

**SURGICAL CARE AFFILIATES, LLC’S WRITTEN COMMENTS
TO THE NORTH CAROLINA RULES REVIEW COMMISSION IN
RESPONSE TO THE NORTH CAROLINA INDUSTRIAL
COMMISSION’S PERMANENT RULEMAKING FOR WORKERS’
COMPENSATION MEDICAL FEE SCHEDULE,
04 NCAC 10J .0103
October 12, 2017**

The permanent rule before the Rules Review Commission is the third attempt by the North Carolina Industrial Commission to deviate from the rulemaking requirements under the Administrative Procedure Act (“APA”) in order to promulgate a revised fee schedule for ambulatory surgical centers who treat injured workers. The first two attempts have been struck down and invalidated by Superior Courts because the Industrial Commission did not comply with the APA. This third attempt also violates the APA. Using its authority under Part 3 of the APA, the Rules Review Commission should object to the permanent for not meeting the rulemaking requirements under Part 2 of the APA.

Surgical Care Affiliates, LLC (“SCA”) respectfully submits the following comments to the Rules Review Commission in response to the permanent rule published by the Industrial Commission addressing the fee schedule for ambulatory surgical center (“ASC”) services in workers’ compensation cases. SCA also submits the attached report entitled “Economic Effects of Proposed Changes to the North Carolina Workers’ Compensation Fee Schedules for Ambulatory Surgery Centers” prepared by Avalon Health Economics (hereinafter “the Avalon Report”).

BACKGROUND

SCA manages seven ASCs in North Carolina and has an ownership interest in each of these centers through wholly-owned subsidiary corporations. The SCA ambulatory surgical centers are located throughout North Carolina and include Blue Ridge Surgery in Raleigh, Charlotte Surgery Center, Fayetteville Ambulatory Surgical Center, Greensboro Specialty Surgery Center, Surgical Center of Greensboro, The Eye Surgery Center of the Carolinas in Southern Pines, and Eastern Regional Surgical Center in Wilson. As stated in

the Avalon Report, SCA provides roughly half of all workers' compensation surgical procedures performed in ASCs.

Historically, the Industrial Commission has established separate fee schedules for physicians, hospitals, ASCs, and other health care providers. Payments to ASCs represent less than 6% of workers' compensation medical payments.

2015 Expedited Permanent Rulemaking

In 2013, the General Assembly enacted a provision authorizing the Industrial Commission to base the fee schedules for physicians and hospitals on the Medicare methodology and permitted the Industrial Commission to by-pass the usual requirement of obtaining a fiscal note to analyze the financial impact of these changes. The Industrial Commission tasked a group of stakeholders to develop and recommend the fee schedules. ASCs were not included in that process.

In 2015, the Industrial Commission adopted rules that changed the fee schedules for physicians and hospitals (as authorized by the General Assembly) but also changed the fee schedule for ASCs.

2016 Superior Court Decision Invalidating 2015 Rule

In 2016, a Superior Court struck down the changes to the ASC fee schedule because the Industrial Commission was not authorized to ignore the requirement of a fiscal note. The Industrial Commission has appealed to the Court of Appeals. The Superior Court decision has been stayed pending the appeal.

When the Court of Appeals affirms the Superior Court decision, the valid fee schedule that was in place prior to April 2015 will be the reimbursement that will be applied retroactively to all workers' compensation procedures performed in ASCs. As the Industrial Commission acknowledges in its fiscal note, ASCs will be entitled to collect underpayments for services provided since April 2015.

Conservatively, this will require insurance carriers and self-insured employers to pay ASCs over \$75 million. The affirmance of the 2016 Superior Court Decision will also require that the pre-April 2015 fee schedule be used.

2016 Temporary Rulemaking

After the issuance of the 2016 Court Decision and the subsequent stay, the Industrial Commission had the option of proceeding with permanent rulemaking including the required fiscal note. The Industrial Commission decided instead to proceed with temporary rulemaking. As the Rules Review Commission is well aware, the temporary rulemaking process is an abridged procedure that does not include several important components of permanent rulemaking, including the fiscal note.

On 18 October 2016, the Industrial Commission submitted a proposed temporary rule to the Rules Division of the Office of Administrative Hearings and provided notice to the public. The proposed temporary rule was nearly identical to the improperly promulgated permanent rule that had been set aside by the 2016 Court Decision. (R pp 11) The Industrial Commission acknowledged that the fee schedule invalidated by the 2016 Court Decision and the proposed temporary rule are “essentially the same.”

In December 2016, the Industrial Commission adopted a temporary rule and submitted it to the Rules Review Commission, explaining that the temporary rule was necessary to respond to “the effects of” the Superior Court Decision. The Industrial Commission never argued that the immediate adoption of the temporary rule was required by the 2016 Court Decision. That same month, over objections lodged by Surgical Care Affiliates and other ASCs and in a split decision, the Rules Review Commission approved the temporary rule.

2017 Court Decision Invalidating Temporary Rule

Several ASCs immediately challenged the temporary rule as not meeting the criteria for a temporary rule as required by the APA and violating the separation of powers clause. In March 2017, another Superior Court Judge concluded that the 2016 Court Decision did not require a temporary rule and declared the temporary rule void and of no effect. The 2017 Court Decision marked the second time a Superior Court determined that the Industrial Commission failed to comply with the APA when promulgating revisions to the fee schedule for ambulatory surgical centers. The Industrial Commission again appealed, and the appeal is pending before the Court of Appeals.

2017 Permanent Rulemaking

While its two appeals were still pending, the Industrial Commission decided to move forward with permanent rulemaking. The Industrial Commission prepared a fiscal note for the proposed rule but used the wrong baseline. Instead of recognizing that the 2016 Superior Court Decision invalidated the 2015 ASC fee schedule, the Industrial Commission prepared a fiscal note that imagined that the 2016 Superior Court Decision did not exist.

During the public hearing and again in the written comments, SCA and others raised concerns with the Industrial Commission's failure to conduct a proper fiscal analysis. Additionally, SCA submitted a report prepared by Avalon Health Economics showing that the Industrial Commission's error grossly underestimated the effect the permanent rule would have on the Workers' Compensation system.

Despite these objections, the Industrial Commission moved forward with approving the permanent rule. After initially delaying the approval of the permanent rule in order to more fully consider the written comments, the Industrial Commission convened a public meeting at which they voted, without any discussion or debate, to adopt the permanent rule.

At this public meeting, the Chairman of the Industrial Commission revealed that the Industrial Commission had solicited additional feedback and input from the Office of State Budget and Management and the National Council on Compensation Insurance. The Industrial Commission did not disclose the substance of this feedback but indicated that the individual commissioners had reviewed the information in preparing for approving the permanent rule.

Although the Industrial Commission has still not published the feedback relied upon by the Industrial Commission in approving the permanent rule, SCA has obtained the records. These records show that the Industrial Commission considered written comment after the comment period had expired and amended the fiscal analysis after the permanent rule had been noticed. Both of these actions are out of compliance with the APA's rulemaking requirements.

REASONS WHY THE INDUSTRIAL COMMISSION DID NOT COMPLY WITH THE ADMINISTRATIVE PROCEDURE ACT

The Rules Review Commission is required to determine whether a rule was adopted in accordance with Part 2 of the rulemaking requirements. N.C. Gen. Stat. § 150B-21.9(a)(4).

A rulemaking agency subject to the APA's requirements must, no later than the publication date of the notice of text in the North Carolina Register, publish all of the following:

- (1) The text of a proposed rule.
- (2) An explanation of the proposed rule and the reason for the proposed rule.
- (3) The federal certification required by subsection (g) of this section.

(4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.

(5) Any fiscal note that has been prepared for the proposed rule.

N.C. Gen. Stat. § 150B-19.1(c).

All of this information must be provided before the proposed permanent rule is published. The APA does not permit this information to be amended after publication without additional publication. In fact, the APA states:

If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

Id.; *see id.* § 150B-21.2(a) (requiring an agency to comply with § 150B-19.1 when adopting a permanent rule).

As the Industrial Commission acknowledges, the Administrative Procedure Act requires a fiscal and regulatory impact analysis in advance of publishing a proposed permanent rule. *See* N.C. Gen. Stat. § 150B-21.4. In developing a fiscal note, the agency must analyze the substantial economic impact by doing the following:

(1) Determine and identify the appropriate time frame of the analysis.

- (2) Assess the baseline conditions against which the proposed rule is to be measured.
- (3) Describe the persons who would be subject to the proposed rule and the type of expenditures these persons would be required to make.
- (4) Estimate any additional costs that would be created by implementation of the proposed rule by measuring the incremental difference between the baseline and the future condition expected after implementation of the rule. The analysis should include direct costs as well as opportunity costs. Cost estimates must be monetized to the greatest extent possible. Where costs are not monetized, they must be listed and described.

Id. § 150B-21.4(b1).

The APA requires that an agency consider written comments and the previously prepared fiscal note before adopting a permanent rule. *Id.* § 150B-21.2(g). The permanent rulemaking requirements do not permit the agency to solicit additional comments after the close of the comment period or to amend the fiscal note without further publication.

That is exactly what the Industrial Commission has done in this instance. Moreover, the Industrial Commission's fiscal note does not meet the APA's requirements because it uses an improper and self-serving baseline that does not address the actual, prospective impact of the proposed rule.

The Industrial Commission Did Not Comply with the Transparency Requirements of the APA.

The Industrial Commission initiated the permanent rulemaking process with a notice that included the text of the proposed rule,

referenced a fiscal note, and provided information about a public hearing and an opportunity to submit written comments.

After the public hearing had ended and the written comments period had closed, staff for the Industrial Commission solicited additional comments and revisions to the fiscal analysis from different stakeholders. The Industrial Commission acknowledged that it had sought out information at the meeting in which the Industrial Commission adopted the rule.

The Industrial Commission, however, did not disclose the substance of the feedback prior to adopting the rule. To date, the Industrial Commission has not published any of this additional information, nor has it disclosed the changes to the fiscal analysis to the public or the even the Rules Review Commission.

Publication at this point would be too late since the APA requires publication occur before the rule is adopted. For these reasons alone, the Rules Review Commission should object to the Industrial Commission's permanent rule.

The Industrial Commission Did Not Comply with the Fiscal Note Requirements of the APA.

The fiscal note developed by the Industrial Commission fails to meet any of the APA's requirements. The Industrial Commission uses the wrong timeframe by comparing the proposed rule to a rule that has been invalidated. In so doing, the Industrial Commission uses the wrong baseline. Because the Industrial Commission uses the wrong baseline, it underestimates the costs that will be borne by certain providers and the injured workers that would otherwise be served by ASC facilities. See Avalon Report.

The Industrial Commission's fiscal note is not only flawed; it is flawed in bad faith. The Industrial Commission ignores the fact that the April 2015 ASC fee schedule was invalidated because the Industrial

Commission failed to include a fiscal note. Contrary to the Superior Court's ruling, the Industrial Commission continues to fail to conduct a fiscal analysis between the valid fee schedule (the one in effect prior to April 2015) and the proposed fee schedule. In so doing, the Industrial Commission downplays the dramatic cut to reimbursement for ASCs and the negative impact on injured workers' access to care. The Avalon Report estimates the significant economic impact that the proposed rule change will have.

Moreover, the Industrial Commission acknowledges that the fiscal note fails to consider the behavioral changes to the system of reducing ASC reimbursement. *See* Avalon Report. This error is particularly egregious because the Industrial Commission recognizes that changing reimbursement will affect where injured workers receive surgery and therefore the amount of reimbursement paid by insurance carriers and self-insured employers. Still, the Industrial Commission neglects to factor how reducing the ASC fee schedule will shift utilization to higher-cost settings. In fact, the invalid fee schedule has already done so, but the Industrial Commission simply ignores this data that has been created by the experiment of continuing to enforce an invalid rule.

Finally, the fiscal note only considers alternatives using the invalid fee schedule as the baseline and also inappropriately relies upon 2015 data, which includes claims under the invalid fee schedule and the valid fee schedule. The reliance upon this data is erroneous and in bad faith.

The Industrial Commission waited over two years to produce a fiscal note and then produced a document that fails to even discuss the fiscal impact of the changes to ASC reimbursement when treating injured workers. This violates the rulemaking requirements under the Administrative Procedure Act.

CONCLUSION

For the reasons set forth above, SCA requests that the Rules Review Commission object to Industrial Commission's permanent rule.

Respectfully submitted this 12th day of October 2017.



Kelli Collins, Vice President Operations
Surgical Care Affiliates, LLC
3820 North Elm Street #102
Greensboro, NC 27455
(336) 854-1663 office
(336) 202-6681 mobile
(866) 367-3168 fax
kelli.collins@scasurgery.com



TO: NORTH CAROLINA RULES REVIEW COMMISSION

On behalf of the North Carolina Ambulatory Surgical Center Association (“the Association”), please accept this letter in opposition to the permanent rule, 04 NCAC 10J .0103, adopted by the North Carolina Industrial Commission.

The Association represents the overwhelming majority of freestanding ambulatory surgical centers (“ASCs”) in North Carolina. ASCs provide great value to North Carolina’s health care delivery system broadly and specifically in performing surgical procedures to injured workers through the Workers’ Compensation system. ASCs can perform the same types of surgical procedures that are provided in hospital outpatient departments and some procedures that are currently being provided to patients on an inpatient basis in hospitals. Unfortunately, the proposed permanent rule does not recognize the myriad ways that ASCs can serve injured workers and does not properly reimburse ASCs for the procedures they perform.

The Association was formed in 2016. Since its inception, the Association has taken a very active role in commenting upon and even challenging certain actions that have been taken by the Industrial Commission in connection with the ASC fee schedule for workers’ compensation cases. The Association is one of the plaintiffs in the legal action filed earlier this year that resulted in the Wake County Superior Court declaring the Industrial Commission’s temporary rule invalid. When the temporary rule was being considered by the Industrial Commission, the Association voiced its serious concerns directly and through its members. Unfortunately, the permanent rule currently being considered is identical to the temporary rule.

The Association and its members are united in our desire to have the Industrial Commission adopt a reasonable and comprehensive fee schedule for ambulatory surgical centers that will provide adequate reimbursement for workers’ compensation cases. This will result in better containing medical costs because ambulatory surgical centers are the most cost-effective, efficient setting for many of the surgical procedures needed by injured workers.



The Association also expects the Industrial Commission to comply with the rulemaking requirements of the Administrative Procedure Act (“APA”). Yet again, the Industrial Commission has failed to do so in promulgating the most recent changed to the ASC fee schedule.

The Industrial Commission has considered feedback and changes to the fiscal analysis outside of the rulemaking process set forth in the APA. These maneuvers violate the letter and the spirit of the law. They are also antithetical to the notion of notice and comment, which are at the heart of administrative rulemaking.

The Association also has serious objections to the approach taken and the assumptions made in the fiscal note. The Industrial Commission has not actually analyzed the change to the rule that is being proposed. The fiscal note does not take into account the major reduction being proposed to ASCs from the valid fee schedule. Instead, it is using as the baseline the April 2015 fee schedule, which a Superior Court has already invalidated. By comparing the proposed rule change to the invalid rule, the Industrial Commission is not actually analyzing the significance of the reduction in reimbursement, the impact on stakeholders, and the impact on the system as a whole.

For example, the fiscal note does not address the dynamic effects that such a reduction will have—and already has had—on injured workers and the cost to the system. In failing to consider these effects, the Industrial Commission has failed to meet its statutory obligations under the rulemaking process.

The Industrial Commission’s proposed permanent rule is nearly identical to a prior permanent rule and identical to a temporary rule—both of which were invalidated by the courts. Although the courts did not have the opportunity to review the substance of the rules, these prior failed rulemaking efforts gave the Industrial Commission the opportunity to reconsider its approach to the ASC fee schedule and construct a fee schedule that took into account stakeholder feedback and that accomplished the statutory requirements. With this proposed permanent rule, the Industrial Commission has squandered these opportunities. In any event, the Industrial Commission has failed to follow the requirements of the APA.



For the reasons set forth above, the Association opposes the permanent rule, 04 NCAC 10J .0103, as adopted by the North Carolina Industrial Commission.

This the 12th day of October 2017.

A handwritten signature in black ink, which appears to read 'Peter A. Lohrengel', is positioned in the center-right of the page.

Peter Lohrengel, Executive Director
North Carolina Ambulatory Surgical Center
Association