

August 18, 2016

CIRCULAR LETTER TO ALL MEMBER COMPANIES

Re: North Carolina Industrial Commission – Ambulatory Surgical Center Rule Activity

The North Carolina Industrial Commission (NCIC) sets the Workers' Compensation fee schedule for Ambulatory Surgical Centers (ASCs) through the administrative rulemaking process. Prior to April 1, 2015, the NCIC's fee schedule set the rate of reimbursement for ASCs to be 67.15% of billed charges. Effective April 1, 2015, the NCIC's fee schedule changed to reimburse ASCs at the rate of 220% of the Medicare ASC facility-specific amount (04 NCAC 10J .0103). The Bureau's 2015 voluntary loss cost and assigned risk rate filings contained an adjustment in overall rates of -0.4% to recognize the effects of this fee schedule change.

On October 1, 2015, one ASC group – Surgical Care Affiliates (SCA) – filed a Request for Declaratory Ruling seeking to invalidate all parts of the NCIC's rules that acted to amend the Workers' Compensation fee schedule provisions for ASCs operating in North Carolina. The Request for Declaratory Ruling was granted by the NCIC on October 30, 2015. On December 14, 2015, the NCIC issued its Declaratory Ruling denying the relief requested by SCA.

SCA then filed a Petition for Judicial Review in the Wake County Superior Court seeking a reversal of the NCIC's Declaratory Ruling denying the relief requested. By decision issued August 9, 2016, the Court reversed the NCIC's Declaratory Ruling, and granted the relief requested by SCA. The effect of this Decision is that the NCIC's April 1, 2015 fee schedule change as it applied to ASCs is invalidated and of no effect and that the prior fee schedule for ASCs is reinstated.

A copy of the Judge's Order is attached.

We are advised that the NCIC anticipates appealing this decision, and may request a "stay" of the Court's decision. In addition, we are advised that the NCIC is considering making a new rule on ASC fee schedule reimbursements.

The Bureau has a Workers' Compensation rate filing due to be filed, by Statute, on September 1, 2016 for rates to be effective on April 1, 2017. At this time, the Bureau has elected to wait until all appeals have been exhausted to determine if any adjustments to the loss cost and assigned risk rates are needed. The Bureau will endeavor to keep you advised of further developments in this matter.

Sincerely,

Joanna Biliouris

Chief Operating Officer

JB:rw

C-16-16

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

COUNTY OF WAKE

2016 AUG -9 PM 2: 51

SUPERIOR COURT DIVISION

16-CVS-00600

SURGICAL CARE AFFILIATES, LLC,

Petitioner,

v.

NORTH CAROLINA INDUSTRIAL
COMMISSION,

Respondent.

DECISION

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

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

THE PARTIES

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

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