

To: Rules Review Commissioners

From: Amanda Reeder, Counsel

Date: April 10, 2018

Re: Surgical Care Affiliates, LLC v. North Carolina Industrial Commission Update

The Industrial Commission was exempt from rulemaking under Article 2A until the General Assembly repealed that exemption in Session Law 2011-287.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

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

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

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

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

In response to the August 9, 2016 Order, the agency sought and was awarded a stay while an appeal was pending at the North Carolina Court of Appeals. In addition, the agency moved to amend the Rule through temporary measures.

In December 2016, the Rules Review Commission approved Rule 04 NCAC 10J .0103 as a temporary rule. The Commission discussed whether the statute required a court order to explicitly order the agency to engage in temporary rulemaking in order to meet this

requirement. In this instance, the Industrial Commission was not ordered by the trial court to engage in temporary rulemaking; instead, the effect of the court order invalidating the Rule led the Industrial Commission to find that the temporary rule was necessary. The Commission determined that the court order invalidating the previous version of the Rule satisfied the requirements of G.S. 150B-21.1(a)(5) and provided the agency with grounds to adopt a temporary rule following a “recent court order.”

In January 2017, pursuant to G.S. 150B-21.1(c), Surgical Care Affiliates, LLC, filed an action for declaratory judgment in Wake County Superior Court to challenge the validity of the temporary rule. In a ruling issued March 21, 2017, the Superior Court granted summary judgment to Surgical Care Affiliates, stating that the temporary rule was invalid. The Industrial Commission appealed this ruling to the North Carolina Court of Appeals, while its original appeal to the Court of Appeals was still pending. Thus, there were two appeals regarding Rule 04 NCAC 10J .0103 pending at the same time.

In November 2017, the Court of Appeals issued an opinion reversing the August 9, 2016 Wake County Superior Court ruling. The Court of Appeals held that the trial court erred in excluding ambulatory surgical centers from the definition of hospitals, and the rule adopted by the Industrial Commission and approved by the Commission in February 2015 had in fact been adopted in compliance with the APA. The Court of Appeals reversed the Superior Court order and remanded for entry of an order consistent with that ruling.

Following the Court of Appeals opinion, Surgical Care Affiliates, LLC, filed a petition for discretionary review with the North Carolina Supreme Court on December 22, 2017. The appeal following the March 21, 2017 Superior Court ruling was ordered to be held in abeyance by the Court of Appeals pending final disposition in the appeal of the 2016 case.

On April 5, 2018, the North Carolina Supreme Court denied Surgical Care Affiliates, LLC’s petition for discretionary review.

SUPREME COURT OF NORTH CAROLINA

PETITIONS

5 April 2018

004P18	State v. Travis Rashad Mitchell	<p>1. Def's Motion for Temporary Stay (COA17-369)</p> <p>2. Def's Petition for <i>Writ of Supersedeas</i></p> <p>3. Def's PDR Under N.C.G.S. § 7A-31</p>	<p>1. Allowed 01/08/2018 Dissolved 04/05/2018</p> <p>2. Denied</p> <p>3. Denied</p>
005P18	State v. Ricardo Melgar-Argueta	Def's PDR Under N.C.G.S. § 7A-31 (COA17-434)	Denied
009P18	In the Matter of: A.L.Z.	<p>1. Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA17-507)</p> <p>2. Respondent-Mother's Motion for Temporary Stay</p> <p>3. Respondent-Mother's Petition for <i>Writ of Supersedeas</i></p>	<p>1. Denied</p> <p>2. Allowed 02/27/2018 Dissolved 04/05/2018</p> <p>3. Denied</p>
014P18	Pender County and the Town of Atkinson v. Donald Sullivan and Marion P. Sullivan	<p>1. Defs' <i>Pro Se</i> Motion for Notice of Appeal (COA17-1160)</p> <p>2. Defs' <i>Pro Se</i> Motion to Withdraw Appeal</p>	<p>1. Dismissed <i>ex mero motu</i> 03/01/2018</p> <p>2. Dismissed as moot</p>

423PA16-2	Cecelia W. Peoples and Ernest A. Robinson, Jr. v. Thomas H. Tuck	Def's PDR Under N.C.G.S. § 7A-31 (COA16-293-2)	Denied
432P17	State v. Daris Lamont Spinks	Def's PDR Under N.C.G.S. § 7A-31 (COA17-413)	Denied
435P17	Surgical Care Affiliates, LLC v. North Carolina Industrial Commission	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-78)	Denied
437P17	Lenton C. Brown v. North Carolina Department of Public Safety, an agency of the State of North Carolina, and Division of Adult Correction and Juvenile Justice, a subunit contained within the North Carolina Department of Public Safety	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-1298)	Denied
438P17	Anthony M. Kyles v. The Goodyear Tire & Rubber Co., Employer, Liberty Mutual Ins. Co., Carrier	1. Plt's Motion for Temporary Stay (COA17-594) 2. Plt's Petition for <i>Writ of Supersedeas</i> 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed 12/29/2017 Dissolved 04/05/2018 2. Denied 3. Denied
439P17	State v. Kenneth Gore, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-267)	Denied