

STATE OF NORTH CAROLINA

COUNTY OF WAKE

2017 JAN -4 P. 3: 52

NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, S.C.)
SURGICAL CARE AFFILIATES, LLC, AND)
COMPASS SURGICAL PARTNERS, LLC)

Plaintiffs,

v.

NORTH CAROLINA INDUSTRIAL COMMISSION,

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17-CVS-_____

**COMPLAINT FOR
DECLARATORY JUDGMENT**

SUMMARY OF CLAIMS

Pursuant to Section 150B-21.1(c) and Article 26 of Chapter 1 of the North Carolina General Statutes, Plaintiffs North Carolina Ambulatory Surgical Center Association, Surgical Care Affiliates, LLC (“SCA”), and Compass Surgical Partners, LLC (“Compass”) (collectively “Plaintiffs”) seek a determination that Defendant North Carolina Industrial Commission’s (“Defendant” or “Commission”) written statement of findings of need do not meet the criteria for a temporary rule listed in N.C. Gen. Stat. § 150B-21.1(a) and the temporary rule does not meet the North Carolina Administrative Procedure Act (“APA”) standards as set forth in N.C. Gen. Stat. § 150B-21.9(a).

The Commission adopted a temporary rule in response to a court decision that invalidated a permanent rule because it violated the APA’s requirements. The Commission acknowledges that the court decision does not require a temporary rule and that the temporary rule is designed to limit the effect of the court decision. Such a rationale does not fit within the limited criteria that allow an agency to adopt a temporary rule.

The Commission's actions also are contrary to the North Carolina Constitution. The Commission is attempting to accomplish through temporary rulemaking a result that was found to be invalid by the court order in violation of the separation of powers clause. N.C. Const. art. I, § 6. Contrary to the court decision, the Commission is again attempting to avoid the permanent rulemaking requirement of obtaining a fiscal analysis of the impact of a new or amended rule before it becomes effective.

THE PARTIES

1. The North Carolina Ambulatory Surgical Center Association (the "Association") is a trade association of several ambulatory surgical centers located in North Carolina. It represents the interests of its members.

2. SCA manages seven ambulatory surgical centers in North Carolina and has an ownership interest in each of these centers through wholly-owned subsidiary corporations. The SCA ambulatory surgical centers are located throughout North Carolina and include Blue Ridge Day Surgery Center at 2308 Westfield Court in Raleigh, Wake County, North Carolina.

3. Compass manages ambulatory surgical centers in North Carolina, including Capital City Surgery Center in Raleigh, Wake County, North Carolina and Holly Springs Surgery Center in Holly Springs, Wake County, North Carolina. Compass has an ownership interest in each of these centers.

4. The Commission is a state agency created under the provisions of Chapter 97 of the North Carolina General Statutes and has the responsibility for administering the North Carolina Workers' Compensation Act. N.C. Gen. Stat. § 97-77. Among its responsibilities, the Commission adopts rules setting forth a schedule of maximum fees for medical compensation to be paid to injured employees who are covered by the Act. N.C. Gen. Stat. § 97-26(a).

JURISDICTION AND VENUE

5. Wake County Superior Court has jurisdiction over this case in that Plaintiffs are persons aggrieved and are authorized by N.C. Gen. Stat. § 150B-21.1(c) to bring an action for declaratory judgment in Wake County Superior Court.

6. Each Plaintiff is considered a “person” according to N.C. Gen. Stat. § 150B-2(7), which defines a “person” as “any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.”

7. Each Plaintiff is a “person aggrieved” according to N.C. Gen. Stat. § 150B-2(6), which defines a “person aggrieved” as “any person or group or persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.” Each Plaintiff is affected substantially in its person and property by the Commission’s temporary rule.

8. The Association has standing to seek relief “on behalf of its members.” *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 129-130, 388 S.E.2d 538, 555 (1990). The definition of “person aggrieved” specifically recognizes the ability of a “group” to bring an action under N.C. Gen. Stat. § 150B-21.1(c).

9. As persons aggrieved, Plaintiffs “may file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26 of Chapter 1 of the General Statutes.” In such an action, “the court shall determine whether the agency’s written statement of findings of need for the rule meets the criteria” included in the NCAPA and whether the standards in the NCAPA have been met. N.C. Gen. Stat. § 150B-21.1(c). Therefore, the Wake County Superior Court has jurisdiction over this case.

10. Pursuant to N.C. Gen. Stat. § 150B-21.1(c), Wake County is the appropriate venue in which to bring this action for declaratory judgment.

FACTS

The Wake County Superior Court Decision

11. On October 1, 2015, SCA filed with the Commission a Request for Declaratory Ruling. In SCA's Request, SCA sought a ruling from the Commission declaring invalid those parts of the Commission's rules with an effective date of April 1, 2015 that changed the workers' compensation fee schedule for ambulatory surgical centers.

12. SCA's Request for Declaratory Ruling was based upon the Commission's failure to adopt a new fee schedule for ambulatory surgery centers in substantial compliance with the rulemaking requirements of Article 2 of the APA, N.C. Gen. Stat. Chapter 150B.

13. In Section 33.(a) of Session Law 2013-410, the General Assembly specifically addressed the methodology for the fee schedules for physicians and hospitals and directed the Commission to base the fee schedule for physician and hospital compensation on the applicable Medicare payment methodologies. Under this law, the Commission was exempt from the APA's fiscal note requirements only for developing the fee schedules for physicians and hospitals.

14. Session Law 2013-410 did not direct the Commission to change the fee schedule for ambulatory surgical centers and did not exempt the Commission from the fiscal note requirement for any changes to the fee schedule for ambulatory surgery centers. Nevertheless, when the Commission changed the fee schedule for physicians and hospitals, it also changed the fee schedule for ambulatory surgical centers without obtaining the required fiscal note.

15. Regarding the fee schedule for ambulatory surgical centers, the Commission set forth a fee schedule of 200% of the Medicare ambulatory surgical center fee schedule for those

procedures reimbursed by Medicare. The Commission also amended its rules to delete the fee schedule for ambulatory surgical centers that had been in effect since 2013.

16. In its Request for Declaratory Ruling, SCA sought a determination from the Commission that those portions of the new and amended regulations that changed the fee schedule for ambulatory surgical centers were invalid because the Commission had failed to obtain the required fiscal note prior to promulgating and adopting the changed fee schedule. “[A] rule is not valid unless it is adopted in substantial compliance with this Article.” N.C. Gen. Stat. § 150B-18.

17. On December 14, 2015, the Commission issued a Declaratory Ruling in response to SCA’s Request. In its ruling, the Commission concluded that it had followed the law and declined to grant the relief sought by SCA in its Request for Declaratory Ruling.

18. On January 13, 2016, SCA filed a Petition for Judicial Review pursuant to Article 4 of the APA seeking reversal of the Commission’s Declaratory Ruling and a decision invalidating those parts of the Commission’s rules that changed the ambulatory surgical center fee schedule.

19. Because the Commission had failed to obtain the required fiscal note for permanent rulemaking, the Honorable Paul Ridgeway, Wake County Superior Court Judge, reversed the Commission’s declaratory ruling that it had complied with all of the requirements. *See Surgical Care Affiliates, LLC v. N.C. Indus. Comm’n*, No. 16-CVS-00600 (Wake Cty. Super. Ct. August 9, 2016). A copy of Judge Ridgeway’s Decision is attached as Exhibit A. The August 9, 2016 Superior Court Decision concludes:

The Commission’s attempted adoption of a new fee schedule for ambulatory surgical center services, but limited solely to those services, as set forth in 04 NCAC 10J .0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the

Prior Rule, specifically 04 NCAC 10J .0101(d)(3), (5), and (6), to the extent that the amendment removed the old fee schedule for ambulatory surgical centers, are invalid and of no effect.

20. On September 2, 2016, the Wake County Superior Court stayed the application and effect of the August 9, 2016 decision pending appeal to the North Carolina Court of Appeals.

21. On September 6, 2016, the Commission filed a Notice of Appeal of the August 9, 2016 Superior Court Decision. The appeal has not yet been docketed in the Court of Appeals.

The Commission's Temporary Rule

22. On October 18, 2016, the Commission submitted a proposed temporary rule to the Rules Division of the Office of Administrative Hearings and provided notice to the public. The Commission's notice and the proposed temporary rule are attached as Exhibit B. The proposed temporary rule was nearly identical to the improperly promulgated permanent rule that had been set aside by the Superior Court. For those surgical procedures covered by Medicare, the proposed temporary rule set forth a reimbursement schedule of 200% of the Medicare ambulatory surgical center fee schedule. For those procedures that are not covered under the Medicare ambulatory surgical center fee schedule, the Commission's proposed temporary rule set forth a reimbursement of usual, customary and reasonable, which already was provided by statute. *See* N.C. Gen. Stat. § 97-26(c).

23. It was this version of the rule that was the subject of Commission's notice, the public hearing, and the opportunity for comment. Although the stakeholders did not share a consensus view of the temporary rule, all agreed that the use of usual, customary, and reasonable to reimburse surgical procedures not covered under the Medicare ambulatory surgical center fee schedule created more uncertainty to the Workers' Compensation system and created additional costs.

24. On December 5, 2016, the Commission met and adopted a different rule than the one that had been subject to public hearing and comment as it pertained to procedures not covered under the Medicare ambulatory surgical center fee schedule. For those procedures, the Commission proposed a reimbursement of 135% of the fee schedule applicable to outpatient hospital facilities. For procedures covered by the Medicare ambulatory surgical center fee schedule, the Commission's temporary rule continued with the reimbursement of 200% of the Medicare ambulatory surgical center fee schedule which had been found to be invalid by Judge Ridgeway's Decision because the Commission had not obtained the fiscal note required under the APA.

25. No stakeholder proposed the language in the temporary rule adopted by the Commission that addresses procedures not covered in the ambulatory surgical center Medicare fee schedule. In effect, the Commission provided notice and an opportunity to comment on one temporary rule and then adopted a different temporary rule for which no notice or opportunity to comment were provided.

26. The Commission failed to follow the plain requirements of the temporary rulemaking process. *See* N.C. Gen. Stat. § 150B-21.1(a3). The Commission submitted a rule to the Codifier of Rules, accepted written comments on a proposed temporary rule, and held a hearing on a proposed temporary rule. The Commission then accepted a different temporary rule. A mark-up created by the Commission shows the significant differences between the proposed temporary rule that was the subject of the public notice and comment and the adopted temporary rule. A copy of the rule adopted by the Commission showing all of the changes is attached as Exhibit C.

27. After adopting the temporary rule, the Commission submitted a Statement of Findings of Need to the Rules Review Commission, explaining that the temporary rule was necessary to address “the effects of” the Superior Court Decision. A copy of the Commission’s Statement of Findings of Need is attached as Exhibit D. Plaintiff SCA submitted written comments opposing the Commission’s temporary rulemaking as not meeting the criteria and standards of the APA. A copy of SCA’s written comments addressing the failure to meet the court order criterion for a temporary rule is attached as Exhibit E.

28. A staff member of the Rules Review Commission was assigned to review the Commission’s temporary rule and concluded that the temporary rule was necessary because it was “in response to” the Superior Court Decision. A copy of the staff member’s opinion is attached as Exhibit F. Both the Commission’s and the Rules Review Commission staff member’s interpretation of need violates the plain language of the APA.

29. On December 15, 2016, over objections lodged by Plaintiffs, the Rules Review Commission decided to accept the staff members’ recommendation and approved the temporary rule, 04 NCAC 10J. 0103. The temporary rule is effective January 1, 2017.

FIRST CLAIM FOR RELIEF

THE COMMISSION FAILED TO DEMONSTRATE THAT THE COURT ORDER REQUIRED THE ADOPTION OF A TEMPORARY RULE.

30. Allegations contained in paragraphs 1 through 29 are incorporated by reference into this claim for relief.

31. The APA authorizes an agency to adopt a temporary rule only “when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 [which provides the required process for permanent rulemaking] would be contrary to the public interest and that the

immediate adoption of the rule is required by one or more” specific circumstances. N.C. Gen. Stat. § 150B-21.1.

32. Thus, the APA requires the agency to find that immediate adoption of the temporary rule is required because of a specific listed circumstance.

33. The Commission contends that N.C. Gen. Stat. § 150B-21.1(a)(5) provides the statutory authority for adopting the proposed amendment to 04 NCAC 10J .0103 as a temporary rule. *See* Exhibit D. Under this criterion, the immediate adoption of the rule must be required by a recent court order. However, there is no recent court order that requires the immediate adoption of an amendment to 04 NCAC 10J .0103.

34. The Commission contends that “the effects of” the August 9, 2016 Decision in *Surgical Care Affiliates LLC v. North Carolina Industrial Commission* “necessitate the expedited implementation of this temporary rule,” admitting that the Decision does not order or even mention temporary rulemaking. *See* Exhibit D.

35. The Commission is misreading the clear language of the temporary rule statute, N.C. Gen. Stat. § 150B-21.1(a). The Decision upon which the Commission relies does not require the immediate adoption of a temporary rule. *See* Exhibit A. As the N.C. Supreme Court has stated on numerous occasions, when the language of a statute is clear and unambiguous, courts must give the statute its plain and definite meaning. *See, e.g., State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996); *Lemons v. Old Hickory Council, Boy Scouts of America*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

36. The Decision does not direct the Commission to pursue temporary rulemaking or require temporary rulemaking implicitly. *See* Exhibit A. The “effects” of the Decision do not require temporary rulemaking either. The Decision in *Surgical Care Affiliates* invalidated the

Commission's attempted adoption of a new fee schedule for ambulatory surgery centers which had the effect of keeping in place the fee schedule for ambulatory surgical centers that had been lawfully adopted in 2013. As a result, there is a fee schedule for ambulatory surgical centers and there is no immediate need to bypass the requirements of permanent rulemaking to implement a fee schedule.

37. The Commission contends, contrary to the plain language of the temporary rule statute, that "the effects of the Decision" require the immediate adoption of the proposed rule. *See* Exhibit D. The Commission uses conclusory statements about "restoring balance to the workers' compensation system."

38. If such conclusory statements could be justification for a temporary rule, all agencies would be promulgating temporary rules any time a decision was made on judicial review that an agency had failed to follow the required permanent rulemaking process. Such a broad interpretation of the temporary rulemaking criteria would permit a rulemaking agency to blatantly violate the permanent rulemaking process and then, after a court order invalidates those rules, pursue temporary rulemaking based on "the effects of the court order." That is what the Commission is attempting to do with the temporary rule.

39. By the Commission's logic, agencies could use temporary rules to avoid almost any court order, legislation, or regulation by citing alleged negative effects. The exception (temporary rulemaking) would swallow the rule (permanent rulemaking).

40. Because the Commission did not fulfill the requirements of N.C. Gen. Stat. § 150B-21.1(a), the Commission violated the APA. Therefore, the temporary rule should be invalidated.

SECOND CLAIM FOR RELIEF

THE COMMISSION MATERIALLY CHANGED THE TEXT AND SUBSTANCE OF THE TEMPORARY RULE BETWEEN THE TIME THAT THE RULES WERE NOTICED AND THE TIME THEY WERE ADOPTED.

41. Allegations contained in paragraphs 1 through 40 are incorporated by reference into this claim for relief.

42. A temporary rule must also meet the standards of N.C. Gen. Stat. § 150B-21.9, including that the temporary rule be adopted in accordance with Part 2 of the APA. N.C. Gen. Stat. § 150B-21.9(a)(4).

43. Under Article 2 of the APA, prior to adopting a temporary rule, a rulemaking agency must publish notice of the text with the Office of Administrative Hearings and hold a public hearing to receive comments on the published temporary rule. *See* N.C. Gen. Stat. § 150B-21.1.

44. A mark-up created by the Commission shows the significant differences between the proposed temporary rule that was the subject of the public notice and comment and the adopted temporary rule. *See* Exhibit B. In particular, although the proposed temporary rule adopted by the Commission on December 5, 2016 retained the fee schedule of 200% Medicare ambulatory surgical center for those procedures covered by the Medicare ambulatory surgical center fee schedule which had been found invalid by Judge Ridgeway's Decision, the rule adopted by the Commission substantially changed the formula for reimbursing surgical procedures that are not covered under the Medicare ambulatory surgical center fee schedule.

45. The requirement that there be a new notice-and-hearing period when a proposed temporary rule is substantially rewritten is based on the idea that the "substantially different" rule is in fact not the same rule as the one first noticed, and, therefore, no notice-and-hearing procedure has taken place with regard to the new "substantially different" rule.

46. Because the rule submitted to the Rules Review Commission was substantially different than the temporary rule noticed on the Office of Administrative Hearings' website, the Commission should have re-noticed the substantially different temporary rule before submitting it to the RRC for approval.

47. Failure to re-notice the rule deprived the public of an opportunity to participate meaningfully in the rulemaking process in violation of North Carolina law. N.C. Gen. Stat. § 150B-21.1(a3).

THIRD CLAIM FOR RELIEF

THE COMMISSION'S ADOPTION OF THE TEMPORARY RULE VIOLATES THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE BRANCH AND JUDICIAL BRANCH AND USURPS THE AUTHORITY OF THE COURTS.

48. Allegations contained in paragraphs 1 through 47 are incorporated by reference into this claim for relief.

49. North Carolina's Constitutional "founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty." *State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). Accordingly, the Constitution of North Carolina declares: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

50. "A violation of the separation of powers required by the North Carolina Constitution occurs when one branch of state government exercises powers that are reserved for another branch of state government." *Ivarsson v. Office of Indigent Def. Servs.*, 156 N.C. App. 628, 631, 577 S.E.2d 650, 652 (2003).

51. The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *Berger*, 368 N.C. at 645, 781 S.E.2d at 256.

52. The APA permits an executive agency to adopt temporary rules required by a recent court order. This provision supports and furthers the separation of powers. Here, the Commission adopted the temporary rule, not to comply with a court order, but to avoid the effects of a court order while that order was being appealed.

53. The Commission’s adoption of the temporary rule interferes with and subverts the power of the courts to interpret the law and rule on legal controversies.

54. The Commission’s adoption of the temporary rule violates the separation of powers clause of the North Carolina Constitution, N.C. Const. Art. I, § 6.

WAIVER OF JURY TRIAL

55. Because the issues raised in this Complaint for Declaratory Judgment do not raise material issues of disputed fact but only issues of law, Plaintiffs waive their right to a jury trial.

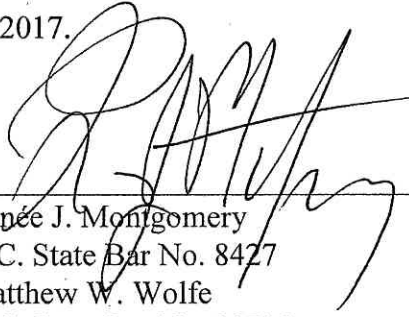
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court issue a declaratory ruling and other appropriate relief, pursuant to N.C. Gen. Stat. § 150B-21.1(c) and Art. 26 of Ch. 1, to:

1. Declare that the temporary rule adopted by the North Carolina Industrial Commission, 04 NCAC 10J .0103, is invalid because it does not comply with the criteria and standards for temporary rulemaking set forth in the North Carolina Administrative Procedures Act;
2. Declare that the temporary rule adopted by the North Carolina Industrial Commission, 04 NCAC 10J .0103, is invalid because it is in violation of the separation of powers clause of the North Carolina Constitution;

3. Make all further orders as are just, necessary, and proper;
4. Grant Plaintiffs such other and further relief as may be proper and just; and
5. Assess the costs of the action against the Commission pursuant to N.C. Gen. Stat. § 1-263.

Respectfully submitted this 7th day of January 2017.



Renee J. Montgomery
N.C. State Bar No. 8427
Matthew W. Wolfe
N.C. State Bar No. 38715
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400
Post Office Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564
reneemontgomery@parkerpoe.com
*Attorneys for Plaintiffs North Carolina
Ambulatory Surgical Center Association,
Surgical Care Affiliates, LLC, and Compass
Surgical Partners, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing **COMPLAINT FOR DECLARATORY JUDGMENT** on the following via U.S. mail:

Theodore S. Danchi, General Counsel
NC Industrial Commission
4340 Mail Service Center
Raleigh, NC 27699-4340

Kendall Bourdon, IC Rulemaking Coordinator
NC Industrial Commission
4336 Mail Service Center
Raleigh, NC 27699-4336

Molly Masich, Codifier of Rules
Rules Division
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

North Carolina Rules Review Commission
Rules Division
North Carolina Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609

Amanda Reeder, Rules Review Commission Counsel
North Carolina Rules Review Commission
1711 New Hope Church Road
Raleigh, NC 27609

This the 3rd day of January 2017.



Renee J. Montgomery
N.C. State Bar No. 8427
PARKER POE ADAMS & BERNSTEIN LLP
301 Fayetteville Street, Suite 1400
Post Office Box 389
Raleigh, North Carolina 27602-0389
Telephone: (919) 828-0564
Facsimile: (919) 834-4564
reneemontgomery@parkerpoe.com

STATE OF NORTH CAROLINA

COUNTY OF WAKE

SURGICAL CARE AFFILIATES, LLC,

Petitioner,

v.

NORTH CAROLINA INDUSTRIAL
COMMISSION,

Respondent.

FILED

2016 AUG -9 PM 2: 51

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

16-CVS-00600

Wake Co., C.S.C.

BY

DECISION

This matter came before the undersigned Superior Court Judge of Wake County upon a Petition for Judicial Review filed by Petitioner Surgical Care Affiliates, LLC ("SCA") pursuant to Article 4 of the North Carolina Administrative Procedure Act ("APA"). Petitioner seeks reversal of the December 14, 2015 Declaratory Ruling entered by Respondent North Carolina Industrial Commission ("the Commission") denying the declaratory relief sought in SCA's October 1, 2015 Request for Declaratory Ruling filed with the Commission.

After review and consideration of the Official Record and the filings and arguments of the parties, this Court has concluded that the Commission's Declaratory Ruling should be reversed.

THE PARTIES

SCA manages seven ambulatory surgical centers in North Carolina and has an ownership interest in each of these centers through wholly owned subsidiary corporations (hereinafter "SCA Ambulatory Surgical Centers"). (Record page 8, hereinafter "R p ____"). The SCA Ambulatory Surgical Centers are located throughout North Carolina and include Blue Ridge Day Surgery Center at 2308 Westfield Court in Raleigh, Wake County, North Carolina. (R p 8).

EXHIBIT A

The Commission is an agency of the State of North Carolina created by the General Assembly and has the responsibility for administering the North Carolina Workers' Compensation Act ("the Act"). N.C. Gen. Stat. § 97-77. Among its responsibilities, the Commission adopts rules setting forth a schedule of maximum fees for medical compensation to be paid to injured employees who are covered by the Act. N.C. Gen. Stat. § 97-26(a). As a State agency, the Commission is subject to the rule-making requirements of Article 2A of the APA. N.C. Gen. Stat. §§ 150B-2(1a), 150B-18.

SCA'S REQUEST AND THE COMMISSION'S DECLARATORY RULING

On October 1, 2015, SCA filed with the Commission a Request for Declaratory Ruling. (R p 8-25). In SCA's Request, SCA sought a ruling from the Commission declaring invalid those parts of the Commission's rules with an effective date of April 1, 2015 that changed the workers' compensation maximum fee schedule for services provided by ambulatory surgical centers. (R pp 8-25). In its Request for Declaratory Ruling, SCA contended that the Commission failed to adopt a new fee schedule for ambulatory surgical centers in substantial compliance with the rule-making requirements of Article 2A of the APA because the Commission had failed to prepare or obtain the fiscal note and certifications from the Office of State Budget and Management required under N.C. Gen. Stat. §§ 150B-21.2(a) and 150B-21.4(b1). (R pp 9-10). On October 30, 2015, the Commission granted SCA's request for a declaratory ruling and indicated that a ruling on the merits would be issued within 45 days, (R p 6).

On December 14, 2015, the Commission issued its Declaratory Ruling. The Ruling concluded that the Commission had followed the law in adopting a new maximum fee schedule

for ambulatory surgical centers, and declined to declare those parts of its rules invalid as requested by SCA in its Request for Declaratory Ruling. (R pp 2-5).

On January 13, 2016, SCA filed a Petition for Judicial Review pursuant to Article 4 of the APA seeking reversal of the Commission's Declaratory Ruling and a decision invalidating those parts of the Commission's rules that changed the ambulatory surgical center fee schedule.

THE MOTION TO INTERVENE AS AMICI CURIAE

Ten days prior to the week of the hearing on SCA's Petition for Judicial Review, Greensboro Orthopedics, P.A., OrthoCarolina, P.A., Raleigh Orthopaedic Clinic, P.A., Surgical Center of Greensboro, LLC, Southeastern Orthopaedic Specialists, P.A., Orthopaedic & Hand Specialists, P.A., Cary Orthopaedic and Sports Medicine Specialists, P.A., and Stephen D. Lucey (collectively "the Movants" or "Intervenors") filed a Motion to Intervene as *Amici Curiae*. Along with the Motion, Movants filed a Brief. Attached to Movants' Brief is an Affidavit of Conor Brockett, Associate General Counsel for the North Carolina Medical Society. In response to the Motion to Intervene, Respondent filed an objection to Movants' Motion to Intervene as *Amici Curiae* and a Motion to Strike the Affidavit of Conor Brockett and the attachment to that Affidavit, as well as all references to the Affidavit and exhibit within the body of Movants' brief.

In reaching the decision on the relief requested in SCA's Petition for Judicial Review, the undersigned has disregarded and not considered the Affidavit of Conor Brockett and attached exhibit and has disregarded any references to the Affidavit and exhibit in Movants' Brief. Respondent's Motion to Strike has been granted. The Affidavit of Conor Brockett and exhibit are not part of the record in this case.

In its discretion, this Court has allowed Movants' Motion to Intervene in this judicial review proceeding for the limited purpose of filing the *Amici Curiae* Brief without the Affidavit of Conor Brockett and exhibit.

STANDARD OF REVIEW

Article 4 of the APA governs judicial review of a declaratory ruling. N.C. Gen. Stat. §§ 150B-43 *et seq.* The Commission's issuance of a Declaratory Ruling upholding the validity of rule provisions challenged by SCA is a decision that is subject to judicial review under Article 4 of the APA. *See* N.C. Gen. Stat. § 150B-4(a1)(2).

In its Petition for Judicial Review, SCA contends that the Commission's Declaratory Ruling is in excess of its statutory authority, made upon unlawful procedure, and affected by other error of law. Because of these errors asserted by the SCA, this Court has applied the *de novo* standard of review to review the Commission's decision as required under N.C. Gen. Stat. § 150B-51(c).

ANALYSIS

The Commission, pursuant to N.C. Gen. Stat. § 97-26, is required to adopt by rule a schedule of maximum fees for medical compensation. The fees adopted by the Commission in its schedule must be adequate to ensure that (i) injured workers are provided the standard of services and care intended by North Carolina Workers' Compensation Act, (ii) providers are reimbursed reasonable fees for providing services, and (iii) medical costs are adequately contained. N.C. Gen. Stat. § 97-26(a).

Prior to the promulgation of the rules at issue in this case, the Commission, in accordance with the statutory mandate set out in N.C. Gen. Stat. § 97-26, adopted through rule-making procedures its "Fees for Medical Compensation" published at 04 NCAC 10J .0101. This rule

consisted of a "Medical Fee Schedule" and a "Hospital Fee Schedule" (the "Prior Rule"). The "Medical Fee Schedule" of the Prior Rule set maximum amounts that could be paid for "medical, surgical, nursing, dental and rehabilitative services, and medicines, sick travel and other treatment, including medical and surgical supplies, and original artificial members." The "Hospital Fee Schedule" of the Prior Rule set maximum amounts that could be paid for "inpatient hospital fees," "outpatient hospital fees," and "ambulatory surgery fees."

On August 23, 2013, Session Law 2013-410 was enacted into law. Section 33.(a) of Session Law 2013-410 provided the following:

SECTION 33.(a) Industrial Commission Hospital Fee Schedule:

- (1) Medicare methodology for physician and hospital fee schedules. -- With respect to the schedule of maximum fees for physician and hospital compensation adopted by the Industrial Commission pursuant to G.S. 97-26, those fee schedules shall be based on the applicable Medicare payment methodologies, with such adjustments and exceptions as are necessary and appropriate to ensure that (i) injured workers are provided the standard of services and care intended by Chapter 97 of the General Statutes, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained. . . .

...

- (3) Expedite rule-making process for fee schedule. - The Industrial Commission is exempt from the certification requirements of G.S. 150B-19.1(h) and the fiscal note requirement of G.S. 150B-21.4 in developing the fee schedules required pursuant to this section.

Notably, in Session Law 2013-410, Section 33.(a), the General Assembly provided for an expedited rule-making process for the new fee schedules which bypassed the certification and fiscal note requirements that would otherwise be required prior to adoption of a fee schedule. Although the certification requirements of N.C. Gen. Stat. § 150B-19.1(h) became moot when those requirements were repealed by Session Law 2014-112, Section 6(a), there are certification requirements in preparing the fiscal note described in N.C. Gen. Stat. § 150B-21.4(b1).

In response to this Session Law, the Commission undertook a process to modify its fee schedules and ultimately amended 04 NCAC 10J .0101 and adopted two rules: (1) a rule setting fees for "Professional Services," 04 NCAC 10J.0102, which sets fees for physicians and health care providers; and (2) the rule at issue in this matter, 04 NCAC 10J.0103, entitled "**Fees for Institutional Services.**" In adopting the "Fees for Institutional Services" rule, the Commission did not prepare or obtain a fiscal note, relying upon the exemption language set forth in Session Law 2013-410, Section 33.(a)(3). The fee schedule set forth in the new "Fees for Institutional Services" rule includes separate subsections setting forth maximum fees for "**hospital inpatient institutional services,**" "**hospital outpatient institutional services,**" "**critical access hospital**" inpatient and outpatient services, and "**institutional services provided by ambulatory surgical centers.**"

Petitioner, an owner and operator of ambulatory surgical centers, seeks declaratory relief from this Court on the grounds that the Commission exceeded the statutory authority of Session Law 2013-410, Section 33.(a) by adopting a fee schedule pertaining to ambulatory surgical centers without complying with the fiscal note requirements of N.C. Gen. Stat. §§ 150B-21.2(a) and 150B-21.4. Specifically, Petitioner, joined by Intervenor for the purposes of this Petition, contends that the General Assembly, in Session Law 2013-410, Section 33.(a), mandated only that new schedules of maximum fees for **physicians and hospitals** be adopted under an expedited rule-making process, so as to ensure that the maximum fees of **physicians and hospitals** be based on the applicable Medicare payment methodologies.

Petitioners and Intervenor contend that they, as **ambulatory surgical centers**, are legally distinct from **hospitals** and that because the General Assembly mandated new fee schedules for **physicians and hospitals**, and not **ambulatory surgical centers**, the Commission did

not have statutory authority to adopt new fee schedules relating to ambulatory surgical centers under the expedited rule-making process.

North Carolina law defines a “hospital” as:

any facility which has an organized medical staff and which is designed, used and operated to provide health care, diagnostic and therapeutic services, and continuous nursing care primarily to inpatients where such care and services are rendered of the supervision and direction of physicians licensed under Chapter 90 of the General Statutes, Article 1, to two or more persons over a period in excess of 24 hours.

N.C. Gen. Stat. § 131E-76(3).

North Carolina law defines an “ambulatory surgical facility” as:

a facility designed for the provision of a specialty ambulatory surgical program or a multispecialty ambulatory surgical program. An ambulatory surgical facility serves patients who require local, regional or general anesthesia and a period of post-operative observation. An ambulatory surgical facility may only admit patients for a period of less than 24 hours

N.C. Gen. Stat. § 131E-146(1); *see also* N.C. Gen. Stat. § 131E-176(1b) and (13) (setting forth separate definitions for hospitals and ambulatory surgical facilities). No further definition of the terms “hospital” or “ambulatory surgical facility” is contained in the statutes pertaining to the authority of the Commission to adopt fee schedules.

The Court finds and concludes that **hospitals** are separate and legally distinct entities from **ambulatory surgical centers**. The Court further finds and concludes that the plain language of the General Assembly, in enacting Session Law 2013-410, Section 33.(a), authorized the Commission to use an expedited rule-making process only in adopting new maximum fees for **physicians** and **hospitals** and that the General Assembly did not authorize the Commission to use an expedited rule-making process in adopting new maximum fees for **ambulatory surgical centers**.

As the North Carolina Supreme Court has stated on numerous occasions, when the language of a statute is clear and unambiguous, courts must give the statute its plain and definite meaning. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996); *Lemons v. Old Hickory Council, Boy Scouts of America*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

The Commission contends that because the term "Hospital Fee Schedule" is used in the heading of Section 33.(a) of Session Law 2013-410, this indicates that ambulatory surgical centers were included in the General Assembly's mandate to change the maximum fee schedules using an expedited rule-making process. The Commission contends that under the prior fee schedules, ambulatory surgical centers were included as one subsection of "Hospital Fee Schedule." However, North Carolina law is clear that captions of a statute cannot control when the text is clear. *Appeal of Forsythe County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974). Respondent's argument also is contradicted by the fact that the physician fee schedule is included within the fee schedules that the General Assembly mandated be changed and physicians were not included as a subsection of "Hospital Fee Schedule" under the Prior Rule.

Unless otherwise exempted, the fiscal note requirements are part of the mandatory procedure of administrative rule-making. N.C. Gen. Stat. § 150B-21.2. Under N.C. Gen. Stat. § 150B-18, a rule is not valid unless it is adopted in substantial compliance with Article 2A of the APA. The failure of the Commission to comply with the fiscal note requirements in adopting a new fee schedule for ambulatory surgical centers cannot, in this instance, be viewed as substantial compliance with the rule-making requirements of Article 2A of the APA.

Because the Commission was required to comply with the fiscal note requirements in adopting a new fee schedule for ambulatory surgical centers and failed to do so, the Commission

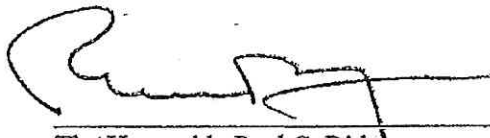
exceeded its statutory authority and employed an unlawful procedure. N.C. Gen. Stat. § 150B-51(c).

Therefore, this Court finds and concludes that the Petitioner is entitled to the declaratory ruling that the Commission's attempted adoption of a new fee schedule for ambulatory surgical center services, but limited solely to those services, as set forth in 04 NCAC 10J.0103(g) and (h) (also referenced in 04 NCAC 10J.0103(i)), and the amendment of the Prior Rule 04 NCAC 10J.0101(d)(3), (5), and (6), to the extent that the amendment removed the old fee schedule for ambulatory surgical centers, are invalid and of no effect.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the relief sought by SCA in its Request for Declaratory Ruling and Petition for Judicial Review is GRANTED and the Declaratory Ruling entered by the Commission is REVERSED.

The Commission's attempted adoption of a new fee schedule for ambulatory surgical center services, but limited solely to those services, as set forth in 04 NCAC 10J.0103(g) and (h) (also referenced in 04 NCAC 10J.0103(i)), and the amendment of the Prior Rule, specifically 04 NCAC 10J.0101(d)(3), (5), and (6), to the extent that the amendment removed the old fee schedule for ambulatory surgical centers, are invalid and of no effect.

This the 9 day of August 2016.


The Honorable Paul C. Ridgeway
Superior Court Judge

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 00600

SURGICAL CARE AFFILIATES, LLC,)

Petitioner)

v.)

NORTH CAROLINA INDUSTRIAL)
COMMISSION,)

Respondent)

ORDER ALLOWING STAY

THIS MATTER comes before the undersigned upon Respondent's Motion to Stay the Final Judgment of the Superior Court pursuant to N.C. Gen. Stat. § 150B-52 and Rule 62 of the North Carolina Rules of Civil Procedure. On August 9, 2016, the Superior Court, by and through the undersigned, issued its final judgment in the above-captioned matter, wherein the Court reversed the Respondent's Declaratory Ruling and granted the relief requested by the Petitioner. Respondent seeks, through its motion, to preserve the *status quo* of the subject matter while pursuing an appeal of the Court's final judgment. The Court has considered the record proper and the arguments of counsel.

For good cause shown, and in the discretion of the Court, the Court finds and concludes that the Motion to Stay should be allowed. Therefore, it is ORDERED that the application and effect of the Court's Final Judgment entered on August 9, 2016 in this matter is STAYED until such time that the Court of Appeals of North Carolina can rule on the matter or until this order is modified by a court of competent jurisdiction.

So ORDERED, this the 2nd day of September, 2016.


Paul C. Ridgeway, Superior Court Judge

EXHIBIT A

Montgomery, Renee J.

From: Bourdon, Kendall <kendall.bourdon@ic.nc.gov>
Sent: Tuesday, October 18, 2016 4:14 PM
To: ncic.rules@lists.ncmail.net
Subject: [NCIC.Rules] Notice of North Carolina Industrial Commission Rulemaking Temporary
Attachments: Proposed Temporary Rule 04 NCAC 10J .0103.pdf; ATT00001.txt
Importance: High

Good afternoon,

The Industrial Commission has proposed a temporary rule that has been submitted to the North Carolina Office of Administrative Hearings, Rules Division, for publication on its website, <http://www.oah.state.nc.us/rules/>. The proposed temporary rule is attached to this e-mail. This temporary rule is proposed pursuant to N.C. Gen. Stat. § 150B-21.1(a)(5). The effects of the August 9, 2016 decision in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-0060 (Wake County Superior Court) necessitate the expedited implementation of this temporary rule.

A public hearing will be held on Friday, November 18, 2016, at 1:00 p.m., in Room 2149 of the Dobbs Building, 430 North Salisbury Street, Raleigh, NC, 27603. Room 2149 is the Utilities Commission Hearing Room on the second floor of the Dobbs Building. The public comment period will run from October 19, 2016 to November 29, 2016. Please send any written comments to Kendall Bourdon at kendall.bourdon@ic.nc.gov or 4333 Mail Service Center, Raleigh, NC 27699-4333, no later than November 29, 2016.

The Industrial Commission will provide updates throughout the rulemaking process on the "Latest News" tab as well as the "Industrial Commission Rules" page of the Industrial Commission's website, www.ic.nc.gov. Should you have any additional questions, please call Kendall Bourdon at (919) 807-2644.

Sincerely,
Kendall Bourdon



KENDALL M. BOURDON
AGENCY LEGAL SPECIALIST
NORTH CAROLINA INDUSTRIAL COMMISSION
4333 MAIL SERVICE CENTER
RALEIGH, NC 27699-4333
PHONE 919-807-2644 FAX 919-715-0282
KENDALL.BOURDON@IC.NC.GOV
WWW.IC.NC.GOV

Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

EXHIBIT B

Rule 04 NCAC 10J .0103 is proposed as a temporary rule as follows:

04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.
- (2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.
- (3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.
- (2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.
- (3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective Payment System reimbursement formula and factors as published annually in the Federal Register ("the Medicare ASC facility-specific amount"). Reimbursement shall be based on the fully implemented payment amount in Addendum AA, Final AA (Final ASC Covered Surgical Procedures for CY-2015, 2017) and Addendum BB, Final BB (Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2015, 2017) as published in the Federal Register, or their successors. The maximum

1 reimbursement rate for institutional services provided by ambulatory surgical centers is 200 percent of the Medicare
2 ASC facility-specific amount.

3 ~~(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers~~
4 ~~is as follows:~~

5 (1) ~~Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.~~

6 (2) ~~Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.~~

7 (3) ~~Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.~~

8 (h) Notwithstanding Paragraph (g) of this Rule, if surgical procedures listed in Addendum EE (Surgical Procedures
9 Excluded from Payment in ASCs for CY 2017) to the most recently adopted and effective Hospital Outpatient
10 Prospective Payment and Ambulatory Surgical Center Payment Systems as published in the Federal Register, or its
11 successors, are provided at ASCs, they shall be reimbursed with the maximum amount being the usual, customary,
12 and reasonable charge for the service or treatment rendered.

13 (i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific
14 reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages
15 set out in Paragraphs (b), (c), (e), (f), and ~~(h)~~ (g) of this Rule.

16 (j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee
17 schedules in Rule .0102 of this Section.

18 (k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG")
19 payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no
20 more than the billed charges.

21 (l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment
22 shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient
23 institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

24
25 *History Note: Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410;*

26 *Eff. April 1, 2015-2015;*

27 *Temporary Amendment Eff. January 1, 2017.*

Rule 04 NCAC 10J .0103 is amended under temporary procedures as follows:

04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

(a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.

(b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.

(c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:

- (1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.
- (2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.
- (3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.

(d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.

(e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.
- (2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.
- (3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.

(f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:

- (1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.
- (2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.
- (3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the ~~Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective~~ most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment System Systems reimbursement formula and factors factors, including all OPPIs and ASC Addenda, as published annually or referenced by website in the Federal Register ("the Medicare ASC facility specific amount"). ("the OPPIs/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPIs/ASC Medicare rule shall be applied in the calculation of

1 the maximum allowable amount for any institutional service it provides. Reimbursement shall be based on the fully
2 implemented payment amount in Addendum AA, Final [AA (Final) ASC Covered Surgical Procedures for CY 2015,
3 [2017]] and Addendum BB, Final [BB (Final) ASC Covered Ancillary Services Integral to Covered Surgical
4 Procedures for 2015, [2017]] as published in the Federal Register, or their successors. [The maximum reimbursement
5 rate for institutional services provided by ambulatory surgical centers is 200 percent of the Medicare ASC facility-
6 specific amount.]

7 (h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers
8 is as follows:

9 (1) Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.

10 (2) Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.

11 (3) Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.

12 (1) A maximum reimbursement rate of 200 percent shall apply to institutional services that are eligible
13 for payment by CMS when performed at an ASC.

14 (2) A maximum reimbursement rate of 135 percent shall apply to institutional services performed at an
15 ASC that are eligible for payment by CMS if performed at an outpatient hospital facility, but would
16 not be eligible for payment by CMS if performed at an ASC.

17 [(h) Notwithstanding Paragraph (g) of this Rule, if surgical procedures listed in Addendum EE (Surgical Procedures
18 Excluded from Payment in ASCs for CY 2017) to the most recently adopted and effective Hospital Outpatient
19 Prospective Payment and Ambulatory Surgical Center Payment Systems as published in the Federal Register, or its
20 successors, are provided at ASCs, they shall be reimbursed with the maximum amount being the usual, customary,
21 and reasonable charge for the service or treatment rendered.]

22 (i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific
23 reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages
24 set out in Paragraphs (b), (c), (e), (f), and (h) [(g)] of this Rule.

25 (j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee
26 schedules in Rule .0102 of this Section.

27 (k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG")
28 payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no
29 more than the billed charges.

30 (l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment
31 shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient
32 institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

33
34 History Note: Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410;

35 Eff. April 1, 2015-2015;

36 Temporary Amendment Eff. January 1, 2017.



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: 04 NCAC 10J .0103

3. Action: ☐ Adoption ☒ Amendment ☐ Repeal

4. Was this an Emergency Rule: ☐ Yes ☒ No Effective date:

5. Provide dates for the following actions as applicable:

- a. Proposed Temporary Rule submitted to OAH: October 18, 2016
- b. Proposed Temporary Rule published on the OAH website: October 21, 2016
- c. Public Hearing date: November 18, 2016
- d. Comment Period: October 19, 2016 through November 29, 2016
- e. Notice pursuant to G.S. 150B-21.1(a3)(2): October 18, 2016
- f. Adoption by agency on: December 5, 2016
- 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]: January 1, 2017
- 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: *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-00600 (Wake County Superior Court).
- ☐ State Medical Facilities Plan.
- ☐ Other:

Explain: The effects of the August 9, 2016 decision in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-00600 (Wake County Superior Court) necessitate the expedited implementation of this temporary rule. This recent court decision invalidated the Industrial Commission's medical fee schedule provisions for ambulatory surgery centers, which had taken effect April 1, 2015, based on the court's interpretation of Session Law 2013-410, Section 33(a), and the application of its fiscal note exemption language. Due to the court decision, the medical fee schedule, as applied only to ambulatory surgery centers, reverts back to the pre-April 1, 2015 provisions which provided for a maximum reimbursement rate of 67.15% of billed charges, resulting in a potentially retroactive and prospective multi-million dollar increase in costs to the workers' compensation system. Although the August 9, 2016 decision has been stayed by the Superior Court during the appeal to the North Carolina Court of Appeals, it is the Industrial Commission's statutory obligation to adopt a rule as quickly as possible to restore balance to the workers' compensation system pursuant to N.C. Gen. Stat. § 97-26 in the event the decision is upheld on appeal. By putting a temporary rule in place as soon as possible, the period of time subject to a potential retroactive invalidation of the ambulatory surgery center fee schedule provisions will be limited to April 1, 2015 to December 31, 2016, providing certainty regarding medical costs for 2017 and beyond.

EXHIBIT D

3

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

The effects of the August 9, 2016 decision in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-00600 (Wake County Superior Court) necessitate the expedited implementation of this temporary rule. This recent court decision invalidated the Industrial Commission's medical fee schedule provisions for ambulatory surgery centers, which had taken effect April 1, 2015, based on the court's interpretation of Session Law 2013-410, Section 33(a), and the application of its fiscal note exemption language. Due to the court decision, the medical fee schedule, as applied only to ambulatory surgery centers, reverts back to the pre-April 1, 2015 provisions which provided for a maximum reimbursement rate of 67.15% of billed charges, resulting in a potentially retroactive and prospective multi-million dollar increase in costs to the workers' compensation system. Although the August 9, 2016 decision has been stayed by the Superior Court during the appeal to the North Carolina Court of Appeals, it is the Industrial Commission's statutory obligation to adopt a rule as quickly as possible to restore balance to the workers' compensation system pursuant to N.C. Gen. Stat. § 97-26 in the event the decision is upheld on appeal. By putting a temporary rule in place as soon as possible, the period of time subject to a potential retroactive invalidation of the ambulatory surgery center fee schedule provisions will be limited to April 1, 2015 to December 31, 2016, providing certainty for all industry stakeholders, including employers, insurers, and medical providers, regarding medical costs for 2017 and beyond. Although the decision in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-00600 (Wake County Superior Court) did not order the Industrial Commission to engage in temporary rulemaking, it is the Commission's position that the effects of the decision require the immediate adoption of this rule.

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: Kendall M. Bourdon

Phone: (919) 807-2644

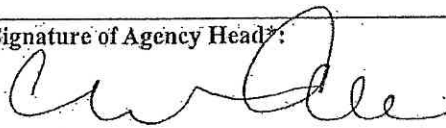
E-Mail: kendall.bourdon@ic.nc.gov

Agency contact, if any:

Phone:

E-Mail:

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.

Typed Name: Charlton L. Allen

Title: Chairman

E-Mail: Charlton.Allen@ic.nc.gov

RULES REVIEW COMMISSION USE ONLY

Action taken:

Submitted for RRC Review:

☐ Date returned to agency:

**SURGICAL CARE AFFILIATES' INITIAL COMMENTS IN OPPOSITION
TO THE TEMPORARY RULE, 04 NCAC 10J .0103, PROPOSED
BY THE NORTH CAROLINA INDUSTRIAL COMMISSION**

TO: NORTH CAROLINA RULES REVIEW COMMISSION

The temporary rulemaking process is a deviation from the permanent rulemaking process. Because of the presumption that permanent rulemaking should be used, the Rules Review Commission reviews every temporary rule to determine whether it meets the limited criteria for adoption of a temporary rule set forth in N.C. Gen. Stat. § 150B-21.1(a). The Industrial Commission's ("IC") attempted amendment of 04 NCAC 10J .0103 does not meet the criteria for adopting a temporary rule.

The IC relies upon a "recent court order" that neither explicitly nor implicitly requires a temporary rule. The IC instead contends that "the effects of" the recent court order make a temporary rule necessary. The effect of the recent court order is to revert to a lawfully adopted prior fee schedule for certain medical services.

Unlike two other times when temporary rules have been required by a recent court order, the IC's temporary rule is not necessary to comply with or enforce the recent court order or to ensure activities can continue that would otherwise be prohibited by the recent court order. Instead, the IC is merely trying to avoid the consequences of a recent court order that invalidates one of its rules for failing to comply with the permanent rulemaking requirements under the Administrative Procedure Act ("APA"). The IC is now trying to do through temporary rulemaking what it failed to do properly through permanent rulemaking—change a fee schedule. We request that the Rules Review Commission prohibit this attempted end-around the APA.

THE CRITERIA FOR ADOPTING A TEMPORARY RULE HAVE NOT BEEN MET.

**Immediate Adoption of the Temporary Rule is
Not Required by Recent Court Order.**

The IC contends that N.C. Gen. Stat. § 150B-21.1(a)(5) provides the statutory authority for adopting the proposed amendment to 04 NCAC 10J .0103 as a temporary rule. Under this criterion, the immediate adoption of the rule must be required by a recent court order. However, there is no recent court order that requires the immediate adoption of an amendment to 04 NCAC 10J .0103.

The IC contends that “the effects of” the August 9, 2016 Decision in *Surgical Care Affiliates LLC v. North Carolina Industrial Commission* “necessitate the expedited implementation of this temporary rule,” admitting that the Decision does not order or even mention temporary rulemaking. The IC is misreading the clear language of the temporary rule statute, N.C. Gen. Stat. § 150B-21.1(a). The court order upon which the IC relies does not require the immediate adoption of a temporary rule. As the N.C. Supreme Court has stated on numerous occasions, when the language of a statute is clear and unambiguous, courts must give the statute its plain and definite meaning. *State v. Dellinger*, 343 N.C. 93, 95, 468 S.E.2d 218, 220 (1996); *Lemons v. Old Hickory Council, Boy Scouts of America*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988).

The Superior Court Decision is No Basis for Temporary Rulemaking.

Because the IC had failed to obtain the required fiscal note for permanent rulemaking, the Honorable Paul Ridgeway, Wake County Superior Court Judge, reversed the IC’s declaratory ruling that it had complied with all of the requirements. In the Decision, Judge Ridgeway concluded:

The Commission's attempted adoption of a new fee schedule for ambulatory surgical center services, but limited solely to those services, as set forth in 04 NCAC 10J .0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the Prior Rule, specifically 04 NCAC 10J .0101(d)(3), (5), and (6), to the extent that the amendment removed the old fee schedule for ambulatory surgical centers, are invalid and of no effect."

The Decision does not direct the IC to pursue temporary rulemaking or require temporary rulemaking implicitly. The "effects" of the Decision do not require temporary rulemaking either. The "effect" of the Decision in *Surgical Care Affiliates* was to recognize the invalidity of the IC's attempted adoption of a new fee schedule for ambulatory surgery centers ("ASCs"), which had the effect of keeping in place the fee schedule for ASCs that had been lawfully adopted in 2013. As a result, there is a fee schedule for ASCs. If the IC chooses to change that ASC fee schedule, it can pursue permanent rulemaking complying with all of its requirements.

**The IC's Position that "The Effects of the Decision" Provide
Justification for Temporary Rulemaking Has No Merit.**

The IC contends, contrary to the plain language of the temporary rule statute, that "the effects of the Decision" require the immediate adoption of the proposed rule. The IC uses conclusory statements about "restoring balance to the workers' compensation system."

If such conclusory statements could be justification for a temporary rule, all agencies would be promulgating temporary rules any time a decision was made on judicial review that an agency had failed to follow the required permanent rulemaking process. Such a broad interpretation of the temporary rulemaking criteria would permit a rulemaking agency to blatantly violate the permanent rulemaking process, invite a court order that invalidates those rules, and then pursue temporary rulemaking based on "the effects of the court order." That is what the IC is attempting to do here.

By the IC's logic, agencies could use temporary rules in the wake of almost any court order, legislation, or regulation by citing alleged negative effects. The exception (temporary rulemaking) would swallow the rule (permanent rulemaking).

**The Proposed Temporary Rule is Not Necessary to
Comply With or Enforce the Decision.**

To our knowledge, there have been only two other times that agencies have promulgated temporary rules required by a recent court order. These two cases further demonstrate that the IC fails to meet the threshold for temporary rulemaking in this case.

The Environmental Management Commission ("EMC") adopted temporary rules in 2001 as required by the Supreme Court's recent decision in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). The Supreme Court invalidated the Army Corps of Engineers' jurisdiction over the discharge of fill into isolated waters. At that time, there had been no State permitting process because it would have been duplicative. When the Corps of Engineer lost jurisdiction, the State alone retained jurisdiction over activities impacting isolated, intrastate waters. But there was no permitting process. As concluded by the North Carolina Attorney General, the Supreme Court decision meant that "[u]ntil a permit program is codified in the [EMC's] rules, no activities involving the discharge of waste into isolated waters in violation of water quality standards can occur in this State." Thus, the "immediate necessity for proceeding with temporary rules is evident." Authority of the Environment Management Commission to Adopt Temporary and Permanent Rules Requiring Permits for Impacts to Isolated Wetlands and Surface Waters (N.C.A.G. Sept. 5, 2001) [attached as Ex. A].

In another situation, a federal district court entered a preliminary injunction prohibiting the hunting of coyotes in a five-county red wolf recovery area with limited exceptions. The

Wildlife Resource Commission (“WRC”) adopted a temporary rule required by the court order. As stated in its Findings of Need submitted to the Rules Review Commission: “In order to fully comply with the injunction and enforce its restrictions, the WRC must pursue rule-making.” Wildlife Resources Commission, Temporary Rule-Making Findings of Need (July 10, 2014) (emphasis added) [attached as Ex. B].

The situation in which the IC finds itself is clearly distinguishable from the temporary rules promulgated by the EMC and the WRC. The IC’s proposed temporary rule is not required to ensure activities can still occur in the worker’s compensation system. Injured workers can still file claims, those claims can still be paid, ASCs can still treat injured workers, and ASCs can still be reimbursed for such treatment. Unlike the WRC preliminary injunction, the Superior Court Decision does not halt any activity until temporary rules are adopted.

The IC also does not need a temporary rule in order to fully comply with and enforce the Decision. The Decision requires the IC to enforce the prior lawfully adopted ASC fee schedule, which was used—without problem—for two years. The temporary rule is an attempt by the IC to avoid full compliance and enforcement of the Decision.

**The IC Also Fails to Show That Permanent Rulemaking
Would be Contrary to the Public Interest.**

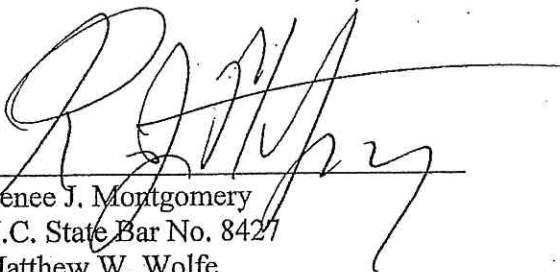
The IC also has failed to show how it would be contrary to the public interest to amend its rules using the permanent rulemaking process set forth in the APA as required under N.C. Gen. Stat. § 150B-21.1. In its Findings of Need Statement addressing this standard, the IC cites the Superior Court Decision as resulting in the pre-April 1, 2015 fee schedule continuing to be effective. There is no discussion of the public interest being harmed by following the permanent rulemaking process.

The IC is using temporary rulemaking in an attempt to avoid the Wake County Superior Court Decision and bypass the important process in N.C. Gen. Stat. § 150B-21.2 for adopting a permanent rule.

CONCLUSION

For the reasons set forth above, the IC has failed to show that its temporary rulemaking meets the standards of N.C. Gen. Stat. § 150B-21.1. Surgical Care Affiliates will be filing supplemental comments addressing the other requirements and standards that have not been met by the IC's temporary rulemaking.

This the 7th day of December 2016.



Renee J. Montgomery
N.C. State Bar No. 8427

Matthew W. Wolfe

N.C. State Bar No. 38715

PARKER POE ADAMS & BERNSTEIN LLP

301 Fayetteville Street, Suite 1400

Post Office Box 389

Raleigh, North Carolina 27602-0389

Telephone: (919) 828-0564

Facsimile: (919) 834-4564

mattwolfe@parkerpoe.com

Attorneys for Surgical Care Affiliates, LLC

TEMPORARY RULE

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Industrial Commission

RULE CITATION: 04 NCAC 10J .0103

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Object, based on:
- Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA

COMMENT:

The Industrial Commission was exempt from rulemaking under Article 2A until the General Assembly repealed that exemption in Session Law 2011-287. The Industrial Commission acted to adopt rules in accordance with that law. In its October, November, and December 2012 meetings, the RRC reviewed over 150 rules adopted by the Industrial Commission and ultimately approved them all.

In December 2012, the RRC approved Rule 04 NCAC 10J .0101, General Provisions. This was the only Rule in Subchapter 10J, Fees for Medical Compensation. This Rule did not receive ten letters of objection and was not subject to legislative review; it went into effect January 1, 2013. The RRC approved this Rule again in March 2014 after the agency amended it; the amendment became effective July 1, 2014.

In Session Law 2013-410, Section 33 (Page 18 of the Tab), the Industrial Commission was directed to base the fee schedules for maximum physician and hospital fees upon the applicable Medicare payment methodologies. The Industrial Commission was also told to periodically review the fee schedule. Session Law 2013-410 stated that in setting the Medicare methodology for physician and hospital fee schedules, the Industrial Commission was exempt from the certification requirements of G.S. 150B-19.1(h) and the fiscal note requirement of G.S. 150B-21.4.

Amanda J. Reeder
Commission Counsel

EXHIBIT F

In February 2015, the RRC approved rules submitted by the Industrial Commission. Those Rules separated Rule 10J .0101 into three separate rules, effective April 1, 2015. At that time, Rule 10J .0101 was amended to only include general guidelines for the fee schedule. Rule 10J .0102 set fees for professional services. Rule 10J .0103 set the fees for institutional services.

As amended in 2015, Rule 04 NCAC 10J .0103 set the fee schedule for institutional service. Before the adoption of the Rule, that schedule was contained in Rule 10J .0101, Paragraph (d). Rule 10J .0103 was not a restatement of Paragraph (d), but set a different rate schedule. In the agency's Temporary Rulemaking Findings of Need form, the agency states that the reimbursement rate was 67.15% of billed charges prior to April 1, 2015. In the adoption of Rule .0103, effective April 1, 2015, the rate was set to an annually decreasing scale, and would be 200% of the Medicare ASC facility-specific amount beginning January 1, 2017.

In a Wake County Superior Court decision issued August 9, 2016 (Page 5 of the Tab), the Court declared that Paragraphs (g) and (h) of Rule 10J .0103 were invalid, finding that the fiscal note exemption in Session Law 2013-410 did not extend to ambulatory surgical centers. The court found that the amendment of Rule 10J .0101 was also invalid to the extent that it removed the fee schedule for ambulatory surgical centers from that Rule in Subparagraphs (d)(3), (5), and (6).

In response to the August 9, 2016 Order, the agency sought and was awarded a stay while an appeal is pending at the North Carolina Court of Appeals (Pages 14 and 15 of the Tab). In addition, the agency moved to amend the Rule through temporary measures. As stated in the agency's Temporary Rulemaking Findings of Need form, the agency believes that a temporary rule is necessary to ensure continuity of the payments beginning in January 1, 2017 for industry stakeholders, including employers, insurers, and medical providers.

Given that this rulemaking was timely done in response to a court order that invalidated portions of the existing rule, staff recommends approving this Rule amendment as a temporary rule pursuant to G.S. 150B-21.1(a)(5).