

NOTICE OF PROPOSED INDUSTRIAL COMMISSION RULEMAKING

DATE: JUNE 15, 2017

Notice is hereby given in accordance with G.S. 150B-21.2 that the North Carolina Industrial Commission intends to amend the rule cited as 04 NCAC 10J .0103.

This proposed rule amendment was also published today in Volume 31, Issue 24, of the North Carolina Register at Pages 2440-2442, available at <http://www.oah.state.nc.us/rules/register/Volume%2031%20Issue%2024%20June%2015,%202017.pdf>.

Proposed Effective Date: *October 1, 2017*

Oral comments on the proposed rule amendment may be made at the Public Hearing before the Industrial Commission:

Date: *July 19, 2017*

Time: *2:30 p.m.*

Location: *Room 2149, 2nd Floor, Dobbs Building, 430 North Salisbury Street, Raleigh, NC 27603*

Written comments on the proposed rule amendment may be submitted to: *Kendall M. Bourdon 4340 Mail Service Center, Raleigh, NC 27699-4340; phone (919) 807-2644; email kendall.bourdon@ic.nc.gov*

The written comment period ends: *August 14, 2017*

Procedure for Subjecting a Proposed Rule to Legislative Review: If an objection is not resolved prior to the adoption of the rule, a person may also submit written objections to the Rules Review Commission after the adoption of the Rule. If the Rules Review Commission receives written and signed objections after the adoption of the Rule in accordance with G.S. 150B-21.3(b2) from 10 or more persons clearly requesting review by the legislature and the Rules Review Commission approves the rule, the rule will become effective as provided in G.S. 150B-21.3(b1). The Commission will receive written objections until 5:00 p.m. on the day following the day the Commission approves the rule. The Commission will receive those objections by mail, delivery service, hand delivery, or facsimile transmission. If you have any further questions concerning the submission of objections to the Commission, please call a Commission staff attorney at 919-431-3000.

Reason for Proposed Action: *The Industrial Commission proposes to amend the provisions of Rule 04 NCAC 10J .0103 for several reasons. The proposed amendment to Paragraph (a) is a clarification regarding the qualifications for reimbursement under Paragraphs (c), (d), and (f). Next, there are two primary reasons for the proposed amendments to the provisions related to fees for ambulatory surgical centers, Paragraphs (g) and (h). First, this rule has been the subject of litigation that is ongoing at the time of filing. The provisions of the rule as adopted on April 1, 2015, that relate to fees for ambulatory surgical centers, specifically Paragraphs (g) and (h) and the reference to (h) in Paragraph (i) were held to be invalid by Wake County Superior Court Judge Paul Ridgeway in an August 9, 2016 Decision. The decision was predicated on the court's belief that those provisions of the rule were not adopted in compliance with the Administrative Procedure Act because no fiscal note was prepared. The Industrial Commission has appealed that ruling, and the matter is pending before the North Carolina Court of Appeals. The August 9, 2016 Decision was stayed by Judge Ridgeway by Order dated September 2, 2016. While the Industrial Commission maintains its position that it was not required to complete a fiscal note to adopt and/or amend the challenged provisions, the Industrial Commission has now completed a fiscal note and seeks to amend the ambulatory surgical centers fee provisions of Rule 04 NCAC 10J .0103. Pending the outcome of the litigation, the amendments are sought to restore certainty and balance to the fee schedule for stakeholders, including payers and medical providers, as to future medical expenses. Moreover, the Industrial Commission is statutorily obligated to periodically review the schedule of maximum fees charged for medical treatment in workers' compensation cases and make revisions if necessary. The proposed amendments to Rule 04 NCAC 10J .0103 incorporate feedback from various stakeholders that the addition of a provision setting maximum fees for ambulatory surgical centers, for additional procedures covered by the Medicare Outpatient Prospective Payment System, would be beneficial to payers, providers, and injured workers.*

The fee schedule reimbursement rate for services provided by ambulatory surgical centers covered by the Medicare Ambulatory Surgical Center Payment System will be 200%, in keeping with the rate for 2017 and beyond in the rule as adopted on April 1, 2015. The fee schedule reimbursement rate for additional procedures provided by ambulatory surgical centers that are covered by the Medicare Hospital Outpatient Prospective Payment System will be 135%. The rates were calculated to fall in the estimated median range of workers' compensation fee schedules nationally, as well as within the range of workers' compensation fee schedules in states that base payment to ambulatory surgical centers on a percentage of the Medicare Hospital Outpatient Prospective Payment System and/or the Medicare Ambulatory Surgical Center Payment Systems. The following studies and data sources were reviewed:

(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.*
- (5) *CompScope™ Medical Benchmarks for North Carolina, 16th Edition, published by the Workers' Compensation Research Institute, October 2015.*
- (6) *CompScope™ Medical Benchmarks for North Carolina, 17th Edition, published by the Workers' Compensation Research Institute, October 2016.*
- (7) *Payments to Ambulatory Surgery Centers, 2nd Edition, published by the Workers' Compensation Research Institute, May 2016.*
- (8) *Review of medical fee schedules of states that base reimbursement to ambulatory surgical centers on the Medicare Ambulatory Surgical Center Payment System.*
- (9) *Analysis of Alternatives to the North Carolina Ambulatory Surgical Center Fee Schedule Proposed to Be Effective October 1, 2017, prepared by the National Council on Compensation Insurance, May 2, 2017.*
- (10) *Analysis of Alternatives to the North Carolina Ambulatory Surgical Center Fee Schedule Proposed to Be Effective January 1, 2017, prepared by the National Council on Compensation Insurance, September 19, 2016.*
- (11) *Analysis of Proposed Changes to the North Carolina Medical Fee Schedule, prepared by the National Council on Compensation Insurance, December 4, 2014.*

Fiscal impact (check all that apply).

- State funds affected**
- Environmental permitting of DOT affected**
Analysis submitted to Board of Transportation
- Local funds affected**
- Substantial economic impact (≥\$1,000,000)**
- Approved by OSBM**
- No fiscal note required by G.S. 150B-21.4**

The approved fiscal note is available on the Industrial Commission website at <http://www.ic.nc.gov/proposed10J0103FiscalNote.pdf> and on the website of the Office of State Budget and Management at https://ncosbm.s3.amazonaws.com/s3fs-public/documents/files/IndustrialCommission_2017-05-23.pdf.

Text of Proposed Rule Amendment:

CHAPTER 10 – INDUSTRIAL COMMISSION

SUBCHAPTER 10J – FEES FOR MEDICAL COMPENSATION

SECTION .0100 – FEES FOR MEDICAL COMPENSATION

04 NCAC 10J .0103 FEES FOR INSTITUTIONAL SERVICES

- (a) Except where otherwise provided, maximum allowable amounts for inpatient and outpatient institutional services shall be based on the current federal fiscal year's facility-specific Medicare rate established for each institutional facility by the Centers for Medicare & Medicaid Services ("CMS"). "Facility-specific" rate means the all-inclusive amount eligible for payment by Medicare for a claim, excluding pass-through payments. An institutional facility may only be reimbursed for hospital outpatient institutional services pursuant to this Paragraph and Paragraphs (c), (d), and (f) of this Rule if it qualifies for payment by CMS as an outpatient hospital.
- (b) The schedule of maximum reimbursement rates for hospital inpatient institutional services is as follows:
- (1) Beginning April 1, 2015, 190 percent of the hospital's Medicare facility-specific amount.
 - (2) Beginning January 1, 2016, 180 percent of the hospital's Medicare facility-specific amount.
 - (3) Beginning January 1, 2017, 160 percent of the hospital's Medicare facility-specific amount.
- (c) The schedule of maximum reimbursement rates for hospital outpatient institutional services is as follows:
- (1) Beginning April 1, 2015, 220 percent of the hospital's Medicare facility-specific amount.
 - (2) Beginning January 1, 2016, 210 percent of the hospital's Medicare facility-specific amount.
 - (3) Beginning January 1, 2017, 200 percent of the hospital's Medicare facility-specific amount.
- (d) Notwithstanding the Paragraphs (a) through (c) of this Rule, maximum allowable amounts for institutional services provided by critical access hospitals ("CAH"), as certified by CMS, are based on the Medicare inpatient per diem rates and outpatient claims payment amounts allowed by CMS for each CAH facility.
- (e) The schedule of maximum reimbursement rates for inpatient institutional services provided by CAHs is as follows:
- (1) Beginning April 1, 2015, 200 percent of the hospital's Medicare CAH per diem amount.
 - (2) Beginning January 1, 2016, 190 percent of the hospital's Medicare CAH per diem amount.
 - (3) Beginning January 1, 2017, 170 percent of the hospital's Medicare CAH per diem amount.
- (f) The schedule of maximum reimbursement rates for outpatient institutional services provided by CAHs is as follows:
- (1) Beginning April 1, 2015, 230 percent of the hospital's Medicare CAH claims payment amount.
 - (2) Beginning January 1, 2016, 220 percent of the hospital's Medicare CAH claims payment amount.

(3) Beginning January 1, 2017, 210 percent of the hospital's Medicare CAH claims payment amount.

(g) Notwithstanding Paragraphs (a) through (f) of this Rule, the maximum allowable amounts for institutional services provided by ambulatory surgical centers ("ASC") shall be based on the ~~Medicare ASC reimbursement amount determined by applying the most recently adopted and effective Medicare Payment System Policies for Services Furnished in Ambulatory Surgical Centers and Outpatient Prospective~~ most recently adopted and effective Medicare Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment System Systems reimbursement formula and factors factors, including all Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems Addenda, as published annually in the Federal Register and on the CMS website at <https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/HospitalOutpatientPPS/index.html> (~~"the Medicare ASC facility-specific amount"~~). ("the OPPS/ASC Medicare rule"). An ASC's specific Medicare wage index value as set out in the OPPS/ASC Medicare rule shall be applied in the calculation of the maximum allowable amount for any institutional service it provides. ~~Reimbursement shall be based on the fully implemented payment amount in Addendum AA, Final ASC Covered Surgical Procedures for CY 2015, and Addendum BB, Final ASC Covered Ancillary Services Integral to Covered Surgical Procedures for 2015, as published in the Federal Register, or their successors.~~

(h) The schedule of maximum reimbursement rates for institutional services provided by ambulatory surgical centers is as follows:

(1) ~~Beginning April 1, 2015, 220 percent of the Medicare ASC facility-specific amount.~~

(2) ~~Beginning January 1, 2016, 210 percent of the Medicare ASC facility-specific amount.~~

(3) ~~Beginning January 1, 2017, 200 percent of the Medicare ASC facility-specific amount.~~

(1) A maximum reimbursement rate of 200 percent shall apply to institutional services that are eligible for payment by CMS when performed at an ASC.

(2) A maximum reimbursement rate of 135 percent shall apply to institutional services performed at an ASC that are eligible for payment by CMS if performed at an outpatient hospital facility, but would not be eligible for payment by CMS if performed at an ASC.

(i) If the facility-specific Medicare payment includes an outlier payment, the sum of the facility-specific reimbursement amount and the applicable outlier payment amount shall be multiplied by the applicable percentages set out in Paragraphs (b), (c), (e), (f), and (h) of this Rule.

(j) Charges for professional services provided at an institutional facility shall be paid pursuant to the applicable fee schedules in Rule .0102 of this Section.

(k) If the billed charges are less than the maximum allowable amount for a Diagnostic Related Grouping ("DRG") payment pursuant to the fee schedule provisions of this Rule, the insurer or managed care organization shall pay no more than the billed charges.

(l) For specialty facilities paid outside Medicare's inpatient and outpatient Prospective Payment System, the payment shall be determined using Medicare's payment methodology for those specialized facilities multiplied by the inpatient institutional acute care percentages set out in Paragraphs (b) and (c) of this Rule.

Authority G.S. 97-25; 97-26; 97-80(a); S.L. 2013-410.