mediation fee provisions contained in Rule .0104 and Rule .0107 of this Subchapter;
- (3) disciplinary proceedings before the North Carolina State Bar or any agency enforcing standards of conduct for mediators or other neutrals, including the Commission; and
- (4) proceedings to enforce laws concerning juvenile or elder abuse.

(i) As used in this Subchapter, the term "neutral observer" includes persons seeking mediator certification, persons studying dispute resolution processes, and persons acting as interpreters.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 3 of Rules Implementing Statewide Mediated Settlement Conference 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 .0103 Eff. June 1, 2018.

#### **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 or agent of any party that is not a natural person or a governmental entity who is not such party's outside counsel and who has the authority to decide on behalf of such 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 party's outside counsel or Attorney General's counsel responsible for the case and who has the authority to decide on behalf of such 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 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, an employee or agent of the named governmental entity or agency is not required to attend the mediated settlement conference; the Attorney General shall attempt to make an employee or agent of the named governmental entity or agency in a 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 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 or agent who is not 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 (f) 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.

(c) In appropriate 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 under this Rule to attend the conference by telephone, conference call, speaker telephone or videoconferencing; provided that, the party or representative so attending shall bear all costs of such telephone calls or videoconferencing, 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. 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 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 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); 143-295; 143-296; 143-300; Rule 4 of Rules Implementing Statewide Mediated Settlement Conference 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.*

#### **11 NCAC 23G .0104A FOREIGN LANGUAGE INTERPRETERS**

(a) Any party who is unable to speak or understand English shall so notify the Commission, the mediator, and the opposing party or parties in writing, not less than 21 days prior to the date of the mediated settlement conference. The notice shall contain the party's primary language and how the party plans to communicate in English during the mediation.

(b) The party requesting the assistance of a qualified foreign language interpreter shall bear the costs.

(c) If the certified mediator, in his or her discretion, notifies the parties of the need for a qualified foreign language interpreter, the parties shall retain a disinterested interpreter who possesses the qualifications listed in Paragraph (d) of this Rule to assist at the mediated settlement conference. The fee of the foreign language interpreter and any postponement fees necessitated by the need for a qualified foreign language interpreter shall be shared by the parties unless the parties agree otherwise.

(d) A qualified foreign language interpreter shall possess sufficient experience and education, or a combination of experience and education, in speaking and understanding English and the foreign language to be interpreted, to qualify as an expert witness pursuant to G.S. 8C-1, Rule 702.

(e) Qualified foreign language interpreters shall abide by the Code of Conduct and Ethics of Foreign Language Interpreters and Translators, contained in Part 4 of *Policies and Best Practices for the Use of Foreign Language Interpreting and Translating Services in the North Carolina Court System* and promulgated by the North Carolina Administrative Office of the Courts, and shall interpret, as word for word as is practicable, without editing, commenting, or summarizing, testimony or other communications. The Code of Conduct and Ethics of Foreign Language Interpreters and Translators is hereby incorporated by reference and includes subsequent amendments and editions. A copy may be obtained at no charge from the North Carolina Administrative Office of the Court's website, <http://www.nccourts.org/Citizens/CPrograms/Foreign/Documents/guidelines.pdf>, or upon request, at the offices of the Commission, as set forth in Rule 11 NCAC 23A .0101.

*History Note:* Authority G.S. 97-80(a); 97-80(c); 143-296; 143-300;  
Eff. January 1, 2011;  
Amended Eff. July 1, 2014;  
Recodified from 04 NCAC 10G .0104A Eff. June 1, 2018.

#### **11 NCAC 23G .0105 SANCTIONS (EFFECTIVE JULY 1, 2014)**

If a person or party whose attendance at a mediated settlement conference is required by Rule.0104 of this Subchapter fails to attend or cancels, without Commission approval in accordance with Paragraph (f) of Rule .0101 of this Subchapter, a duly ordered mediated settlement conference without good cause, the Commission may impose upon the party any lawful sanction, including holding the party in contempt or requiring the party to pay fines, attorneys' fees, mediator fees and expenses and loss of earning incurred by persons attending the conference. Any sanctions that are assessed against a party consistent with the Workers' Comp Act, the Tort Claims Act and the Rules in this Subchapter, including mediated settlement conference postponement fees and sanctions for the unauthorized cancellation or failure to appear at the conference, may be assessed against the party depending on whose conduct necessitated the assessment of sanctions.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 5 of Rules Implementing Statewide Mediated Settlement Conference 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; June 1, 2000;  
Recodified from 04 NCAC 10G .0105 Eff. June 1, 2018.

#### **11 NCAC 23G .0106 AUTHORITY AND DUTIES OF MEDIATORS**

(a) Control of Conference. The mediator shall at all times be in control of the mediated settlement conference and the procedures to be followed. Except as otherwise set forth in the Rules in this Subchapter with regard to the finalization of the parties' agreement, there shall be no audio, video, electronic or stenographic recording of the mediation process by any participant.

(b) Private Consultation. The mediator may meet and consult privately with any participant prior to or during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(c) 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.

(d) Information to the Parties. The mediator shall define and describe the following to the parties at the beginning of the mediated settlement conference:

- (1) the process of mediation;
- (2) the differences between mediation and other forms of conflict resolution;
- (3) the costs of the conference;
- (4) the facts that the conference is not a trial or hearing, the mediator is not acting in the capacity of a Commissioner or Deputy Commissioner and shall not act in such capacity in the subject case at any time in the future, and the parties retain their right to a hearing if the parties do not reach a settlement;
- (5) the circumstances under which the mediator may meet alone with any of the parties or with any other person;

- (6) whether and under what conditions, communications with the mediator will be held in confidence during the conference;
  - (7) the inadmissibility of conduct and statements as provided by G.S. 8C-1, Rule 408 and Paragraph (f) of Rule. 0103 of this Subchapter;
  - (8) the duties and responsibilities of the mediator and the parties; and
  - (9) the fact that any agreement reached will be reached by mutual consent of the parties.
- (e) Disclosure. The mediator shall be impartial and advise all parties of any circumstances bearing on possible bias, prejudice or partiality.
- (f) Declaring Impasse. The mediator shall determine when mediation is not viable, that an impasse exists, or that mediation should end.
- (g) 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 mediated settlement conference on a form provided by the Commission. If an agreement was reached, the report shall state whether the issue or matter under mediation will be resolved by Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket, and shall identify the persons designated to file or submit for approval the agreement, or dismissal. The mediator shall not attach a copy of the parties' memorandum of agreement to the mediator's report transmitted to the Commission and, except as permitted under the Rules in this Subchapter, or unless deemed necessary in the interests of justice by the Commission, the mediator shall not disclose the terms of settlement in the mediator's report. The Commission shall require the mediator to provide statistical data for evaluation of the mediated settlement conference program on forms provided by the Commission.
- (h) Scheduling and Holding the Conference. The mediator shall schedule the mediated settlement conference in consultation with the parties and conduct the conference prior to the completion deadline set out in the Commission's order. Deadlines for completion of the conference shall be observed by the mediator unless the time limits are changed by the Commission.
- (i) Standards of Conduct. All mediators conducting mediated settlement conferences pursuant to the Rules in this Subchapter shall adhere to the *Standards of Professional Conduct for Mediators* adopted by the Supreme Court of North Carolina and enforced by the North Carolina Dispute Resolution Commission. The *Standards of Professional Conduct for Mediators* is hereby incorporated by reference and includes subsequent amendments and editions. A copy may be obtained at no charge from the North Carolina Administrative Office of the Court's website, [http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/StandardsofConduct\\_1-1-12.pdf](http://www.nccourts.org/Courts/CRS/Councils/DRC/Documents/StandardsofConduct_1-1-12.pdf), or upon request, at the offices of the Commission, located in the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, between the hours of 8:00 a.m. and 5:00 p.m.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 6 of Rules Implementing Statewide Mediated Settlement Conference 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; June 1, 2000; Recodified from 04 NCAC 10G .0106 Eff. June 1, 2018.

#### **11 NCAC 23G .0107 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's compensation shall be as follows:
- (1) Conference Fees. The mediator shall be paid by the parties at the rate of one hundred fifty dollars (\$150.00) per hour for mediation services provided at the mediated settlement conference.
  - (2) Administrative Fees. The parties shall pay to the mediator a one time, per case administrative fee of one hundred fifty dollars (\$150.00). The mediator's administrative fee shall be paid in full unless, within 10 days after the mediator has been appointed, written notice is given to the mediator and to the Dispute Resolution Coordinator that the issues for which a request for hearing was filed have been fully resolved or that the hearing request has been withdrawn.
  - (3) Postponement Fees. As used in this Subchapter, the term "postpone" means to reschedule or otherwise not proceed with a scheduled mediated settlement conference after the conference has

been scheduled to convene on a specific date. After a conference is scheduled to convene on a specific date, the conference may not be postponed unless the requesting party notifies all other parties of the grounds for the requested postponement and obtains the consent and approval of the mediator or the Dispute Resolution Coordinator. If the conference is postponed without good cause, the mediator shall be paid a postponement fee. The postponement fee shall be three hundred dollars (\$300.00) if the conference is postponed within seven calendar days of the scheduled date, and one hundred fifty dollars (\$150.00) if the conference is postponed more than seven calendar days prior to the scheduled date. Unless otherwise ordered by the Commission in the interests of justice, postponement fees shall be allocated in equal shares to the party or parties requesting the postponement. As used in this Rule, "good cause" shall mean that the reason for the postponement involves a situation over which the party seeking the postponement has no control, including a party or attorney's illness, a death in a party or attorney's family, a demand by a judge that a party or attorney for a party appear in court, or inclement weather such that travel is prohibitive.

- (4) The settlement of a case prior to the scheduled date of the mediated settlement conference shall be good cause to cancel the mediation without the approval of the mediator or the Dispute Resolution Coordinator. The parties shall notify the mediator of any cancellation due to settlement. The mediator may charge a cancellation fee of one hundred fifty dollars (\$150.00) if notified of the cancellation within 14 days of the scheduled date, or three hundred dollars (\$300.00) if notified within seven days of the scheduled date.

(c) **Payment by Parties.** Payment is due upon completion of the mediated settlement conference; provided, that the State shall be billed at the conference and shall pay within 30 days of receipt of the bill, and insurance companies or carriers whose written procedures do not provide for payment of the mediator at the conference shall pay within 15 days of the conference. Unless otherwise agreed to by the parties or ordered by the Dispute Resolution Coordinator due to a party or parties violating a rule in this Subchapter, the costs of the conference shall be allocated to the parties, as follows:

- (1) one share by plaintiff(s);
- (2) 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;
- (3) one share by participating third-party tort defendants or their carrier, or if there are conflicting interests among them, one share from each defendant or group of defendants having shared interests; and
- (4) if applicable, one share by the defendant State agency in a Tort Claims Act case.

Parties obligated to pay a share of the costs are responsible for equal shares; provided, however, that in workers' compensation claims the defendant shall pay the plaintiff's share of mediation, postponement, and substitution fees, as well as defendant's own share. If plaintiff requests postponement of the mediated settlement conference, defendants shall be entitled to a credit for the postponement fee.

(d) Unless the Dispute Resolution Coordinator enters an order allocating such fees to a particular party due to the party violating a Rule in this Subchapter, the fees may be taxed as other costs by the Commission in an Order or Opinion and Award. After the case is concluded, the defendant shall be reimbursed for the plaintiff's share of such fees from any compensation determined to be due to the plaintiff, and the defendant may withhold funds from any award for this purpose.

*History Note: Authority G.S. 97-80(a); 97-80(c); 143-296; 143-300; Rule 7 of Rules Implementing Statewide Mediated Settlement Conference 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 .0107 Eff. June 1, 2018.*

#### **11 NCAC 23G .0108 MEDIATOR CERTIFICATION AND DECERTIFICATION**

(a) **Party Selection.** The parties may, by mutual consent, select any North Carolina Dispute Resolution Commission-certified mediator, with or without the qualifications in Paragraph (b) of this Rule, as the parties' mediator.



(b) Appointment of Mediators. If the parties have agreed or been ordered to mediate, and cannot agree on the selection of a mediator, the Commission shall appoint a mediator, who holds current certification from the North Carolina Dispute Resolution Commission that he or she is qualified to carry out mandatory mediations in the Superior Courts of the State of North Carolina and who has filed a declaration with the Commission, on forms provided by the Commission, stating that the declarant agrees 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. A mediator making this declaration shall notify the Commission when any of the facts declared are no longer accurate.

(c) Failure of Mediator to Appear at Conference. If a mediator fails to appear at a scheduled mediated settlement conference, the mediator is not entitled to the administrative fee for the case.

*History Note: Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 8 of Rules Implementing Statewide Mediated Settlement Conference 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 .0108 Eff. June 1, 2018.*

## **11 NCAC 23G .0109 NEUTRAL EVALUATION**

(a) Nature of Neutral Evaluation. As used in this Subchapter, neutral evaluation is an abbreviated presentation of facts and issues by the parties to a neutral evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, and for providing a candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to a hearing. The neutral evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

(b) When Conference Is to Be Held. The provisions applicable to the scheduling of mediated settlement conferences set forth in Rule .0103 of this Subchapter also apply to neutral evaluation proceedings.

(c) Pre-conference Submissions. No later than 20 days prior to the date established for the neutral evaluation conference to begin, each party may, but is not required to, furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that the party has served a copy of such summary on all other parties in the case. The information provided to the neutral evaluator and the other parties under this Rule shall be a summary of the facts and issues in the case, shall not be more than 10 pages in length, and shall include as attachments copies of any documents supporting the party's summary. Information provided to the neutral evaluator and to the other parties pursuant to this Paragraph shall not be filed with the Commission.

(d) Replies to Pre-conference Submissions. No later than five days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the neutral evaluator responding to the submission of an opposing party. The party's response shall not exceed five pages in length, and the party sending the response shall certify to the neutral evaluator that the party has served a copy of the response on all other parties in the case. The response shall not be filed with the Commission.

(e) Conference Procedure. Prior to a neutral evaluation conference, the neutral evaluator may, if he or she deems it necessary, request additional written information from any party. At the conference, the neutral evaluator may address questions to the parties and give the parties an opportunity to complete their summaries with a brief oral statement.

(f) Modification of Procedure. Subject to the approval of the neutral evaluator, the parties may agree to modify the procedures for neutral evaluation required by the Rules in this Subchapter, or the procedures may be modified by order of the Commission in the interests of justice. The modified procedures may include the presentation of submissions in writing or by telephone in lieu of physical appearance at a neutral evaluation conference, and may also include revisions to the time periods and page limitations concerning the parties' submissions.

(g) Evaluator's Opening Statement. At the beginning of the neutral evaluation conference, the neutral evaluator shall define and describe the following points to the parties:

- (1) the facts that:
  - (A) the conference is not a hearing,
  - (B) the neutral evaluator is not acting in the capacity of a Commissioner or Deputy Commissioner and shall not act in such capacity in the subject case at any time in the future,

- (C) the neutral evaluator's opinions are not binding on any party, and
  - (D) the parties retain their right to a hearing if the parties do not reach a settlement;
  - (2) the fact that any settlement reached will be only by mutual consent of the parties;
  - (3) the process of the proceeding;
  - (4) the differences between the proceeding and other forms of conflict resolution;
  - (5) the costs of the proceeding;
  - (6) the inadmissibility of conduct and statements as provided by G.S. 8C-1, Rule 408 and Paragraph (f) of Rule .0103 in this Subchapter; and
  - (7) the duties and responsibilities of the neutral evaluator and the participants.
- (h) Oral Report to Parties by Evaluator. In addition to the written report to the Commission required under the Rules in this Subchapter, at the conclusion of the neutral evaluation conference, the neutral evaluator shall issue an oral report to the parties advising the parties of the neutral evaluator's opinion of the case. The opinion shall include a candid assessment of liability, estimated settlement values and options, and the strengths and weaknesses of the parties' claims and defenses if the case proceeds to a hearing. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The neutral evaluator shall not reduce his or her oral report to writing and shall not inform the Commission thereof.
- (i) Report of Evaluator to Commission. Within 10 days after the completion of the neutral evaluation conference, the neutral evaluator:
- (1) shall submit to the Dispute Resolution Coordinator a written report using a form prepared and distributed by the Commission, stating:
    - (A) when and where the conference was held,
    - (B) the names of those persons who attended the conference,
    - (C) whether or not an agreement was reached by the parties, and
    - (D) whether the issue or matter will be resolved by Commission form agreement, compromise settlement agreement, other settlement agreement, voluntary dismissal or removal from the hearing docket;
  - (2) shall identify the persons designated to file or submit for approval such agreement, or dismissal; and
  - (3) shall provide statistical data for evaluation of the settlement conference programs on forms provided by the Commission.
- (j) Evaluator's Authority to Assist Negotiations. If all parties at the neutral evaluation conference request and agree, the neutral evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during the discussions, the neutral evaluator shall complete the neutral evaluation conference and make his or her written report to the Commission as if the settlement discussions had not occurred.
- (k) Finalizing Agreement. If the parties are able to reach an agreement before the conclusion of the neutral evaluation conference and before the evaluator provides his report to the Commission, the parties shall reduce the agreement to writing, specifying all the terms of the parties' agreement that bear on the resolution of the dispute before the Commission, and shall sign the agreement along with the parties' respective counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. All agreements for payment of compensation shall be submitted for Commission approval and shall be filed with the Commission within 20 days of the conclusion of the conference.
- (l) Applicability of Mediation Rules and Duties. All provisions and duties applicable to mediated settlement conferences set forth in Rule .0103 through Rule .0107 of this Subchapter, that are not in conflict with the provisions and duties of Rule .0109 of this Subchapter, apply to neutral evaluation conferences conducted under the Rules in this Subchapter.
- (m) Ex Parte Communications Prohibited. Unless all parties agree otherwise, there shall be no ex parte communication prior to the conclusion of the proceeding between the neutral evaluator and any counsel or party on any matter related to the proceeding except with regard to administrative matters.
- (n) Adherence to Standards of Conduct for Neutrals. All neutral evaluators conducting neutral evaluation conferences pursuant to the Rules in the Subchapter shall adhere to any applicable standards of conduct that are adopted by the North Carolina Dispute Resolution Commission and are hereby incorporated by reference and include subsequent amendments and editions. A copy may be obtained at no charge from The North Carolina Court System's website, <http://www.nccourts.org/Courts/CRS/Councils/DRC/Default.asp>, or upon request, at the offices of the Commission, located in the Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, between the hours of 8:00 a.m. and 5:00 p.m.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Rule 11 of Rules Implementing Statewide Mediated Settlement Conference 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 .0109 Eff. June 1, 2018.

#### **11 NCAC 23G .0110 WAIVER OF RULES**

In the interests of justice or to promote judicial economy, the Commission may, except as otherwise provided by the rules in this Subchapter, waive or vary the requirements or provisions of any of the rules in this Subchapter in a case pending before the Commission upon written application of a party or upon its own initiative only if the employee is not represented by counsel. Factors the Commission shall use in determining whether to grant the waiver are:

- (1) the necessity of a waiver;
- (2) the party's responsibility for the conditions creating the need for a waiver;
- (3) the party's prior requests for a waiver;
- (4) the precedential value of such a waiver;
- (5) notice to and opposition by the opposing parties; and
- (6) the harm to the party if the waiver is not granted.

*History Note:* Authority G.S. 97-80(a); 97-80(c); 143-296; 143-300; Eff. January 16, 1996; Amended Eff. October 1, 1998; Recodified from 04 NCAC 10A .0616; Amended Eff. July 1, 2014; June 1, 2000; Recodified from 04 NCAC 10G .0110 Eff. June 1, 2018.

#### **11 NCAC 23G .0111 MOTIONS**

Unless otherwise indicated by the Rules in this Subchapter or an applicable order by the Commission in the interests of justice or judicial economy, motions pursuant to the Rules in this Subchapter shall be addressed to the Commission's Dispute Resolution Coordinator and served on all parties to the claim and the settlement procedure. Responses may be filed with the Commission within 10 days after the date of receipt of the motion. Notwithstanding the above, the Commission may, in the interests of justice, act upon oral motions, or act upon motions prior to the expiration of the 10-day response period. Motions shall be decided without oral argument unless otherwise ordered in the interests of justice. Any appeals from orders issued pursuant to a motion under the Rules in this Subchapter shall be addressed to the attention of the Commission Chair or the Chair's designee for appropriate action.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; 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 .0111 Eff. June 1, 2018.

#### **11 NCAC 23G .0112 MISCELLANEOUS**

Throughout the Rules in this Subchapter any reference to the number of days within which any act may be performed shall mean and refer to calendar days, and shall include Saturdays, Sundays and holidays established by the State Personnel Commission. Provided, however, that if the last day (a) to file a motion, (b) to give notice of the selection of a mediator, or (c) for a pro se plaintiff to give notice that the plaintiff requests mediation is a Saturday, Sunday or holiday established by the State Personnel Commission, the motion or notice may be filed or given on the next day that is not a Saturday, Sunday or holiday established by the State Personnel Commission.

*History Note:* Authority G.S. 97-80(a),(c); 143-296; 143-300; Eff. January 16, 1996; Amended Eff. October 1, 1998;

*Recodified from 04 NCAC 10A .0616;  
Amended Eff. July 1, 2014; June 1, 2000;  
Recodified from 04 NCAC 10G .0112 Eff. June 1, 2018.*