

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

COUNTY OF WAKE

17-CVS-00144

NORTH CAROLINA AMBULATORY )  
SURGICAL CENTER ASSOCIATION, )  
SURGICAL CARE AFFILIATES, LLC, AND )  
COMPASS SURGICAL PARTNERS, LLC )

Plaintiffs,

**ORDER GRANTING SUMMARY  
JUDGMENT**

v.

NORTH CAROLINA INDUSTRIAL )  
COMMISSION, )

Defendant.

This matter came before the Court on March 16, 2017 upon Plaintiffs North Carolina Ambulatory Surgical Center Association, Surgical Care Affiliates, LLC, and Compass Surgical Partners, LLC's (collectively "Plaintiffs") Motion for Summary Judgment against Defendant North Carolina Industrial Commission ("the Commission"). On January 4, 2017, Plaintiffs filed a Complaint for Declaratory Judgment seeking to have declared invalid a temporary rule adopted by the Commission that amends 04 NCAC 10J .0103. In their Complaint, Plaintiffs contend that the Commission's temporary rule is invalid because it does not comply with the criteria and standards for temporary rulemaking set forth in the North Carolina Administrative Procedure Act and because it is in violation of the Separation of Powers Clause in the North Carolina Constitution.

The temporary rule challenged by Plaintiffs amended 04 NCAC 10J .0103 to change the schedule of reimbursement to ambulatory surgical centers in workers' compensation cases. The Commission's temporary rule had an effective date of January 1, 2017. As justification for this temporary rule, the Commission cited the effects of the August 9, 2016 Decision in *Surgical*

*Care Affiliates, LLC v. North Carolina Industrial Commission*, No. 16-CVS-00600 (Wake County Superior Court). In its Statement of Findings of Need for a Temporary Rule, the Commission cites N.C. Gen. Stat. § 150B-21.1(a)(5), which permits the immediate adoption of a temporary rule when it is required by a recent court order. The August 9, 2016 Decision in *Surgical Care Affiliates* was appealed by the Commission to the North Carolina Court of Appeals and a stay order to preserve the status quo was entered on September 2, 2016.

Plaintiffs bringing this action for declaratory judgment are persons aggrieved. As providers of ambulatory surgical center services and an association whose members are providers of ambulatory surgical center services, Plaintiffs are directly affected substantially by the Commission's temporary rule. N.C. Gen. Stat. §§ 150B-2(6), 150B-21.1(c). Under N.C. Gen. Stat. § 150B-21.1(c), this Court has jurisdiction over Plaintiffs' action for declaratory judgment.

On February 6, 2017, Plaintiffs filed a Motion for Summary Judgment, seeking summary judgment in their favor on the three claims included in their declaratory judgment action. After a review and consideration of the pleadings and other filings with the Court, the briefs of by Plaintiffs and Defendant, and the arguments of counsel, this Court concludes that there are no genuine issues of material fact on Plaintiffs' First Claim and Plaintiffs are entitled to judgment in their favor as a matter of law.

#### **Plaintiffs' First Claim**

In their First Claim, Plaintiffs contend that the Commission failed to demonstrate that the August 9, 2016 Decision in *Surgical Care Affiliates* of Superior Court Judge Paul C. Ridgeway requires the immediate adoption of a temporary rule. For this reason, Plaintiffs contend that the

Commission did not have statutory authority to adopt the amendment to 04 NCAC 10J .010-3 as a temporary rule.

There are no genuine issues of material fact on Plaintiffs' First Claim. The August 9, 2016 Decision in *Surgical Care Affiliates* does not require the immediate adoption of a temporary rule by the Commission.

Citing the affidavit of Andy Ellen, the Commission states in its Memorandum in Opposition to Plaintiffs' Motion that Judge Ridgeway considered whether the Commission could engage in temporary rulemaking in lieu of the stay requested by the Commission. However, Judge Ridgeway decided to enter a stay to preserve the status quo pending the Commission's appeal to the North Carolina Court of Appeals. Judge Ridgeway's entry of a stay order is further support for this Court's conclusion that the immediate adoption of a temporary rule by the Commission is not required.

The Commission failed to meet the requirements of N.C. Gen. Stat. § 150B-21.1(a) in adopting the temporary rule, and its actions in amending 04 NCAC 10J .0103 are without statutory authority. The Commission's temporary rule is invalid because it has not been adopted in substantial compliance with Article 2A of the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-18.

### **Plaintiffs' Second and Third Claims**

At the March 16, 2017 hearing Plaintiffs abandoned their Motion for Summary Judgment on their Second Claim, conceding that there are genuine issues of material fact on this claim. Therefore, this Court denies the Motion for Summary Judgment on Plaintiffs' Second Claim.

In their Third Claim, Plaintiffs contend that the Commission's adoption of the temporary rule violates the Separation of Powers Clause of the North Carolina Constitution, N.C. Const.

Art. I, § 6. It is not necessary for this Court to reach the merits of Plaintiffs' constitutional claim because of the conclusion that summary judgment should be granted on Plaintiffs' First Claim that the Commission failed to meet the statutory criteria for adopting a temporary rule. Therefore, this Court declines to rule on the Third Claim.

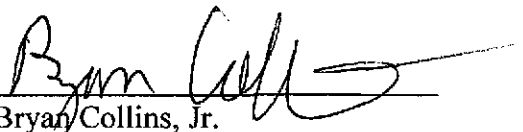
It is therefore **ORDERED, ADJUDGED, and DECREED THAT:**

1. Plaintiffs' Motion for Summary Judgment on its First Claim for Relief is GRANTED. The Commission's amendment of 04 NCAC 10J .0103 is invalid and of no effect.

2. Based upon Plaintiffs' concession that there are genuine issues of material fact on Plaintiffs' Second Claim for Relief, summary judgment on Plaintiffs' Second Claim is DENIED.

3. Plaintiffs and Defendant shall pay their own costs.

This the 21<sup>st</sup> day of March 2017

  
G. Bryan Collins, Jr.  
Superior Court Judge

**Certificate of Service**

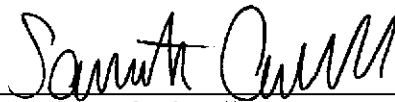
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THIS IS TO CERTIFY that a copy of the foregoing Order was served upon the following parties and persons by mailing a copy thereof by postage prepaid, first class mail or by otherwise approved delivery addressed as follows:

Renee J. Montgomery  
Parker Poe  
PO Box 389  
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Amar Majmundar  
Special Deputy Attorney General  
Attorney General's Office  
9001 Mail Service Center  
Raleigh, NC 27699-9001

This 22<sup>nd</sup> day of March, 2017.



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Samantha L. Cockerell  
Trial Court Coordinator