STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 144
NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, SURGICAL CARE AFFILIATES, LLC, AND COMPASS SURGICAL PARTNERS, Plaintiffs, v. THE NORTH CAROLINA INDUSTRIAL COMMISSION, Defendant.	**ANSWER**

NOW COMES Defendant The North Carolina Industrial Commission (the "Commission"), by and through the undersigned counsel, and without waiving any motions or defenses not set out herein, responds to Plaintiffs' Complaint, denying everything not given a specific response.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM FOR RELIEF AND LACK OF JURISDICTION

Pursuant to N.C. R. Civ. P. 12(b)(1), the Commission moves to dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction in that this Court lacks the jurisdiction to issue a declaratory ruling which is the relief sought by Plaintiffs. Pursuant to N.C. R. Civ. P. 12(b)(6), the Commission moves to dismiss Plaintiffs' Complaint on the basis of failure to state a claim upon which relief may be granted in that the Complaint is legally insufficient and fails to allege any facts that would invalidate 04 NCAC 10J .0103.

ANSWER TO ENUMERATED PARAGRAPHS

1. The allegations of this paragraph do not call for a response from the Commission. To the extent a response is required, the Commission is without knowledge or

information sufficient to form a belief as to the truth of these allegations, and therefore, the allegations are denied.

2. The allegations of this paragraph do not call for a response from the Commission. To the extent a response is required, the Commission is without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore, the allegations are denied.

3. The allegations of this paragraph do not call for a response from the Commission. To the extent a response is required, the Commission is without knowledge or information sufficient to form a belief as to the truth of these allegations, and therefore, the allegations are denied.

4. It is admitted that 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 under N.C. Gen. Stat. § 97-77. It is admitted that 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.

5. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied. The allegations of this paragraph are denied.

6. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied.

7. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied.

8. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied.

9. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied.

10. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied.

11. To the extent this paragraph describes a portion of the October 1, 2015 SCA Request for Declaratory Ruling, that document speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

12. To the extent this paragraph describes a portion of the October 1, 2015 SCA Request for Declaratory Ruling and the APA, that document and the APA speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

13. To the extent this paragraph describes a portion of Section 33.(a) of Session Law 2013-410, that law speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

14. To the extent this paragraph describes a portion of Section 33.(a) of Session Law 2013-410, that law speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

15. To the extent this paragraph describes a portion of 04 NCAC 10J .0103, that rule speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

16. To the extent this paragraph describes a portion of the October 1, 2015 SCA Request for Declaratory Ruling and N.C. Gen. Stat. § 150B-18, that document and statute speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

17. To the extent this paragraph describes a portion of the December 14, 2015 Declaratory Ruling issued by the Commission, that document speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

18. To the extent this paragraph describes a portion of the Petition for Judicial Review filed by SCA on January 13, 2016, that document speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

19. To the extent this paragraph describes a portion of Exhibit A of the Complaint, that document speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

20. It is admitted that on September 2, 2016, the Superior Court of Wake County stayed the application and effect of the August 9, 2016 Decision pending appeal to the North Carolina Court of Appeals.

21. It is admitted that on September 6, 2016, the Commission filed a Notice of Appeal of the August 9, 2016 Superior Court Decision which, since the filing of the Complaint in 17 CVS 144, has been docketed as COA17-78.

22. To the extent this paragraph describes a portion of the Exhibit B of the Complaint and N.C. Gen. Stat. § 97-26(c), that document and statute speak for themselves, and

therefore no response is required. The remaining allegations of this paragraph are denied.

23. It is admitted that the Commission gave notice, a public hearing, and opportunity for comment as required by the Administrative Procedure Act for its temporary rule. To the extent that the any stakeholders objected to the temporary rule, those comments speak for themselves, and therefore no response is required. Except as admitted the remaining allegations of this paragraph are denied.

24. To the extent this paragraph describes a portion of the proposed temporary rule and adopted temporary rule, those rules speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

25. To the extent that this paragraph speaks to the language proposed by the stakeholders, the proposed language speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

26. To the extent this paragraph describes a portion of the Exhibit C to the Complaint and N.C. Gen. Stat. § 150B-21.1, that document and statute speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

27. To the extent this paragraph describes a portion of the Exhibit D and Exhibit E, those documents speaks for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

28. To the extent this paragraph describes a portion of the Exhibit F and the APA, that document and the APA speak for themselves and therefore no response is required. The remaining allegations of this paragraph are denied.

29. To the extent this paragraph describes objections lodged by the Plaintiffs, those objections speak for themselves, and therefore no response is required. It is admitted that on December 15, 2016, the Rules Review Commission agreed with the staff members' recommendation and approved the temporary rule amending 04 NCAC 10J. 0103, which went into effect on January 1, 2017. The remaining allegations of this paragraph are denied.

30. Defendant incorporates by reference its responses to the allegations contained in paragraph 1 through 29 into this Answer.

31. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.1 and 21.2, those statutes speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

32. To the extent this paragraph describes a portion of the APA, those statutes speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

33. To the extent this paragraph describes a portion of Exhibit D, that document speaks for itself, and therefore no response is required. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.1, that statute speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

34. To the extent this paragraph describes a portion of Exhibit D, that document speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they

require no response and is therefore denied. The remaining allegations of this paragraph are denied.

35. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.1, that statute speaks for itself, and therefore no response is required. To the extent this paragraph describes a portion of Exhibit A, that document speaks for itself, and therefore no response is required. To the extent this paragraph describes caselaw, the caselaw speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

36. To the extent this paragraph describes a portion of Exhibit A, that document speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

37. To the extent this paragraph describes a portion of Exhibit D, that document speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

38. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

39. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no response and is therefore denied. The remaining allegations of this paragraph are denied.

40. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.1, that statute speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they that require no response and is therefore denied. The remaining allegations of this paragraph are denied.

41. Defendant incorporates by reference its responses to the allegations contained in paragraph 1 through 29 into this Answer.

42. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.9, that statute speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

43. To the extent this paragraph describes a portion of Article 2 of the APA and of N.C. Gen. Stat. § 150B-21.1, those statutes speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

44. To the extent this paragraph describes a portion of Exhibit B, that document speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

45. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that requires no response, and are therefore denied. The remaining allegations of this paragraph are denied.

46. The allegations of this paragraph are conclusory, and comprise legal arguments and conclusions that require no response, and are therefore denied. The remaining allegations of this paragraph are denied.

47. To the extent this paragraph describes a portion of N.C. Gen. Stat. § 150B-21.1(a3), that statute speaks for itself, and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions; that requires no response and is therefore denied. The remaining allegations of this paragraph are denied.

48. Defendant incorporates by reference its responses to the allegations contained in paragraph 1 through 29 into this Answer.

49. To the extent this paragraph describes the North Carolina Constitution and caselaw, the North Carolina Constitution and caselaw speak for themselves, and therefore no response is required. The remaining allegations of this paragraph are denied.

50. To the extent this paragraph describes caselaw, the caselaw speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

51. To the extent this paragraph describes caselaw, the caselaw speaks for itself, and therefore no response is required. The remaining allegations of this paragraph are denied.

52. To the extent this paragraph describes a portion of the APA, that law speaks for itself and therefore no response is required. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions, they require no

response and is therefore denied. The remaining allegations of this paragraph are denied.

53. It is denied that the Commission's adoption of the temporary rule interferes with and subverts the powers of the courts to interpret the law and rule on legal controversies. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions; that requires no response and is therefore denied.

54. It is denied that the Commission's adoption of the temporary rule violates the separation of powers clause of the North Carolina Constitution. To the extent the allegations of this paragraph are conclusory, and comprise legal arguments and conclusions; that requires no response and is therefore denied.

55. This paragraph does not call for a response from the Commission.

Any and all allegations not specifically mentioned are hereby denied.

FURTHER DEFENSES

The Commission pleads and reserves the right to assert any further defenses against Plaintiffs, or their designee, that may become apparent during the course of litigation and discovery.

WHEREFORE, Defendant prays unto the Court that:

1. That the Plaintiffs' case be dismissed or otherwise denied;

2. That the costs, expenses, and fees in this action be taxed against Plaintiffs;

3. For such other and further relief to the Department as the Court deems just and proper.

Respectfully submitted, this the 9 day of March, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing ANSWER was served on the parties to this action by depositing a copy of same on the date shown below with the United States Mail, first-class postage prepaid, and addressed as follows:

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This the 9 day of March, 2017.

Bethany A. Burgon
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STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 17 CVS 0144
NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, SURGICAL CARE AFFILIATES, LLC, AND COMPASS SURGICAL PARTNERS, Plaintiffs, v. THE NORTH CAROLINA INDUSTRIAL COMMISSION, Defendant.	**MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES Defendant, the North Carolina Industrial Commission ("Commission"), by and through its counsel, Josh Stein, Attorney General of the State of North Carolina, Amar Majmundar, Special Deputy Attorney General, and Bethany Burgon, Assistant Attorney General, and submits this Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

BACKGROUND

The Industrial Commission is an agency of the State of North Carolina created in 1929 to administer the North Carolina Workers' Compensation Act (the "Act"). *See* N.C.G.S. § 97-77. The purpose of the Commission is to effectively and fairly administer the Act for the people of North Carolina. One way the Commission achieves this objective is by setting a "fee schedule" of rates for medical compensation for workers' compensation injuries as mandated by N.C.G.S § 97-26, which in pertinent part provides:

> (a) Fee Schedule. – The Commission shall adopt by rule a schedule of maximum fees for medical compensation and shall periodically review the schedule and make revisions.
>
> The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed

> reasonable fees for providing these services, and (iii) medical costs are adequately contained.

This first fee schedule, known as the "Medical and Hospital Fee Schedule," based the pecuniary liability of an employer on the costs that prevailed in the same community for similar treatment of an injured person of a like standard of living when such treatment is paid for by the injured person. *Mehaffey v. Burger King*, 367 N.C. 120, 749 S.E.2d 865 (2013). The Workers' Compensation Reform Act of 1994 changed the fee schedule to use the 1995 Medicare values to determine a "set fee" for professional providers including physicians, nurses, therapists, dentists, etc. in the "Medical Fee Schedule." The institutional providers received the "fee based on a percentage of the charge" with rates that varied for the same service depending on how much the institution billed for the service. This fee schedule for institutional providers, known as the "Hospital Fee Schedule," included inpatient hospitals, outpatient hospitals, and ambulatory surgery centers. In 2011, the Commission became subject to the rulemaking requirements of the North Carolina Administrative Procedure Act ("APA"). N.C.G.S. § 97-80(a) (as amended by S.L. 2011-287, Section 19), N.C.G.S. § 150B-2(1a), N.C. Gen. Stat. § 150B-18. Pursuant to these statutory mandates, the Commission needed to adopt its Medical and Hospital Fee Schedule into rule in the North Carolina Administrative Code. Rule 04 NCAC 10J .0101, became effective January 1, 2013. (See Attachment A, Rule 04 NCAC 10J .0101(2013)).

By 2013, the General Assembly determined that based on the different formulas used to set the rates, the professional providers were receiving payments below the national median while the payments to the institutional providers were well above the national median. It was further determined that states using no fee schedule or a percentage of charges model did not contain medical costs as adequately as states that used set fees under Medicare. (See Attachment B, Affidavit of Meredith Henderson) The General Assembly recognized the need for reform

based on the outdated payment formula for professionals and uncapped payment formula for institutions. Consequently, on August 23, 2013, Session Law 2013-410 was enacted into law. Section 33.(a) of Session Law 2013-410 ("Section 33.(a)") provides:

> **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. Such fee schedules shall also be periodically reviewed to ensure that they continue to adhere to these standards and applicable fee schedule requirements of Chapter 97.
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> . . .
>
> (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.

See Session Law 2013-410, Section 33.(a).

The Commission interpreted Section 33.(a) as a mandate from the General Assembly to amend the schedule of maximum fees to reflect applicable Medicare payment methodologies. The new fee schedules decided by the Commission were calculated to fall within the estimated nation-wide median range of workers' compensation fee schedules, based on data provided in the studies and empirical sources. The fees for professional services were developed to bring the compensation rates up to the national median while the fees for institutional services were designed to lower the compensation toward the national median. While the new rates were

closer to the national median, all institutions, including ambulatory surgery centers, remained above the median of the nation under the new fee schedule. (See Attachment B, Affidavit of Meredith Henderson)

The Commission drafted language for the new fee schedule rules, and pursuant to N.C.G.S. §150B-21.2, gave notice of its intention to adopt Rules 04 NCAC 10J .0102 and .0103, as well as amend Rule 04 NCAC 10J .0101 in the November 17, 2014 North Carolina Register. In its Notice of Text, the Commission stated that the proposed rules were exempt from the fiscal note requirement of N.C.G.S. §150B-21.4. Language in the notice specifically referenced fees for "ambulatory surgery centers." The notice included the text of the proposed rule that would change the basis of the fees for ambulatory surgery centers from the percentage of charges formula, to set fees based on the Medicare methodologies.

N.C.G.S. § 150B-21.8(b) requires Agencies to submit permanent rules to the Rules Review Commission ("RRC") for review before the rule can be published in the North Carolina Administrative Code. The RRC reviews a rule in accordance with the standards of N.C.G.S. § 150B-21.9. The RRC determined that the adopted rules were within the authority delegated by the General Assembly to the Commission and were adopted in compliance with Part 2 of the Administrative Procedure Act ("APA"). The RRC further agreed that the proposed rules did not require a fiscal note based on the exemption language set forth in Section 33.(a)(3). Plaintiffs did not submit any written comments or objections to these rules. On February 19, 2015, the RRC approved the amendment and adoption of the rules, effective April 1, 2015.

On October 1, 2015, Surgical Care Affiliates, LLC, ("SCA") submitted a Request for Declaratory Ruling to the Commission seeking to invalidate all parts of the Commission's rules that acted to amend the workers' compensation fee schedule provisions for ambulatory surgery

centers. SCA operates seven ambulatory surgery centers in North Carolina. SCA is a nationwide company with over 200 surgical facilities nationwide. In its Request for Declaratory Ruling, SCA contended that the Commission failed to adopt the rule with the new fee provisions for ASCs in substantial compliance with the rule-making requirements of Article 2A of the APA because the Commission did not prepare a fiscal note with the rule. On October 30, 2015, the Commission granted SCA's request for a Declaratory Ruling. On December 14, 2015, the Commission issued its Declaratory Ruling denying the relief requested by SCA stating that it had followed the law in adopting the workers' compensation fee schedule provisions for ambulatory surgical fees.

SCA filed a Petition for Judicial Review in Superior Court of Wake County on January 13, 2016. SCA alleged that the implementation of the new fee schedule in Rule 04 NCAC 10J. 0103 resulted in an $8 million dollar diminishment of its profits. On August 9, 2016, Superior Court Judge Paul Ridgeway issued a Decision reversing the Ruling of the Commission and ordering that the sections of the Commission's rule adopting new fee provisions pertaining to ambulatory surgical services, Rule 04 NCAC 10J. 0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the prior rule, specifically the prior Rule 04 NCAC 10J .0101(d)(3), (5), and (6), to remove the old fee provisions for ambulatory surgery centers, were invalid and of no effect because the Commission failed to comply with the fiscal note requirement of the APA. (See Attachment C, Decision)

On August 10, 2016, the Commission filed a Motion to Stay the Decision issued by Judge Ridgeway. A hearing on the motion was held on August 18, 2016 during which Judge Ridgeway suggested that the Commission engage in temporary rulemaking in lieu of a stay. Judge Ridgeway inquired of the parties whether there existed a possibility that the Commission

could immediately commence rulemaking concerning the subject matter of the temporary rule now before this Court. Judge Ridgeway requested to hear testimony under oath from Kendal Bourdon, Rulemaking Coordinator for the Commission, to thoroughly explore the rulemaking process and applicable timeframes for both temporary and permanent rules. In response, the Commission expressed concern because this remedy would not be retroactive, and that the temporary rule would likely result in further litigation initiated by SCA. On September 2, 2016, Judge Ridgeway issued an Order allowing the stay of the August 9, 2016 Decision, effective until final resolution of the issues by our State's appellate court. The Commission filed its Notice of Appeal to the Court of Appeals on September 6, 2016. (See Attachment B, Affidavit of Meredith Henderson and Attachment D, Affidavit of Andy Ellen)

Pending the appeal, the Commission considered the process of temporary rulemaking in pursuit of all possible remedial measures that might address the concerns of SCA alleging the Commission failed to follow the requirements of the APA with the promulgation of 04 NCAC 10J. 0103 as well as the amendment of 04 NCAC 10J .0101. The Commission held a non-mandatory public comment meeting on October 3, 2016, and accepted proposals from the public regarding possible rulemaking solutions. Thereafter, the Commission submitted a temporary rule to the Office of Administrative Hearings, Rules Division, on October 18, 2016, and provided the required public notice, hearing, and comment period. This temporary rule was put forth to alleviate the uncertainty created by the invalidated fee provisions for ambulatory surgery centers and to restore balance to the medical fee schedule for workers' compensation claims as quickly as possible. (See Attachment B, Affidavit of Meredith Henderson)

In an effort to preserve the exceptionally high profit margin it has historically enjoyed, as compared to the national median, SCA, joined by additional ambulatory surgery centers, again

seeks a ruling from this Court that undermines the Commission's efforts to ensure that the schedule of fees for medical compensation fully contemplates fairness to the injured worker, adequate cost containment, fairness to the various payors (including tax-payer funded state agencies), and fairness between the various medical providers participating the workers' compensation system.

STANDARD OF REVIEW

Summary judgment should be granted pursuant to Rule 56 of the North Carolina Rules of Civil Procedure only when there is no genuine issue of material fact and one or more parties is entitled to judgment as a matter of law. "Summary Judgment, where appropriate, may be rendered against the moving party." N.C. Gen. Stat. § 1A-1, Rule 56(c). *See McNair Constr. Co. v. Focal Bros. Co.*, 64 N.C. App. 282, 307 S.E.2d 200 (1983), *cert. denied*, 312 N.C. 84, 321 S.E.2d 897 (1984); *Greenway v. North Carolina Farm Bureau Mut. Ins. Co.*, 35 N.C. App. 308, 241 S.E.2d 339 (1978).

FIRST CLAIM FOR RELIEF

THE COMMISSION DEMONSTRATED THAT THE COURT ORDER REQUIRED THE ADOPTION OF A TEMPORARY RULE

Plaintiffs' first claim for relief alleges that the Commission failed to demonstrate that the court order required adoption of a temporary rule. Despite that contention, the applicable legal principles and attendant facts of this case, demonstrate that the circumstances here met the criteria for adoption of a temporary rule. As such, Plaintiffs' claim for relief should be rejected by this Court. Specifically, Plaintiffs allege that the August 9, 2016 Decision in *Surgical Care Affiliates LLC v. North Carolina Industrial Commission* did not require the immediate adoption of the rule.

The procedure and requirements for adopting a temporary rule are set out in N.C.G.S § 150B-21.1 which states in part:

> (a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:
>
> . . .
>
> (5) A recent court order.

See N.C.G.S § 150B-21.1 (2016).

Statutory interpretation "properly begins with an examination of the plain words of the statute." *Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). N.C.G.S § 150B-21.1 does not include definitions for "immediate" or "require." Likewise, these terms are not defined in any of the statutes pertaining to authority to adopt a temporary rule. Absent explicit definitions in the statute, it is the task of this Court to ascertain what the legislature intended when it adopted this particular language. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words within a statute." *Perkins v. Ark. Trucking Servs., Inc.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000).

Webster's Dictionary defines immediate as, "occurring or accomplished without delay." Webster's Dictionary, Random House, Inc. (1991). Require is defined as, "to have need of." *Id.* Need is defined as, "a requirement, necessary duty, or obligation." *Id.* As shown in the facts below, the court order in *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission* resulted in a need that had to be expediently met. The need created by the court order constitutes

a requirement, necessary duty, and obligation of the Commission as outlined in N.C.G.S § 97-26. Furthermore, as the facts below show, adherence to the notice and hearing requirements of N.C.G.S. § 150B-21.2 would be contrary to the public interest.

The Commission submitted a Statement of Findings of Need to the RRC, pursuant to N.C.G.S § 150B-21.1(a4), explaining why the court order issued by Judge Ridgeway required the immediate adoption of a temporary rule and why the notice and hearing requirements would be contrary to public interest. (See Attachment E, Statement of Findings of Need). IN doing so, the Commission established that the court order invalidating the current fee schedule for ambulatory surgery centers created a prospective multi-million dollar increase to the workers' compensation system. *Id.* "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 through December 31, 2016, providing certainty regarding medical costs for 2017 and beyond." Again, the Commission is statutorily obligated to to restore balance to the workers' compensation system, and to do so without delay. By extension, it is also in the interest of the public to have certainty regarding medical costs as quickly as possible.

The medical compensation fee schedule is a unity by design to ensure three interrelated purposes: "(i) injured workers are provided the standard services and care intended by Chapter 97, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical

costs are adequately contained." *See* N.C.G.S. § 97-26. The interdependent purposes of N.C.G.S. § 97-26 would be thrown off balance by excluding ambulatory surgery centers from the fee schedule establishing set fees. All other medical providers, professional and institutional, will be under the Medicare methodologies utilizing set fees. If the Decision of Judge Ridgeway is upheld on appeal, the ambulatory surgery centers alone will have an inconsistent rate under the old formula of a percentage of charges. This inconsistency will result in the ability of ambulatory surgery centers to receive a higher payment than hospitals which is unreasonable reimbursement and defeats the objective of adequate cost containment.

Under Medicare, hospitals receive higher payments to equalize profits for the same service, and thereby absorb the overhead created by the "charity care" that they are mandated to provide. Furthermore, given the imbalance is costs, the insurance carriers will likely redirect employee treatment to hospitals, instead of ambulatory surgery centers because the services will be less expensive when in reality the hospital should be reserved for cases requiring a higher standard of care. The potential for situations to be created that do not provide the injured worker the standard of care intended by Chapter 97 would be much greater under this off balance system. These issues have created a situation where adherence to the notice and hearing requirements in N.C.G.S. 150B-21.2 are contrary to the public interest. (See Attachment B, Affidavit of Meredith Henderson).

The North Carolina Rate Bureau ("NCRB") is an organization created by statute which sets the rates for workers' compensation insurance. *See* N.C.G.S. § 58-36-1. The rates set by NCRB determine the premiums charged to employers for workers' compensation insurance. These rates and premiums are affected by the cost of medical compensation. By adopting this temporary rule, the basis for the cost of medical compensation has certainty at the earliest

possible date. This certainty creates the ability to accurately set the rates and premiums for the employers participating in the workers' compensation system. It also allows self-insured employers and insurance carriers to set adequate reserves for medical costs. It is the Commission's duty and obligation as part of fairly and effectively administering the Workers' Compensation Act to promulgate a schedule of maximum fees for medical compensation that provides this certainty for these reasons. The certainty needs to be accomplished without delay. (See Attachment B, Affidavit of Meredith Henderson and Attachment D, Affidavit of Andy Ellen)

The estimated medical cost containment from changing the reimbursement formula for institutional providers from a "percentage of charge" to a "set fee" was $21 to $24 million dollars a year, not including the self-insured market. These savings help employers and businesses through lower insurance premiums. Due to the Decision, a portion of the projected savings may not come to fruition, which may result in increased premiums for employers in the future to recoup the unexpected losses. The temporary rule contains medical costs by putting a definite end to the period that the carriers might have to re-calculate certain medical bills and experience these unexpected losses. If the Commission is unsuccessful with the appeal of *Surgical Care Affiliates LLC v. North Carolina Industrial Commission*, then all of the ambulatory surgical center bills will have to be re-calculated and re-paid resulting in tremendous unanticipated administrative and medical costs. The temporary rule limits this period from April 1, 2015 to December 31, 2016. The temporary rule is immediately required to control these costs and adherence to the notice and hearing requirements of N.C.G.S. 150B-21.2 would be contrary to the public interest. (See Attachment B, Affidavit of Meredith Henderson and Attachment D, Affidavit of Andy Ellen)

Andy Ellen, president and general counsel of the North Carolina Merchants Association, spoke at the RRC meeting and presented written comments in support of the temporary rule on behalf of Capital Associated Industries, North Carolina Association of County Commissioners, North Carolina Association of Defense Attorneys, North Carolina Association of Self-Insurers, North Carolina Automobile Dealers Association, North Carolina Chamber of Commerce, North Carolina Farm Bureau and Affiliated Companies, North Carolina Forestry Association, North Carolina Home Builders, North Carolina League of Municipalities, North Carolina Manufacturers Alliance, American Insurance Association, Property and Casualty Insurers of America Association, Builders Mutual, Dealers Choice Mutual, First Benefits Mutual, Forestry Mutual, The Employers Association, Employers Coalition of North Carolina, and WCI, Inc. (See Attachment F, Business and Insurance Community Initial Comments in Support to the Temporary Rule, 04 NCAC 10J .0103, Proposed by the North Carolina Industrial Commission). These groups represent the interest of the public. (See Attachment D, Affidavit of Andy Ellen)

On December 15, 2016, after hearing comments for and against the rule, the RRC approved the temporary rule amending 04 NCAC 10J. 0103. (See Attachment G, temporary rule amending 04 NCAC 10J. 0103). Deference should be given to the decision of the RRC. The State's appellate courts have determined that "the interpretation of a statute given by the agency charged with carrying it out is entitled to great weight." *Frye Regional Medical Center, Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). *Accord Good Hope Hospital, Inc. v. N.C. Dep't of Health and Human Servs.*, 175 N.C. App. 309, 318, 623 S.E.2d 315, 318 (2006). "It is well settled that when a court reviews an agency's interpretation of a statute it administers, the Court should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *Craven*

Reg'l Med. Auth. v. N.C. HHS 176 N.C. App. 46, 58, 625 S.E.2d 837, 844. *See Hospice at Greensboro, Inc. v. N.C. Dep't of Health and Human Servs.*, 185 N.C. App. 1, 12, 647 S.E.2d 651, 659 (2007).

Plaintiffs cite two court orders that required the immediate need to adopt temporary rules in North Carolina. The court orders that resulted in the rules promulgated by the Environmental Management Commission and the Wildlife Resource Commission did not order or mention temporary rule making. The RRC determined that the facts surrounding these court orders met the standard for temporary rulemaking, but those facts do not create the standard for temporary rulemaking. N.C.G.S § 150B-21.1 is the standard for temporary rulemaking.

The facts of this case, as applied to the law, show that the Commission complied with the requirements of N.C.G.S § 150B-21.1 when it adopted the temporary rule, amending 04 NCAC 10J. 0103.

SECOND CLAIM FOR RELIEF

THE COMMISSION FOLLOWED THE REQUIRED PROCEDURE FOR THE TEXT AND NOTICE OF A TEMPORARY RULE

In the second claim for relief, Plaintiffs allege that the Commission materially changed the text and substance of the temporary rule between the time that the rule was noticed, and the time the rule was adopted. Plaintiffs allege that the change in text was substantially different than the noticed text, and therefore under the "substantially different" rule, the Commission had to have a second hearing.

On October 18, 2016, the Commission submitted a proposed temporary rule amending 04 NCAC 10J. 0103 to the RRC and provided notice to the public. The proposed temporary rule was essentially the same as the rule invalidated by the Decision. (See Exhibit F, Proposed Temporary Rule, 04 NCAC 10J. 0103). The Decision did not reflect any issues with the

substance of 04 NCAC 10J. 0103, and instead only pertained to the procedure related to the fiscal note. The Commission received written comments on the proposed text as required by N.C.G.S § 150B-21.1(a3)(3). The Commission made changes to the proposed text based on oral and written comments received from physicians, ambulatory surgery centers, the North Carolina Hospital Association, and employer and insurance carriers. The changes involved an expansion that allowed ambulatory surgery centers to be paid pursuant to the Commission's medical fee schedule for additional procedures for which Medicare does not offer any reimbursement.

N.C.G.S § 150B-21.2(g) defines what is considered a substantial change to the text of a rule in relation to the APA:

> An adopted rule differs substantially from a proposed rule if it does one or more of the following:
>
> (1) Affects the interests of persons who, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.
> (2) Addresses a subject matter or an issue that is not addressed in the proposed text of the rule.
> (3) Produces an effect that could not reasonably have been expected based on the proposed text of the rule.

The changes made to the proposed text of 04 NCAC 10J. 0103 do not fall into any of the three categories that constitute a "substantially different" rule. Furthermore, the requirement to have notice and hearing on a "substantially different" rule only applies to permanent rulemaking under N.C.G.S § 150B-21.2. The temporary rulemaking process, under N.C.G.S § 150B-21.1, does not have a requirement to have notice and hearing for a "substantially different" rule.

The facts, under the applicable law, establish that the Commission did not materially change the text and substance of the temporary rule between the time that the rule was noticed and the time the rule was adopted. Furthermore, the temporary rulemaking process, under

N.C.G.S § 150B-21.1, does not require notice and a hearing if a rule were deemed "substantially different." Therefore, the Commission adhered to the requirements of the APA in adopting the temporary rule amending 04 NCAC 10J. 0103.

THIRD CLAIM FOR RELIEF

THE COMMISSION'S ADOPTION OF THE TEMPORARY RULE DOES NOT VIOLATE THE SEPARATION OF POWERS BETWEEN THE EXECUTIVE BRANCH AND JUDICIAL BRANCH

Plaintiffs allege that the Commission's adoption of a temporary rule interferes with and subverts the powers of the court to interpret the law and rule on legal controversies. Plaintiffs' further allege that "the Commission adopted the rule, not to comply with the court order, but to avoid the effects of the court order." N.C.G.S § 150B-21.1 permits the adoption of a temporary rule in response to a court order. Given that N.C.G.S § 150B-21.1 permits a party to seek a temporary in rule directly in response to a court order, Plaintiffs' contention that the Commission was not permitted to seek a temporary rule in response to Judge Ridgeway's order is, at best, illogical. The Industrial Commission's engagement of temporary rulemaking complies with the authority granted by the General Assembly with N.C.G.S § 150B-21.1, and simply does not constitute a violation of the separation of powers between the executive and judicial branches.

Furthermore, Judge Ridgeway's Decision did not address the substance of the rule 04 NCAC 10J. 0103 and did not make any determinations about the substance of the fee provisions for ambulatory surgery centers. Likewise, Judge Ridgeway did not determine that the Commission lacked authority to create fee schedule provisions for ambulatory surgery centers. Stated another way, other than the disappointment with their reduction of profits from the treatment of injured employees, SCA did not contend that substance of the rule was legally impermissible. The Decision was solely based on the technical, procedural issue regarding the

necessity of a fiscal note in the adoption of a new rule, in accordance with the provisions of the APA. The court interpreted Session Law 2013-410, Section 33.(a) and the APA to make its determinations that a fiscal note was required. The Commission disagrees with this determination and has properly appealed it. Nevertheless, the adoption of a temporary rule by the Commission is an effort to comply with the Decision made by Judge Ridgeway, to assuage the concerns previously expressed by SCA, and further to adhere to the requirements of the APA. Judge Ridgeway decided that 04 NCAC 10J. 0103 was invalid because the requirements of the APA were not followed. In response, the Commission is attempting to follow the requirements of the APA by adopting a valid temporary rule to amend 04 NCAC 10J. 0103, as described above. Indeed, Judge Ridgeway himself suggested that the Commission engage in the subject temporary rulemaking in and endeavor to remedy the alleged deficiencies announced in his Decision.

Plaintiffs have failed to prove that the facts of this case, as applied to the law, violate the separation of powers between the executive branch and the judicial branch.

CONCLUSION

WHEREFORE, for the above-stated reasons, Defendant respectfully requests that this Honorable Court enter an Order denying Plaintiff's Motion for Summary Judgment and instead rendered Summary Judgment against the moving party in favor of Defendant.

This the 9 day of March, 2017.

JOSH STEIN
Attorney General

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Special Deputy Attorney General
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the forgoing **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was served on the parties to this action by email and depositing a copy of same on the date shown below with the United States Mail, first-class postage prepaid, and addressed as follows:

Renee J. Montgomery
reneemontgomery@parkerpoe.com
Matthew W. Wolfe
mattwolfe@parkerpoe.com
PARKER POE ADAMS & BERNSTEIN LLP
Post Office Box 389
Raleigh, NC 27602-0389
Counsel for Plaintiffs

This the 9 day of March, 2017.

Bethany A. Burgon
Special Deputy Attorney General

SUBCHAPTER 10J – FEES FOR MEDICAL COMPENSATION

SECTION .0100 – FEES FOR MEDICAL COMPENSATION

04 NCAC 10J .0101 FEES FOR MEDICAL COMPENSATION (EFFECTIVE UNTIL JUNE 30, 2014)

(a) The Commission has adopted and published a Medical Fee Schedule, pursuant to the provisions of G.S. 97-26(a), setting maximum amounts, except for hospital fees pursuant to G.S. 97-26(b), that may be paid for medical, surgical, nursing, dental, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances. The amounts prescribed in the applicable published Fee Schedule shall govern and apply according to G.S. 97-26(c).

(b) The Commission's Medical Fee Schedule contains maximum allowed amounts for medical services provided pursuant to Chapter 97 of the General Statutes. The Medical Fee Schedule utilizes 1995 through the present, Current Procedural Terminology (CPT) codes adopted by the American Medical Association, Healthcare Common Procedure Coding Systems (HCPCS) codes, and jurisdiction-specific codes. A listing of the maximum allowable amount for each code is available on the Commission's website at http://www.ic.nc.gov/ncic/pages/feesched.asp and in hardcopy at 430 N. Salisbury Street, Raleigh, North Carolina.

(c) The following methodology provides the basis for the Commission's Medical Fee Schedule:

(1) CPT codes for General Medicine are based on 1995 North Carolina Medicare values multiplied by 1.58, except for CPT codes 99201-99205 and 99211-99215, which are based on 1995 Medicare values multiplied by 2.05.

(2) CPT codes for Physical Medicine are based on 1995 North Carolina Medicare values multiplied by 1.36.

(3) CPT codes for Radiology are based on 1995 North Carolina Medicare values multiplied by 1.96.

(4) CPT codes for Surgery are based on 1995 North Carolina Medicare values multiplied by 2.06.

(d) The Commission's Hospital Fee Schedule, adopted pursuant to G.S. 97-26(b), provides for payment as follows:

(1) Inpatient hospital fees: Inpatient services are reimbursed based on a Diagnostic Related Groupings (DRG) methodology. The Hospital Fee Schedule utilizes the 2001 Diagnostic Related Groupings adopted by the State Health Plan. Each DRG amount is based on the amount that the State Health Plan had in effect for the same DRG on June 30, 2001.

DRG amounts are further subject to the following payment band that establishes maximum and minimum payment amounts:

(A) The maximum payment is 100 percent of the hospital's itemized charges.

(B) For hospitals other than critical access hospitals, the minimum payment is 75 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.

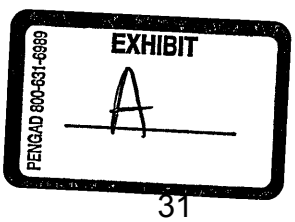
(C) For critical access hospitals, the minimum payment is 77.07 percent of the hospital's itemized charges. Effective February 1, 2013, the minimum payment rate is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.

(2) Outpatient hospital fees: Outpatient services are reimbursed based on the hospital's actual charges as billed on the UB-04 claim form, subject to the following percentage discounts:

(A) For hospitals other than critical access hospitals, the payment shall be 79 percent of the hospital's billed charges. Effective February 1, 2013, the payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.

(B) For critical access hospitals, the payment shall be 87 percent of the hospital's billed charges. For purposes of the hospital fee schedule, critical access hospitals are those hospitals designated as such pursuant to federal law (42 CFR 485.601 et seq.). Effective February 1, 2013, the critical access hospital's payment is the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.

(3) Ambulatory surgery fees: Ambulatory surgery center services are reimbursed at 79 percent of billed charges. Effective February 1, 2013, the ambulatory surgery center services are reimbursed at the amount provided for under Subparagraph (5) below, subject to adjustment on April 1, 2013 as provided therein.



(4) Other rates: If a provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology, that amount or methodology establishes the applicable fee.

(5) Payment levels frozen and reduced pending study of new fee schedule: Effective February 1, 2013, inpatient and outpatient payments for each hospital and the payments for each ambulatory surgery center shall be set at the payment rates in effect for those facilities as of June 30, 2012. Effective April 1, 2013, those rates shall then be reduced as follows:

(A) Hospital outpatient and ambulatory surgery: The rate in effect as of that date shall be reduced by 15 percent.

(B) Hospital inpatient: The minimum payment rate in effect as of that date shall be reduced by 10 percent.

(6) Effective April 1, 2013, implants shall be paid at no greater than invoice cost plus 28 percent.

(e) A provider of medical compensation shall submit its statement for services within 75 days of the rendition of the service, or if treatment is longer, within 30 days after the end of the month during which multiple treatments were provided. However, in cases where liability is initially denied but subsequently admitted or determined by the Commission, the time for submission of medical bills shall run from the time the health care provider received notice of the admission or determination of liability. Within 30 days of receipt of the statement, the employer, carrier, or managed care organization, or administrator on its behalf, shall pay or submit the statement to the Commission for approval or send the provider written objections to the statement. If an employer, carrier, administrator, or managed care organization disputes a portion of the provider's bill, the employer, carrier, administrator, or managed care organization, shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges through its contractual arrangement or through the Commission.

(f) Pursuant to G.S. 97-18(i), when the 10 percent addition to the bill is uncontested, payment shall be made to the provider without notifying or seeking approval from the Commission. When the 10 percent addition to the bill is contested, any party may request a hearing bythe Commission pursuant to G.S. 97-83 and G.S. 97-84.

(g) When the responsible party seeks an audit of hospital charges, and has paid the hospital charges in full, the payee hospital, upon request, shall provide reasonable access and copies of appropriate records, without charge or fee, to the person(s) chosen by the payor to review and audit the records.

(h) The responsible employer, carrier, managed care organization, or administrator shall pay the statements of medical compensation providers to whom the employee has been referred by the treating physician authorized by the insurance carrier for the compensable injury or body part, unless the physician has been requested to obtain authorization for referrals or tests; provided that compliance with the request shall not unreasonably delay the treatment or service to be rendered to the employee.

(i) Employees are entitled to reimbursement for sick travel when the travel is medically necessary and the mileage is 20 or more miles, round trip, at the business standard mileage rate set by the Internal Revenue Service per mile of travel and the actual cost of tolls paid. Employees are entitled to lodging and meal expenses, at a rate to be established for state employees by the North Carolina Director of Budget, when it is medically necessary that the employee stay overnight at a location away from the employee's usual place ofresidence. Employees are entitled to reimbursement for the costs of parking or a vehicle for hire, when the costs are medically neccessay, at the actual costs of the expenses.

(j) Any employer, carrier or administrator denying a claim in which medical care has previously been authorized is responsible for all costs incurred prior to the date notice of denial is provided to each health care provider to whom authorization has been previously given.

History Note: *Authority G.S. 97-18(i); 97-25; 97-25.6; 97-26; 97-80(a); 138-6;*
Eff. January 1, 1990;
Amended Eff. January 1, 2013; June 1, 2000.

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 0144

NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, SURGICAL CARE AFFILIATES, LLC, AND COMPASS SURGICAL PARTNERS,

Plaintiffs,

v.

THE NORTH CAROLINA INDUSTRIAL COMMISSION,

Defendant.

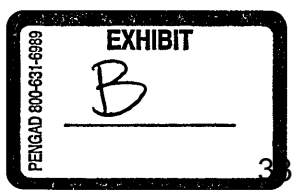
AFFIDAVIT OF MEREDITH HENDERSON

I, Meredith Henderson, being first duly sworn, hereby depose and say:

1. I am a resident of Wake County, North Carolina, over the age of eighteen (18) years, have never been adjudicated incompetent, do not suffer from a mental illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge or about which I have been informed and believe to be true.

2. I am currently employed as the Executive Secretary of the North Carolina Industrial Commission (the "Commission") in Raleigh, North Carolina. I have held this position since February 2011. Before that, I held two other positions at the North Carolina Industrial Commission. I have been employed at the Commission since May 2005.

3. As Executive Secretary of the Commission, my duties include, among other things, management and oversight of the Medical Fees Section which manages, applies, and processes disputes regarding the Commission's Schedule of Fees for Medical Compensation, Rules 04 NCAC 10J .0101-.0103. I was also the Industrial Commission's Rulemaking Coordinator from October 2013 to December 2015. My duties also include assisting the



Chairman and Commissioners with legal and policy issues or projects, as needed, including rule development or revision. Therefore, I have personal knowledge of the process and facts surrounding the promulgation of Rules 04 NCAC 10J .0101-.0103, and the litigation surrounding these rules.

4. I was involved in the promulgation of Rules 04 NCAC 10J .0101-.0103 following the mandate for reform of the fee schedule from the General Assembly in Section 33.(a) of Session Law 2013-410.

5. After reviewing relevant data sources, it was determined that the professional providers were receiving workers' compensation payments below the national median, while the payments to institutional providers were well above the national median. It was further determined that states using no fee schedule or a percentage of charges model did not contain medical costs as adequately as states that used set fees under Medicare.

6. The new fee schedules decided on by the Commission were calculated to fall in the estimated median range of workers' compensation fee schedules nationally, based on the data provided in the studies and data sources. The fees for professional services were developed to bring the rates up to the national median while the fees for institutional services were developed to bring the rates down to the national median. While the new rates were closer to the national median, all institutions, including ambulatory surgery centers, remained above the median of the nation under the new fee schedule.

7. At all times relevant, I was involved in the litigation resulting in the Decision by Superior Court Judge Paul Ridgeway that ordered that all sections of the Commission's rule adopting new fee schedule provisions pertaining to ambulatory surgical services, Rule 04 NCAC 10J. 0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the prior

rule, specifically the prior Rule 04 NCAC 10J .0101(d)(3), (5), and (6), to remove the old fee provisions for ambulatory surgery centers, were invalid and of no effect because the Commission allegedly failed to comply with the fiscal note requirement of the APA.

8. A hearing on the Motion to Stay filed by the Commission was held on August 18, 2016. On September 2, 2016, Judge Ridgeway issued an Order allowing the stay and ordering that the application and effect of the Court's Decision entered on August 9, 2016 in this matter was stayed until such time that the Court of Appeals of North Carolina can rule on the matter. The Commission filed its Notice of Appeal on September 6, 2016.

9. Knowing that an appeal to the Court of Appeals can be a lengthy process, the Commission considered potential measures to limit the prospective effect of the Decision in the event the appeal is unsuccessful, while also providing certainty to the public as quickly as possible regardless of the outcome of the appeal. The Commission held a non-mandatory public comment meeting on October 3, 2016, and accepted proposals from the public regarding possible rulemaking solutions. Thereafter, the Commission submitted a temporary rule to the Office of Administrative Hearings, Rules Division, on October 18, 2016, and provided the required public notice, hearing, and comment period. This temporary rule was put forth to alleviate the uncertainty created by the invalidated fee provisions for ambulatory surgery centers, and to restore balance to the medical fee schedule for workers' compensation claims as quickly as possible.

10. I helped prepare the Statement of Findings of Need required for adoption of a temporary rule. The Statement of Findings of Need explained why Judge Ridgeway's order required the Commission to immediately adopt a temporary rule and why the notice and hearing

requirements would be contrary to public interest. An accurate duplicate of the Statement of Findings of Need is appended as "Attachment E."

11. The invalidation of the current fee schedule for ambulatory surgery centers through the court order created a prospective multi-million dollar increase 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 through December 31, 2016, providing certainty regarding medical costs for 2017 and beyond.

12. It is a necessary duty and obligation of the Commission to restore balance to the workers' compensation system without delay. It is in the interest of the public to have certainty regarding medical costs as quickly as possible.

13. The medical compensation fee schedule is a unity by design to ensure three interrelated purposes: "(i) injured workers are provided the standard services and care intended by Chapter 97, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained." *See* N.C.G.S. § 97-26. The interdependent purposes of N.C.G.S. § 97-26 would be thrown off balance by excluding ambulatory surgery centers from the fee schedule establishing set fees.

14. All other medical providers, professional and institutional, will be under the Medicare methodologies utilizing set fees. If the Decision of Judge Ridgeway is upheld on

appeal, the ambulatory surgery centers alone will have an inconsistent rate under the old percentage-of-charges formula. This inconsistency will result in the ability of ambulatory surgery centers to receive a higher payment than hospitals, which constitutes neither reasonable reimbursement nor adequate cost containment. Under Medicare, hospitals receive higher payments to equalize profits for the same services and thereby absorb the overhead created by the "charity care" hospitals are mandated to provide, as well as other costly requirements hospitals must meet. Furthermore, insurance carriers may direct injured workers to receive certain care at hospitals instead of ambulatory surgery centers because the services will be less expensive, when in reality the hospital should be reserved for cases requiring a higher standard of care. The potential for inadequate medical care for an injured worker, contrary to the intent of Chapter 97, would be much greater under this off balance system.

15. Effectively and fairly administering the Workers' Compensation Act is a necessary duty and obligation of the Commission. The issues in paragraph 14 create a situation where adherence to the notice and hearing requirements in G.S. 150B-21.2 are contrary to the public interest.

16. The North Carolina Rate Bureau ("NCRB") is an organization created by statute which sets the rates for workers' compensation insurance. *See* N.C.G.S. § 58-36-1. The rates set by NCRB determine the premiums charged to employers for workers' compensation insurance. These rates and premiums are affected by the cost of medical compensation. By adopting this temporary rule, the basis for the cost of medical compensation has certainty at the earliest possible date. This certainty creates the ability to accurately set the rates and premiums for the employers participating in the workers' compensation system.

17. This certainty also allows self-insured employers and insurance carriers to set adequate reserves for medical costs. It is the Commission's duty and obligation as part of fairly and effectively administering the Workers' Compensation Act to promulgate a schedule of maximum fees for medical compensation that provides this certainty for these and other reasons. The certainty needs to be accomplished without delay.

18. The estimated medical cost containment from changing the reimbursement formula for institutional providers from a "percentage of charge" to a "set fee" was $21 to $24 million dollars a year, not including the self-insured market. These savings help employers and businesses through lower insurance premiums. If the Decision is upheld on appeal, a portion of the projected savings will not come to fruition, which will likely result in increased premiums for employers in the future to recoup the unexpected losses. The temporary rule contains medical costs by putting a definite end to the period that the carriers might have to re-calculate certain medical bills and experience these unexpected losses. If the Commission is unsuccessful with the appeal of *Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, then all of the ambulatory surgical center bills will have to be re-calculated and re-paid, resulting in tremendous unanticipated administrative and medical costs. The temporary rule limits this period from April 1, 2015 to December 31, 2016. The temporary rule is immediately required to control these costs and adherence to the notice and hearing requirements of N.C.G.S. 150B-21.2 would be contrary to the public interest.

FURTHER THE AFFIANT SAYETH NAUGHT.

This the 9th day of March, 2017.

Meredith Henderson
Executive Secretary of the
North Carolina Industrial Commission

STATE OF NORTH CAROLINA

COUNTY OF Wake

Sworn to and subscribed before me
this the 9 day of March, 2017.

Gina Renee Bunn
Notary Public

My Commission Expires: 5-20-2017

GINA RENEE BUNN
NOTARY PUBLIC
WAKE COUNTY, NC

FILED

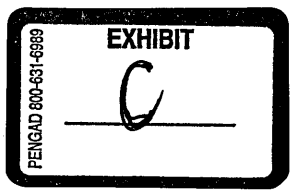
STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE
	SUPERIOR COURT DIVISION
COUNTY OF WAKE 2016 AUG -9 PM 2:51	16-CVS-00600
SURGICAL CARE AFFILIATES, LLC,	
Petitioner,	
v.	**DECISION**
NORTH CAROLINA INDUSTRIAL COMMISSION,	
Respondent.	

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).



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 Intervenors 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 Intervenors 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

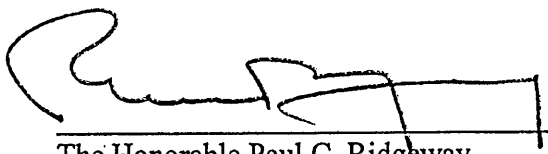
exceeded its statutory authority and employed an unlawful procedure. N.C. Gen. Stat. § 150B-51(c).

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

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
17 CVS 0144

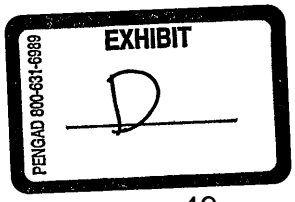
NORTH CAROLINA AMBULATORY SURGICAL CENTER ASSOCIATION, SURGICAL CARE AFFILIATES, LLC, AND COMPASS SURGICAL PARTNERS,	)	
Plaintiffs,	)	**AFFIDAVIT OF ANDY ELLEN**
v.	)	
THE NORTH CAROLINA INDUSTRIAL COMMISSION,	)	
Defendant.	)	

I, Andy Ellen, being first duly sworn, hereby depose and say:

1. I am a resident of Wake County, North Carolina, over the age of eighteen (18) years, have never been adjudicated incompetent, do not suffer from a mental illness, and make this affidavit of my own free will, stating facts of which I have personal knowledge or about which I have been informed and believe to be true.

2. I am currently employed as the President and General Counsel of the North Carolina Retail Merchants Association ("NCRMA") in Raleigh, North Carolina. I have held the position of President since 2012, and the position of General Counsel since 1998.

3. As President and General Counsel of NCRMA, my duties include the overall responsibility for leading NCRMA and its 11 affiliated companies. The NCRMA endeavors to promote a positive legislative and regulatory environment for the retail industry in order to enhance members' opportunities for success. Consequently, I have personal knowledge of Section 33.(a) of Session Law 2013-410, the adoption of the permanent Rules adopt 04 NCAC



10J .0102 and .0103 and the amendment of rule 04 NCAC 10J .0101 along with the temporary rule amending 04 NCAC 10J .0103.

4. In the *amicus* context, I was involved in the litigation that resulted in the Decision by Superior Court Judge Paul Ridgeway that ordered that all sections of the Commission's rule adopting new fee schedule provisions pertaining to ambulatory surgical services, Rule 04 NCAC 10J. 0103(g) and (h) (also referenced in 04 NCAC 10J. 0103(i)), and the amendment of the prior rule, (specifically the prior Rule 04 NCAC 10J .0101(d)(3), (5), and (6)), that served to remove the old fee provisions for ambulatory surgery centers, were deemed to be invalid and of no effect in light of the the Commission's alleged failure to comply with the fiscal note requirement of the APA.

5. On August 10, 2016, the Industrial Commission filed a Motion to Stay the Decision issued by Judge Ridgeway based on the likelihood of success on appeal, and the irreparable harm that would be created through enforcement of the Decision, particularly upon revesal by the Court of Appeals. On August 17, 2016, I participated in the filing of a Motion for Leave to participate as *Amici Curiae* for the limited purpose of addressing the Motion to Stay filed on behalf of the North Carolina Home Builder's Association, the North Carolina Retail Merchants Association, the North Carolina Chamber of Commerce, the North Carolina Forestry Association, and the North Carolina Automobile Dealers Association. On August 18, 2016, Judge Ridgeway issued an order granting the motion to participate as *Amici Curiae.*

6. A hearing on the Motion to Stay was also held on August 18, 2016. At the hearing, Judge Ridgeway suggested the parties proceed with temporary rulemaking in lieu of a stay. In doing so, Judge Ridgeway inquired of the parties whether there existed a possibility that the Commission could immediately commence temporary rulemaking concerning the rate

adjustments that would be applicable to ambulatory surgical centers had a fiscal note been completed, pursuant to SCA's demands.

7. In that regard, and as I understood it, in an attempt to reach consensus among the parties and remove uncertainty regarding the fee schedule for ambulatory surgical centers, Judge Ridgeway repeatedly asked questions of the parties regarding the applicable chronology and processes for temporary and permanent rulemaking under the Administrative Procedures Act. In doing so, Judge Ridgeway even requested to hear sworn testimony from Kendal Bourdon, Rulemaking Coordinator for the North Carolina Industrial Commission, for a thorough exploration of the rulemaking process for both temporary and permanent rules.

8. The Commission expressed its concern to Judge Ridgeway regarding the temporary rule inquires, given that this remedy to SCA's concerns would not be retroactive, and would likely result in additional litigation asserted by SCA in response to any temporary rule. In that respect, I shared, and continue to share the concerns of the Commission.

9. On September 2, 2016, Judge Ridgeway issued an Order allowing the stay, and ordered that the Court's Decision entered on August 9, 2016 would not take effect until final resolution of the pertinent issues by the State's appellate courts.

10. On behalf of the entities represented by the NCRMA[1], I subsequently spoke before and submitted written comments to the North Carolina Rules Review Commission in favor of the temporary rule proposed by the Industrial Commission related to amendment of 04 NCAC 10J .0103. The written comments are attached as Attachment F, Business and Insurance

[1] To wit, Capital Associated Industries, North Carolina Association of County Commissioners, North Carolina Association of Defense Attorneys, North Carolina Association of Self-Insurers, North Carolina Automobile Dealers Association, North Carolina Chamber of Commerce, North Carolina Farm Bureau and Affiliated Companies, North Carolina Forestry Association, North Carolina Home Builders, North Carolina League of Municipalities, North Carolina Manufacturers Alliance, American Insurance Association, Property and Casualty Insurers of America Association, Builders Mutual, Dealers Choice Mutual, First Benefits Mutual, Forestry Mutual, The Employers Association, Employers Coalition of North Carolina, and WCI, Inc.

Community Initial Comments in Support to the Temporary Rule, 04 NCAC 10J .0103, Proposed by the North Carolina Industrial Commission. The entities represented by the NCRMA themselves represent the interests of the public. Attachment F is an accurate copy of my written comments and these written comments are true and accurate to the best of my knowledge.

11. The North Carolina Rate Bureau ("NCRB") is an organization created by statute that sets rates for workers' compensation insurance. *See* N.C.G.S. § 58-36-1. The rates set by NCRB determine the premiums charged to employers for workers' compensation insurance. These rates and premiums are directly impacted by the cost of medical compensation. Adoption of the temporary rule at issue expeditiously affords the various affected entities some certainty regarding the cost of medical compensation. Moreover, this measure of certainty allows for the accurate setting of rates and insurance premiums for the employers participating in the workers' compensation system. Likewise, the temporary rule at issue permits self-insured employers and insurance carriers to set adequate reserves for anticipated future medical costs. Additionally, the rates approved by the NCRB have declined across all class codes by approximately 10% in 2106 effective April 16, 2016 and by 14.4% in 2017 effective April 1, 2017 due to the changes to the medical compensation fee schedule for workers' compensation.

12. It is my understanding that the Industrial Commission is obligated to fairly and effectively administer the Workers' Compensation Act by promulgating a schedule of maximum fees for medical compensation to provide all interested parties with the rate and premium certainty, and to do so without delay.

13. The estimated medical cost containment from changing the reimbursement formula for institutional providers from a "percentage of charge," to a "set fee," was $21 to $24 million dollars a year, excluding the self-insured market. These savings redound to employers

and businesses through a reduction of the insurance premiums that are chargeable to them. Due to Judge Ridgeway's prior Decision, a portion of the projected savings may not come to fruition, and the resultant shortfall will likely be absorbed by employers in the form of increased future premiums for employers.

14. The temporary rule proposed by the Industrial Commission, and approved by the North Carolina Rules Review Commission, serves to contain medical costs by assigning a definite end to the period of time that the carriers will be required to re-calculate certain medical bills and account for unexpected losses. It is my belief that in the event that the Court of Appeals does not overturn Judge Ridgeway's Decision, and absent the maintenance of the temporary rule at issue, all of the ambulatory surgical center bills will have to be re-calculated and re-paid, resulting in tremendous unanticipated administrative and medical costs. The temporary rule correctly serves to limit this period of questionable costs from April 1, 2015 to December 31, 2016.

15. It is my belief that the temporary rule is immediately required to control these costs and adherence to the notice and hearing requirements of N.C.G.S. 150B-21.2 would be contrary to the public interest.

FURTHER THE AFFIANT SAYETH NAUGHT.

This the 9th day of March, 2017.

Andy Ellen
President and General Counsel
North Carolina Retail Merchants Association

STATE OF NORTH CAROLINA

COUNTY OF Johnston

Sworn to and subscribed before me
this the 9th day of March, 2017.

Debra J. Hayes
Notary Public

DEBRA J. HAYES NOTARY PUBLIC JOHNSTON COUNTY, N.C.

My Commission Expires: 03/21/2020

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 E

PENGAD 800-631-6989

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**	**10. Signature of Agency Head*:** *** If this function has been delegated (reassigned) pursuant to G.S. 143B-10(a), submit a copy of the delegation with this form.**
Agency contact, if any: **Phone:** **E-Mail:**	**Typed Name: Charlton L. Allen** **Title: Chairman** **E-Mail: Charlton.Allen@ic.nc.gov**

RULES REVIEW COMMISSION USE ONLY

Action taken: ☐ Date returned to agency:	Submitted for RRC Review:

BUSINESS AND INSURANCE COMMUNITY INITIAL COMMENTS IN SUPPORT TO THE TEMPORARY RULE 04 NCAC 10J .0103, PROPOSED BY THE NORTH CAROLINA INDUSTRIAL COMMISSION

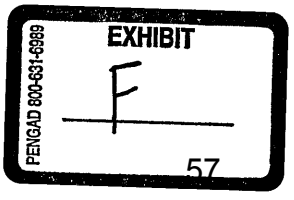
TO: THE NORTH CAROLINA RULES REVIEW COMMISSION

The undersigned organizations representing a large cross-section of business, insurance and local government organizations write to respectfully urge approval by the North Carolina Rules Review Commission (RRC) of the temporary rule amending 04 NCAC 10J .0103 as properly adopted by the North Carolina Industrial Commission (IC).

The IC has legally and justifiably acted in accordance with Chapter 150B of the North Carolina General Statutes specifically N.C.G.S. 150B-21.1(a) to adopt a temporary rule in response to a recent court order. By adopting this temporary rule the IC has in fact returned stability to the workers' compensation system rather than leaving businesses, insurers and state and local governments in limbo and a great deal of uncertainty while the IC appeals the decision of Judge Ridgeway to the North Carolina Court of Appeals.

Additionally, it should be noted that Judge Ridgeway issued a stay of his own order which Judge Ridgeway had previously handed down in Wake County Superior Court. More importantly, during the hearing on whether to grant the motion to stay, Judge Ridgeway inquired of the parties whether there existed a possibility that the IC could immediately commence rulemaking concerning the subject matter now before the RRC. Judge Ridgeway repeatedly asked questions to the parties regarding the applicable timelines and processes for temporary and permanent rulemaking under the Administrative Procedures Act in an attempt to reach consensus among the parties and remove uncertainty. Judge Ridgeway even requested to hear testimony under oath from Kendal Bourdon, Rulemaking Coordinator for the North Carolina Industrial Commission, to thoroughly explore the rulemaking process and applicable timeframes for both temporary and permanent rules. Renee Montgomery and Matthew Wolfe representing SCA, had the opportunity to cross-examine Ms. Bourdon about the emergency, temporary and permanent rulemaking process. In other words, both Judge Ridgeway certainly contemplated and SCA was thoroughly aware that the IC had the ability and statutory authority to proceed to temporary and/or permanent rulemaking. Neither Ms. Montgomery nor Mr. Wolfe raised the issue before Judge Ridgeway, which they now raise before the RRC, of any alleged lack of authority by IC to adopt a temporary rule. To the contrary, SCA now comes before the RRC alleging lack of statutory authority simply because the IC had previously denied SCA's petition for rulemaking and SCA simply does not like the temporary rule that is before the RRC. Undoubtedly, if the IC had adopted the fee schedule previously proposed by SCA that would have cost North Carolina businesses, insurers and state and local governments millions of dollars or a fee schedule that was more to SCA's liking, SCA would likely be fully in support of the rule before the RRC.

What Surgical Care Affiliates (SCA) fails to mention in its written comments is that an objection by the RRC to the temporary rule adopted by the IC would result in irreparable harm to businesses in North Carolina that purchase workers' compensation as required by North Carolina law. The fee schedule SCA seeks to revert to would result in an estimated 23% increase in cost when ten (10) randomly selected procedures recently performed by ambulatory surgical centers in various geographic areas of North Carolina were analyzed. Additionally, the National Council on Compensation Insurance (NCCI) has determined that the estimated negative economic impact would be between $21 million and $24 million in additional annual premium based upon 2014 written premium in North Carolina (see *Analysis of Hypothetical Changes to North Carolina Medical Fee Schedule Proposed to be Effective October 1, 2016* prepared by the National Council on Compensation Insurance (NCCI)). Additionally, SCA's position



would adversely affect medical costs incurred by the State of North Carolina, local governments and school boards, among others.

The temporary rule to which the SCA objects merely readopts what nearly every affected party believes to be the fee schedule for all medical providers when the original rule was properly adopted in accordance with the North Carolina Administrative Procedures Act pursuant to Chapter 150B of the North Carolina General Statutes, and was promulgated at the request of stakeholders that included various members of North Carolina's business community, the North Carolina Hospital Association, the North Carolina Medical Society, workers' compensation insurance companies, the North Carolina Advocates for Justice, and the North Carolina Association of Defense Attorneys. These groups spent nearly three years negotiating in an effort to find common ground. The negotiation, including a jointly-funded study of fee schedules by an agreed-upon consultant, culminated in a formal mediation by noted North Carolina mediator Andy Little. This effort produced a thoughtful compromise that brought North Carolina's medical expenses in line with those of surrounding states and near the median average of other states studied by the Workers' Compensation Research Institute (WCRI). At no point did the parties to the negotiation prevent any other party that asked to be included in the negotiation from participating. This was a carefully crafted and delicate compromise achieved after many long hours of hard work and vigorous negotiation.

Simply stated, SCA's objection to the IC's adopted temporary rule is stale. SCA had every opportunity to engage in the rule-making process regarding fees conducted by the IC dating back to 2011. Yet, at every stage of the formal and informal process (including the above-referenced stakeholder negotiation, two rounds of administrative rulemaking and two statutory changes), SCA never took advantage of the ample opportunities to provide public comment, both at public hearings and through the submission of written comments as set out in the Administrative Procedures Act in Article 2A of Chapter 150B of the General Statutes. The IC properly published the text of the original proposed rule in the *North Carolina Register* on November 17, 2014; properly held a public hearing on December 17, 2014, to receive public comments; properly accepted written comments from the public from November 17, 2014 until January 16, 2015; and properly allowed parties to submit and make comments before formal adoption and submission of the rule by the IC to the North Carolina Rules Review Commission (RRC). Despite being presented every opportunity for input, SCA never sought to utilize these opportunities to be heard on the substance of the proposed rule as afforded by the law. Additionally, SCA neglected to appear before this RRC to raise the very issue that it now asserts, i.e., that the IC failed to adopt the rule in accordance with Part 2 of Article 2A of Chapter 150B of the North Carolina General Statutes (see N.C.G.S. 150B-21.8(a)(4)). Nor did SCA exercise the rights granted to any member of the general public to file ten (10) letters of objection to the proposed rule with the RRC and subject the proposed rule to legislative review (See N.C.G.S. 150B-21.3(b2)).

Despite never engaging in even a single stage of the long-standing Administrative Procedures Act during the IC's adoption of the original rule, SCA filed suit alleging that the IC did not have statutory authority to adopt a fee schedule for ambulatory surgical centers without conducting a fiscal note. While the IC prevailed in Wake County Superior Court on this argument, the order from Wake County Superior Court was stayed pending appeal. In response to this court order and in compliance with Chapter 150B, the IC has properly sought to remove the uncertainty that currently exists in North Carolina's workers' compensation system by further clarifying the fee schedule in an equitable and just manner that ensures stability in the workers' compensation system and that injured workers have access to treatment for their workplace injuries. Now eighteen months after the fact, SCA is essentially objecting to the temporary rule after SCA's substantial failure to utilize the very process that the North Carolina General Assembly has established to ensure that those potentially affected by a proposed administrative rule can comment on, and even object to, that rule before the administrative agency, the RRC and ultimately the North Carolina General Assembly.

In summary, to side with SCA's petition for rulemaking would not only reward SCA's failure to timely exercise its right to comment, but would undermine the entire Administrative Rulemaking process created by the North Carolina General Assembly. For these reasons, the following groups strongly urge the North Carolina Industrial Commission to approve the IC's temporary rule amending 04 NCAC 10J .0103.

Sincerely,

Capital Associated Industries, Inc.
North Carolina Association of County Commissioners
North Carolina Association of Defense Attorneys
North Carolina Association of Self-Insurers
North Carolina Automobile Dealers Association, Inc.
North Carolina Chamber
North Carolina Farm Bureau and Affiliated Companies
North Carolina Forestry Association
North Carolina Home Builders Association
North Carolina League of Municipalities
North Carolina Manufacturers Alliance
North Carolina Retail Merchants Association
American Insurance Association
Property Casualty Insurers of America Association
Builders Mutual Insurance Company
Dealers Choice Mutual Insurance, Inc.
First Benefits Insurance Mutual, Inc.
Forestry Mutual
The Employers Association, Inc.
Employers Coalition of North Carolina
WCI, Inc.

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 most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems reimbursement formula and factors, including all Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems Addenda, as published annually in the Federal Register and on the CMS website at https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html ("the OPPS/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPS/ASC Medicare rule shall be applied in the calculation of the maximum allowable amount for any institutional service it provides.

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

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

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

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

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

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

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

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