



ADVISORY NO. 500

TOPIC: AIR AMBULANCE JUDGE SUGGESTS 149% REIMBURSEMENT RATE

We first addressed the air ambulance fee disputes in FOL Advisory 486. The DWC had decided that the Airline Deregulation Act of 1978 (ADA) preempts state law. Following MDR Findings and Decisions in 2008, workers' compensation carriers have been paying, and providers had been accepting 125% of the Medicare Air Ambulance Fee Schedule. A few years ago and based upon a federal preemption argument, the air ambulance companies demanded payment of their full billed charges.

The federal preemption issue made its way to SOAH where carriers prevailed in convincing the ALJ that the reverse preemption provisions of the federal McCarran Ferguson Act applied. The ALJ's preliminary ruling on this legal issue agreed that the ADA did not preempt the Texas Workers' Compensation Act, and that the DWC had jurisdiction over the disputes.

In a surprise move, the DWC then issued decisions granting a provider something no other provider had ever been granted: their full billed charges based upon a "fair and reasonable" analysis. While many of those disputes are still pending at DWC, many have been issued, appealed by carriers, and placed on a holding docket at SOAH. A handful of test case disputes have now been heard at SOAH on the "fair and reasonable" issue.

We have been informed by the ALJ by Order of intent in the test cases that his final order will apply a 149% Payment Adjustment Factor (PAF) to the Medicare Air Ambulance Fee Schedule. The final Decision and Order will likely be issued in September. But since disclosure of the ALJ's Order of intent, much speculation has arisen regarding the effect of such a ruling. We will not know the full rationale for the ALJ's decision for some time.

But the evidence was very strong that the 125% PAF is fair and reasonable, and the 149% number is tied to payment data for a limited period and for one air carrier. The basis for the 149% does not appear to be tied to any statutory basis. We agree with the test case counsel that we need to wait and see the reasoning behind the 149% PAF. In any case, the air ambulance companies will appeal the decision. So, we doubt the decision in the small number of test cases will have significant precedential effect. But, until we receive Judge Bennett's final Decision and Order, it is too early to gauge the precedential effect of the ruling, if any.

Question: Should carriers and self-insureds continue to pay the bills based upon the 125% PAF, whether based upon the DWC fee schedule or upon a “fair and reasonable” basis?

Answer: In Advisory 486, we recommended continuing to pay 125% of the Medicare Air Ambulance Fee Schedule. Our advice remains the same. With the SOAH Decision and Order in the test cases expected to apply a 149% PAF to Medicare rates, the question becomes what carriers and self-insureds should do in the interim and afterwards. This order has not been officially entered yet, and will be appealed by the air ambulance companies. We do not yet know if DWC Medical Review will immediately adopt the decision, and issue Findings and Decisions based upon 149% of Medicare. We advise you continue to pay 125% of the Medicare Air Ambulance Fee Schedule.

While carriers will likely cross-appeal and still maintain that the 125% PAF ought to apply, paying the 149% now would stop the interest clock on the difference. But that assumes the DWC and SOAH will adopt the 149% rate for other disputes. That is an unknown. Once we see Judge Bennett’s Decision and Order, each carrier and self-insured must evaluate their circumstance, and decide whether to continue to pay 125%, or accept the 149% PAF for pending and future disputes knowing that even a 149% payment will not stop the air ambulance carriers from requesting a SOAH hearing, then appealing any decision that denies their preemption argument and orders anything less than full billed charges. And we believe there is strong evidence the 125% is fair and reasonable.

These interim orders by the ALJ (on preemption and the “fair and reasonable” allowance) are significant blows to the air ambulance industry’s nationwide strategy, and will be appealed. FOL will keep you posted of the progress of these important issues

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 or (512) 435-2162.