

**EMPLOYER, INSURANCE AND LOCAL GOVERNMENT COMMENTS IN SUPPORT
CHANGES TO PERMANENT RULE 04 NCAC 10J .0103, AS PROPOSED AND
ADOPTED BY THE NORTH CAROLINA INDUSTRIAL COMMISSION**

TO: THE NORTH CAROLINA RULES REVIEW COMMISSION

The undersigned organizations representing a large cross-section of employer, insurance and local government organizations write to respectfully urge approval by the North Carolina Rules Review Commission (RRC) of the permanent rule amending 04 NCAC 10J .0103, as properly adopted in accordance with Chapter 150B of the North Carolina General Statutes 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-21.2, to adopt changes to 04 NCAC 10J .0103 as a permanent rule. 04 NCAC 10J .0103 as adopted by the IC unquestionably satisfies the requirements of N.C.G.S. 150B-21.9(a)(1-4) in that the rule is within the authority delegated to the agency by the General Assembly; is clear and unambiguous; is necessary to implement an act of the General Assembly; and has been adopted in accordance with Part 2 of Chapter 150B of the North Carolina General Statutes.

For the better part of two years, the ambulatory surgical center industry – through litigation and technicalities – has fought the IC’s rational, straightforward and well-intentioned efforts to bring fees paid to ambulatory surgical centers in-line with other medical providers and with the median payment methodologies of other states for their services. By adopting this change to 04 NCAC 10J .0103, the IC has in fact returned stability to the workers’ compensation system going forward, rather than leaving businesses, insurers and state and local governments in limbo and a great deal of uncertainty while a final decision on past rulemaking is awaited from the North Carolina Court of Appeals.

The basis of the litigation brought by Surgical Care Affiliates (SCA) and the ambulatory surgical care industry that was recently heard by the North Carolina Court of Appeals was that the IC had failed to prepare a fiscal note, even though the North Carolina General Assembly had clearly exempted the IC from the fiscal note requirement to adopt medical and hospital fee schedules. The IC properly adopted 04 NCAC 10J .0103, including preparing a fiscal note. So now, SCA and the ambulatory surgical care industry are arguing that the IC’s rulemaking is invalid because they disagree with the methodology of the properly prepared fiscal note. It should be noted that the fiscal note was prepared in accordance with N.C.G.S 150B-21.4 and approved by the Office of State Budget and Management (OSBM). Even if the arguments of SCA and the ambulatory surgical center industry were valid – which they are not – that the fiscal note was prepared in error, N.C.G.S. 150B-21.4(c) clearly states “An erroneous fiscal note prepared in good faith does not affect the validity of a rule.” In other words, this baseless challenge as to the validity of the fiscal note is irrelevant and should be disregarded by the RRC, resulting in approval of 04 NCAC 10J .0103 by the RRC. Any allegations of bad faith by SCA are similarly baseless, and represent yet another effort to prevent the IC from bringing ambulatory surgical center costs in-line with the median costs for other states.

Background

The permanent rule to which the SCA objects merely readopts – for a third time – what nearly every affected party believes to be the appropriate fee schedule for all medical providers, including ambulatory surgical centers, since 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. The original rule 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 permanent 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 preparing a fiscal note. While the SCA prevailed in Wake County Superior Court on this argument, the Court’s order was stayed pending appeal. In response to the 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 both overall system stability and adequate access to medical treatment for injured workers. 18 months after the first rule was approved by the RRC and entered into the North Carolina Administrative Code, SCA appeared before the RRC to essentially object 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. When the RRC approved the temporary rule implementing the fee schedule for ambulatory surgical centers on December 15, 2016, SCA and the ambulatory surgical center industry brought litigation once more.

Conclusion

What the ambulatory surgical center industry – and, specifically, Surgical Care Affiliates (SCA) -- continues to fail to mention in its written comments is that an objection by the RRC to the permanent 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, as well as to businesses, State and Local Governments and School Boards that self-insure their workers' compensation liability. The fee schedule SCA sought 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 NCCI). Also note that the North Carolina Rate Bureau has approved average rate reductions across all class codes as provided below, resulting in a reduction of workers' compensation costs to make North Carolina more economically competitive with neighboring states.

April 1, 2015: A reduction of 3.4%
April 1, 2016: A reduction of 10.2%
April 1, 2017: A reduction of 14.4%
April 1, 2018: A reduction of 11.3%

An objection to the permanent rule by the RRC would likely reverse this trend of rate reductions by the North Carolina Rate Bureau and make it costlier for businesses, State and Local Governments and self-insured businesses. The RRC should reject the arguments by SCA and the ambulatory surgical center industry, which are intended to derail a carefully considered policy decision by the IC to bring ambulatory surgical center fees in-line with other medical providers in North Carolina and with the median reimbursement averages of other similarly situated states for the sole purpose of arbitrarily and unreasonably increasing reimbursement for ambulatory surgical centers as compared with other medical providers. As stated above, the changes to 04 NCAC 10J .0103 have been promulgated in a manner that clearly meets all the requirements of

N.C.G.S. 150B-21.9(a)(1-4), including the preparation of a fiscal note as required by N.C.G.S. 150B-21.4. For these reasons, the following groups strongly urge the RRC to approve proposed changes amending 04 NCAC 10J .0103 as adopted by the North Carolina Industrial Commission.

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
North Carolina Chamber
North Carolina Farm Bureau and Affiliated Companies
North Carolina Forestry Association
North Carolina Home Builders Association
North Carolina Interlocal Risk Management Agency
North Carolina League of Municipalities
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.