ADVISORY NO. 503

TOPIC: TRAVIS COUNTY DISTRICT COURT RULES AIR AMBULANCE PROVIDERS SUBJECT TO DWC FEE SCHEDULE

Several years ago, the air ambulance industry began claiming that its bills were not bound by or subject to state workers' compensation fee guidelines on the basis the federal Airline Deregulation Act preempted state law. This issue has been making its way through courts across the country with various presentations and outcomes. On December 15, 2016, we took the third step in that process in Texas. Judge Stephen Yelenosky, in Texas Mutual Ins. Co. v. PHI Air Medical, LLC, Cause No. D-1-GN-15-004940, has agreed with carriers that air ambulance bills are subject to state regulation by the Texas Department of Insurance and the Division of Workers' Compensation.

A Brief History

Following the promulgation of the 2008 Medical Fee Guidelines, and contemporaneous DWC Medical Fee Dispute Decisions, Texas carriers had been paying 125% of the Medicare air ambulance fee schedules. And air ambulance providers had been accepting those payments.

In recent years, air ambulance providers began demanding the full amount of their billed charges under the claim that the Airline Deregulation Act preempted any state law that impacted the charges by an air carrier. Carriers challenged that assertion at DWC and SOAH.

In the Texas challenge, carriers cited the reverse preemption provisions of the McCarran-Ferguson Act. That Act generally reserves to the states regulation of insurance matters. That Act provides that a federal statute will *not* preempt a state statute enacted "for the purpose of regulating the business of insurance" *unless* the federal statute "specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

Over 600 of these disputes have made their way to DWC and more have accumulated on a holding docket at SOAH. In the meantime, a handful of test-case disputes were set on a SOAH docket heard in April 2015. The ALJ agreed the McCarran-Ferguson Act allowed state regulation of insurance matters related to air ambulance services, including reimbursement.

However, rather than complying with the well-established precedent of applying the 125% of Medicare allowance from the DWC medical fee schedule, both the DWC and the SOAH ALJ , ruled that the fee schedule did *not* apply, meaning that the catch-all "fair and reasonable" standard applied. In the meantime, the DWC began ruling the air ambulance providers were entitled to their full billed charges under the "fair and reasonable" standard.

In the April 2015 SOAH docket, the ALJ found that under the evidence presented in that case, 149% of Medicare was appropriate for that small group of disputes. FOL advised at the time that that 149% figure was not supported by any law or evidence, and was a one-off finding limited to one air carrier for a very brief period of time, and limited to the small number of cases on that docket. FOL continued to recommend payment of 125% of the Medicare air ambulance fee schedule.

Both the carriers and providers filed for review and declaratory judgments related to that SOAH Docket, and the DWC intervened. The air ambulance industry attempted to remove the suit to federal court while also requesting a declaratory judgment seeking to establish preemption of the Airline Deregulation Act over the state workers' compensation fee schedules. The federal judge returned the case to the state courts. In the meantime, the air ambulance companies have appealed the federal district court's dismissal of their declaratory judgment to the 5th Circuit Court of Appeals.

<u>The December 15, 2016 State District Court Ruling</u>

In the meantime, the Travis County District Court Judge has ruled that the ADA:

1. Does <u>not</u> preempt the medical fee schedules, policies and guidelines created by the Texas Labor Code and the DWC rules concerning health care provider fees;

2. Does not preempt the Labor Code's prohibition of billing injured workers (thus, prohibiting the air carriers from carrying out their threat to balance bill injured workers); and

3. Does not preempt the Labor Code's authorization for the DWC to assess sanctions for possible administrative violations by air ambulance carriers (allowing enforcement measures against air carriers tempted to balance bill or otherwise discriminate against injured workers).

In ordering the cases be remanded back to SOAH, the Trial Court reversed the SOAH ALJ's determination that 149% of Medicare was fair and reasonable, and concludes that no additional payments greater than 125% of the Medicare air ambulance fee schedule are due.

It is expected that these issues will continue into the state and federal courts. But in the meantime, the DWC and SOAH now have some guidance on how to proceed with these mounting dispute dockets. And the DWC now has some support for protecting injured workers from any balance billing threat that might be created by any order of reimbursement of less than full billed charges.

FOL continues to recommend that air ambulance services be paid using Medicare policies and at 125% of the Medicare air ambulance fee schedule applicable for the date of service. You can expect the air ambulance companies to continue to demand full billed charges and to appeal any adverse determination.

We would also continue to recommend consideration of retrospective medical necessity review related to the appropriateness of air transport versus ground transport when the facts justify, and following the applicable Medicare guidelines and policies. Generally, if the need for air transport was not justified and documented, then ground ambulance rates would apply.

If you have any questions, please contact Steve Tipton at smt1@fol.com.