

April 18, 2016

The Honorable Charlton Allen
Chairman
North Carolina Industrial Commission
430 N Salisbury St,
Raleigh, NC 27603

Dear Chairman Allen:

The undersigned organizations respectively submit the following comments in strong opposition to the Petition to Amend Rule 04 NCAC 10J .0103 as submitted by Surgical Care Affiliates (SCA) to the North Carolina Industrial Commission (IC) on January 29, 2016.

The amendment sought by SCA would result in irreparable harm to businesses in North Carolina that purchase workers' compensation as required by North Carolina law. SCA's proposed amendment to 04 NCAC 10J .0103 resulted 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, if approved, this amendment would also adversely affect medical costs incurred by the State of North Carolina, local governments and school boards, among others.

The rule the SCA seeks to amend 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.

In the November 14, 2014, volume of the *North Carolina Register*, the IC's use of reliable methodology and information from authoritative sources in formulating the rule was clearly shown in its statement that the "Rates were calculated to fall in the estimated median range of workers' compensation fee schedules nationally, based on data available from the following studies and data sources:

(1) NORTH CAROLINA WORKERS COMPENSATION INSURANCE: A WHITE PAPER REVIEWING MEDICAL COSTS AND MEDICAL FEE REGULATIONS, prepared for the National Foundation for Unemployment Compensation and Workers' Compensation; prepared by Philip S. Borba, Ph.D. and Robert K. Briscoe, WCP, Milliman, Inc.; May 23, 2013.

(2) CompScope Medical Benchmarks, 15th Edition, for North Carolina, published by the Workers' Compensation Research Institute, August 2014.

(3) North Carolina Hospital Association/Optum Group Health survey data, June 2013 and July 2014.

(4) Review of states' fee schedule structures, nationally and regionally."

Simply stated, SCA's petition for rulemaking 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 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 the 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)). Now, a year after the fact, SCA has essentially objected to the rule after its 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 approve SCA's petition for rulemaking would not only reward SCA's failure to timely exercise its right to comment, but would undermine the Administrative Rulemaking process created by the North Carolina General Assembly. For these reasons, the following groups strongly urge the North Carolina Industrial Commission to deny the petitioner's proposed amendment to 04 NCAC 10J .0103.

North Carolina Home Builders Association
North Carolina Chamber of Commerce
North Carolina Retail Merchants Association
Capital Associated Industries (CAI)
Employers Coalition of North Carolina
The Employers Association (TEA)
WCI (Western Carolina Industries)
North Carolina Automobile Dealers Association
North Carolina Association of Self-Insurers
North Carolina Restaurant and Lodging Association
North Carolina Association of Defense Attorneys
North Carolina Forestry Association
National Federation of Independent Businesses (NFIB)
Carolinas Association of General Contractors
American Insurance Association
Property Casualty Insurers Association of America
Builders Mutual Insurance Company
First Benefits Insurance Mutual, Inc.
Forestry Mutual Insurance Company
Dealers Choice Mutual Insurance Company
Aegis