



Workers Compensation
Commission

PROTOCOLS FOR TELEPHONE CONCILIATIONS, ARBITRATIONS AND MEDIATIONS

The Workers Compensation Commission is continuing to deliver services during the coronavirus pandemic, while making its top priority the health and safety of its staff, arbitrators, mediators, doctors, parties, legal representatives and other stakeholders.

Commencing 23 March 2020 and **until further notice**,
conciliations, arbitrations and mediations will be conducted by telephone.

Given the current national health emergency, in-person conciliations, arbitrations and mediations will only be held if approved by the President of the Workers Compensation Commission.

This document sets out protocols and expectations of the Commission, which are intended to assist parties and their legal representatives to resolve disputes and conduct proceedings by telephone.

PREPARATION BY PARTIES AND LEGAL REPRESENTATIVES

1. Parties must notify the Commission, at least two working days prior to the telephone conciliation/arbitration (con/arb) or mediation, of the names and telephone numbers of all their participants (e.g. counsel, the worker, the insurer representative) if not previously provided.

Note:

- It is a matter for parties and their legal representatives to determine the best way to conduct the telephone con/arb or mediation (i.e. at the same premises or at different locations).
- Interpreters provided by the Commission are not required to attend at the worker's location to interpret in-person. Interpreting by telephone is required only.
- Direct telephone numbers only will be accepted.
- 1300 telephone numbers will not be accepted.
- Telephone operators will not search for default numbers in the event that a telephone number provided is incorrect.
- Late changes to telephone numbers must be notified to the Dispute Services Officer at the Commission, not to the arbitrator or mediator.

2. **Legal representatives (including counsel) must consult with their clients prior to the telephone con/arb or mediation**, preferably before the day of the listing and, in any event, well before the con/arb or mediation commences, to ensure that the matter is ready to proceed. The Commission **strongly discourages legal practitioners** from obtaining instructions immediately before a scheduled con/arb or mediation - the consequences of such practices are delay, the poor use of Commission resources and fewer settlements.

Note:

- It is extremely important that the insurer representative attends each telephone event. This will ensure minimum delays for their legal representatives to obtain instructions and will enhance opportunities for resolution.
 - The insurer representative may be released if the arbitrator or mediator is satisfied the conference can proceed without them and the insurer representative can be contacted if required further.
3. **Parties are strongly encouraged to consult with each other**, preferably before the day of the con/arb or mediation and, in any event, well before the con/arb or mediation commences to maximise the likelihood that the matter will settle. Ideally, the parties should identify any agreed issues and those in dispute and be ready to articulate them.

THE MECHANICS OF A TELEPHONE CON/ARB AND MEDIATION

4. **Scheduling the telephone con/arb**

- (a) Con/arbs will be scheduled in the standard morning timeslot of 10:00 am however the afternoon con/arb will be moved to 2:30 pm to avoid listing clashes with 2:00 pm initial teleconferences.
- (b) Con/arbs will be scheduled for the standard 3 hours; participants must be available for the entire 3 hours and the prohibition on counsel being briefed in more than one matter concurrently applies.
- (c) Second con/arbs will only be approved in exceptional circumstances.
- (d) The Commission will book con/arbs through telephone service provider Streamlined Communications.
- (e) Parties and legal representatives will be contacted by Streamlined Communications on the contact numbers provided by the legal representatives. It is therefore important that the Commission is provided with all contact names and numbers well in advance of the con/arb and contact numbers are correct.

5. Scheduling the telephone mediation

- (a) Mediations will be scheduled in the standard timeslots of 10:00 am and 2:00 pm.
- (b) Mediations will be scheduled for the standard 3 hours; participants must be available for the entire 3 hours and the prohibition on counsel being briefed in more than one matter concurrently applies.
- (c) Second mediations will only be approved in exceptional circumstances.
- (d) The Commission will book mediations through telephone service provider Streamlined Communications.
- (e) Parties and legal representatives will be contacted by Streamlined Communications on the contact numbers provided by the legal representatives. It is therefore important that the Commission is provided with all contact names and numbers well in advance of the mediation and contact numbers are correct.

6. Connecting the parties to the telephone conference

- (a) Connecting: The operator will connect all participants before calling the arbitrator/mediator.
- (b) Delay: If it appears that the telephone conference will be connected more than 3 minutes after the scheduled time, the operator will call the arbitrator/mediator to advise of the delay.
- (c) Introductions: The operator will advise the arbitrator/mediator of the names of all participants.
- (d) Participant roll call: The operator will ask the arbitrator/mediator if they would like a roll call of participants before being joined to the telephone conference.
- (e) Signalling for assistance: If the arbitrator/mediator requires the operator's assistance, they will **press *1** on their telephone.
- (f) Moving participants into a private conference: Parties may be placed in private conference. If the arbitrator/mediator wants the parties placed into a private conference, they will signal the operator by **pressing *1** and, when the operator joins the call, the arbitrator/mediator will advise the operator who they would like to be moved into a private conference.
- (g) Returning to the main conference: The operator will then advise the participants in the private conference to return to the main conference by **pressing *1**.
- (h) Disconnection: If a party is disconnected, the arbitrator/mediator will ask the operator to reconnect them.

7. Managing interpreters who are not physically present with the worker

- (a) If an interpreter is not physically present with the worker during the con/arb or mediation, consecutive interpreting will be used (i.e. the interpreter listens to a segment, may take notes and interprets while the speaker pauses).

Note:

- Interpreters provided by the Commission are not required attend at the worker's location to interpret in-person. Interpreting by telephone is required only.
- (b) The arbitrator/mediator will remind the legal practitioners and any other participants to adapt their participation to facilitate the interpreter's participation. It is likely that increased time will be needed for interpreting and interpreters must be able to finish interpreting and must not be stopped or interrupted.

CONDUCTING THE CON/ARB

8. Standard procedure

- (a) The conciliation phase of the proceeding will be conducted in a similar manner to an initial teleconference.
- (b) Arbitrators will explain the following:
- (i) all participants must be in a stable location (i.e. not driving or similar¹) during the con/arb and their location must be sufficiently quiet for the matter to proceed without interruption;
 - (ii) participants must mute their telephone when they are not speaking, to ensure background noise is minimised;
 - (iii) the con/arb has all the standard features, powers and expectations of an in-person con/arb;
 - (iv) the conciliation will not be recorded but the arbitration will be recorded;
 - (v) the process for telephone con/arbs, including:
 - A. the arbitrator will strictly manage time and will, for example, allocate the time for private conferences by parties and enforce a maximum recommended allocation of **one hour** for conciliation;
 - B. how interpreters work in a telephone con/arb (i.e. if the interpreter is not physically sitting with the worker during the telephone conciliation – **see point 7** above); and

¹ Participants who drive while participating in a telephone con/arb are at risk of injury and pose a safety risk to others using the roads. Further, legal representatives who drive while acting for a party during a telephone con/arb are likely to be in breach of their professional duties.

- C. the arbitrator will assist the parties and/or legal advisers to move into private conferences for confidential discussions.
- (c) If the matter settles, the arbitrator will record the settlement as they would in an initial teleconference and Commission staff will subsequently issue a Certificate of Determination – Consent Orders, as per the usual practice.
- (d) If the matter does not settle at conciliation, the arbitrator may allow the parties a period of time to conduct private negotiations before proceeding to an arbitration hearing. A maximum of **one hour** will be allowed for this and the Streamlined Communications operator will be asked to reconnect all parties into a new telephone conference at a designated time.
- (e) If, at the end of conciliation (or upon being reconnected after private negotiations), the matter does not resolve, the arbitrator may:
- (i) determine the dispute 'on the papers';
 - (ii) direct the parties to lodge written submissions; or
 - (iii) proceed to arbitration hearing.
- (f) If the matter proceeds to arbitration hearing, the arbitrator will:
- (i) identify the agreed issues and the disputed issues;
 - (ii) identify what is blocking settlement in relation to the disputed issues;
 - (iii) advise the parties that the matter will now move into a formal hearing;
 - (iv) request the Streamlined Communications operator to commence recording the hearing; and
 - (v) commence and conduct the formal hearing, as would occur with an in-person arbitration.

Note:

Section 354(4) of the *Workplace Injury Management and Workers Compensation Act* 1998 expressly permits parties and witnesses to participate in proceedings before the Commission by telephone: *Brines v Westgate Logistics Pty Limited* [2008] NSWWCPCD 43.

9. Summons to appear at conference or hearing

- (a) A party seeking to call oral evidence must lodge and serve with the Application to Resolve a Dispute or Reply:
- (i) A written statement from the witness; or
 - (ii) A written statement why the evidence is required but there is no written statement.
- (b) A party must notify the arbitrator and other parties at the initial teleconference of the intention to issue a summons. If the witness is an expert, the party must also

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demonstrate that the expert's evidence will assist the Commission in the resolution of the dispute.

- (c) Given the current restrictions imposed on proceedings in the Commission, including in-person hearings only allowed with leave of the President, it is essential that the potential calling of witnesses is dealt with at the initial teleconference. Regard must also be had to:
- Section 359 of *the Workplace Injury Management and Workers Compensation Act 1998*;
 - Rule 14.2 of the Workers Compensation Commission Rules 2011;
 - Practice Direction 7B
- (d) It is essential to determine when (including the time), how and by what means the witness will give evidence. It is anticipated most witnesses will give evidence by telephone or video. Arbitrators will consider the appropriateness of a witness being required to attend at an address to give evidence, given the current restrictions and safety concerns.
- (e) The Registrar will not issue a Summons to Attend (Form 8B) unless these matters are addressed at the initial teleconference and are contained in a direction issued by the arbitrator.

10. Adjournment is only permissible with the Commission's permission

- (a) As a general principle, second events are discouraged, especially in the current circumstances.
- (b) Outstanding issues should generally be dealt with by written submissions to be lodged by a specified date (or dates).
- (c) A second arbitration hearing cannot be agreed with the parties unless the arbitrator has first sought and obtained express permission from the Commission to set the matter down for a second arbitration hearing. Second arbitration hearings should not be agreed subject to later Commission approval.
- (d) If a matter is listed for a second arbitration hearing, the arbitrator must:
- (i) agree with the parties on a specific date and time for the listing of the second arbitration hearing, to be held within seven days wherever possible;
 - (ii) request the Streamlined Communications operator to re-convene the proceedings at that time.

CONDUCTING THE MEDIATION

11. Standard procedure – mechanics

- (a) The mediator must explain to the participants:
 - (i) all participants must be in a stable location (i.e. not driving or similar²) during the mediation and their location must be sufficiently quiet for the matter to proceed without interruption;
 - (ii) participants must mute their telephone when they are not speaking, to ensure background noise is minimised;
 - (iii) the process for telephone mediations, including:
 - A. the mediation has all the standard features, powers and expectations of an ‘in-person’ mediation;
 - B. how interpreters work in a telephone mediation (i.e. if the interpreter is not physically sitting with the worker during the telephone mediation – **see point 7** above); and
 - C. the mediator will assist the parties or legal advisers to move into private conferences for confidential discussions.
- (b) If the matter settles before the allocated 3 hours expires, the parties should record the settlement as soon as possible and exchange the agreement.
- (c) If the matter does not settle before the allocated 3 hours, the mediator will (**subject to points 13 and 14** below) advise the parties that the Certificate of Mediation Outcome will be issued under Rule 17.12 of the Workers Compensation Commission Rules 2011.

12. Standard procedure – conducting the mediation

- (a) In opening the mediation, the mediator will emphasise the following aspects and characteristics of the mediation:
 - (i) who is in attendance;
 - (ii) confidentiality of the mediation process;
 - (iii) opening statements;
 - (iv) bilateral party-to-party dialogue via telephone;
 - (v) bilateral mediator-to-party dialogue via telephone;
 - (vi) all-party dialogue (perhaps on the hour or as required to check on progress).

² Participants who drive while participating in a telephone mediation are at risk of injury and pose a safety risk to others using the roads. Further, legal representatives who drive while acting for a party during a telephone mediation are likely to be in breach of their professional duties.

- (b) The mediator will be easily available for direct dialogue with either party via private telephone conversations or in all-party sessions.
- (c) The full mediation group will be reconvened to close the mediation with either confirmation of settlement, certificate offers or adjournment.

13. Adjournment of mediation

- (a) As a general principle, second mediations are discouraged, especially in the current circumstances.
- (b) Mediations must be resolved in one event unless the Commission approves a second mediation conference. A second mediation should only be sought if the parties are close to resolution or if further medical evidence is required, and only if the parties are ready to proceed in seven days' time.
- (c) Mediators will pause the mediation and contact the Commission to request approval for a second mediation conference.
- (d) If a matter is listed for a second mediation, the mediator must:
 - (i) agree with the parties on a specific date and time for the mediation, to be held within seven days;
 - (ii) request the Streamlined Communications operator to re-convene the proceedings at that time.

14. Post mediation negotiations

- (a) The mediation may be left 'open' for up to 14 days after the conference to allow parties to continue discussions.
- (b) At the end of 14 days, a Certificate of Mediation Outcome will be issued, unless the Commission/mediator has been advised in writing, by 5.00 pm on the end date, that the matter has settled.
- (c) Settlement offers to be included in a Certificate of Mediation Outcome must be delivered to the Commission/mediator by 5.00 pm on the end date.