



## ADVISORY NO. 486

### TOPIC: AIR AMBULANCE DISPUTES

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Attached is a Memorandum of March 28, 2013, from the Division regarding Federal Preemption and Medical Fee Disputes and which requires some explanation.

In response to recent air ambulance service bills, workers' compensation carriers and self-insureds have been paying in accordance with Texas workers' compensation fee guideline payment adjustment factors (Rule 134.203) as applied to the Medicare-based allowances for these services.

See <http://www.cms.gov/Center/Provider-Type/Ambulances-Services-center.html?redirect=/center/ambulance.asp>

The air ambulance services argue the Air Deregulation Act of 1978 (ADA) pre-empts state law, and requires the payment of their bills in full. As a result, they argue the DWC medical fee dispute resolution process has no jurisdiction to address the amount a workers' compensation carrier or self-insured must reimburse the air ambulance service.

The DWC has recently issued Medical Fee Dispute Findings and Decisions dismissing the requests for fee dispute resolution on the basis of the federal prohibition from enforcing any state law regarding the pricing of airline services. The DWC's Memorandum reflects that current position. Many of these cases have been appealed by the air ambulance services to SOAH as they awarded no fees. Many carriers disagree with the pre-emption argument and argue the Texas fee guidelines apply. These disputes continue to be submitted for DWC Medical Fee Dispute Resolution by the air ambulance services. The appealed dismissals are currently being placed on a holding docket at SOAH.

The DWC Memorandum is designed to inform carriers and self-insureds that its present ruling does not affect other aspects of the claim. Issues of medical necessity, compensability and extent of injury are not affected by the federal pre-emption claim. Carriers and self-insureds are still required to pay, deny or audit such bills within the time frames described by DWC rules.

**Question: Should carriers and self-insureds continue to pay the bills based upon DWC fee guidelines? We believe the answer is "Yes".**

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The Medical Fee Dispute Findings and Decisions dismissing for want of jurisdiction are on appeal by the air ambulance companies. To our knowledge at this time, the air ambulance companies have not filed these disputes in federal court. We believe they are unlikely to do so as they are not likely to find that a friendly venue.

We also believe federal case law interpreting the ADA and federal reverse pre-emption statutes give the State exclusive jurisdiction over these disputes. This is not a dispute over the pricing of an airline ticket in a competitive market. It is a dispute over the extent of liability of a third-party indemnitor for a medical service under a state-promulgated indemnity contract. We believe Congress had neither the power nor the intent to change the terms of those contracts or to exert jurisdiction over state workers' compensation claims.

On one hand, the DWC claims federal law pre-empts state law here. On the other hand, the DWC Memorandum warns the air ambulance companies that state law does not allow them to collect all or part of the charges for their medical service from the person who incurred the bill—the workers' compensation claimant. We believe the DWC's current position actually exposes the claimant to the balance billing it seeks to prohibit, as the federal courts should not in any event be able to force the carrier or self-insured to indemnify the patient for more than it has contracted to pay—that is, the amount allowed under the Texas Workers' Compensation Act. The DWC's current position appears to leave injured Texas workers exposed to at least the difference in the state fee guideline and the amount charged.

**Conclusion:** Pending an enforceable order otherwise or final resolution of the jurisdictional, pre-emption dispute in either state or federal courts, workers' compensation carriers and self-insureds should continue to pay, deny and audit air ambulance bills in accordance with the Medicare-based DWC medical fee guidelines.

This is an important issue involving substantial exposure and potentially affecting such disputes in all states. If you have any question about how to respond to air ambulance bills, or have management or claims counsel monitoring these disputes nationwide, please contact Steve Tipton at [smt1@fol.com](mailto:smt1@fol.com) or (512) 435-2162.