



ADVISORY NO. 508

TOPIC: The Austin Court of Appeals Issues Opinion in Air Ambulance Federal Preemption Dispute

The Third Court of Appeals in Austin issued its opinion in [*PHI Air Medical v. Texas Mutual Ins. Co., et al.*](#) on January 31, 2018. The Court determined the Texas Workers' Compensation Act and Division of Workers' Compensation rules related to reimbursement to air ambulance providers are preempted by the federal Airline Deregulation Act (ADA), and are not subject to reverse preemption under the federal McCarran-Ferguson Act. The decision is limited to the statutes and rules relating to reimbursement rates, and explicitly does not address the balance-billing prohibition in Division rules. The Court remands the case back to the trial court for further proceedings.

The State District Court had determined the McCarran-Ferguson Act (MFA) kept reimbursement in the hands of Texas statutes and Division rules. It concluded that PHI could recover no more than 125% of the Medicare air ambulance rate, and that the injured employee could not be balance-billed.

PHI Air argued that the ADA prevents the State from regulating the "price" the air ambulance company charges for its medical transport services, thereby preventing the State from regulating reimbursement by workers' compensation carriers. The Court of Appeals agrees. The Court concludes that the ADA preempts those statutory and regulatory reimbursement amounts "as they attempt to regulate PHI's rates."

The Court also concludes the MFA does not reverse preempt the ADA, that would otherwise allow Texas to regulate air ambulance reimbursement in workers' compensation cases. The Court reasoned that the MFA only applies if the Workers' Compensation Act and Division rules were enacted "for the purpose of regulating the business of insurance." Then concluding that the payment of a claim is not related to "the business of insurance" (in part because the Court believes the

workers' compensation scheme does not spread risk, nor is such reimbursement the performance of an insurance contract), the Court decides the MFA does not apply.

It is unclear what the outcome of a remand to the trial court would be. This decision is also subject to appeal to the Supreme Court of Texas. The Opinion does not yet deliver a resolution of what workers' compensation carriers, certified self-insureds, or governmental entities owe air ambulance carriers for services rendered to an injured worker.

Note this is the Texas state court track on the preemption issue. Different parties are also litigating similar issues in federal district court. Cross-summary judgment motions on the preemption issue are due in March 2018 in the federal case. We will keep you apprised of further developments in this and the federal case.

Until further notice, we believe air ambulance bills should continue to be paid at 125% of posted Medicare rates. Please contact Steve Tipton if you have additional questions. smt1@fol.com