# ADVISORY NO. 520

## TOPIC: The Third Court of Appeals Issues its Second Opinion in the Air Ambulance Cases-One Step Forward, Two Steps Back

The Supreme Court of Texas previously reversed the Third Court of Appeals' initial conclusion the Airline Deregulation Act ("ADA")(49 U.S.C. § 41713) preempts the reimbursement provisions of the Texas Workers' Compensation Act (the "Act"). See *PHI Air Medical, LLC v. Texas Mutual Ins. Co.*, 549 S.W.3d 804, 816 (Tex. App.—Austin 2018), rev'd, 610 S.W.3d 839, 843 (Tex. 2020). After denial of *certiorari* by the U. S. Supreme Court, and upon remand to the court of appeals, that court has now addressed PHI's remaining issues the court did not address in its original opinion.

**Summary**

In its opinion of February 3, 2022, the court of appeals:

(1) affirms the trial court's summary judgment in favor of the Insurers, concluding the trial court did not err in determining the ADA does not preempt the medical fee guidelines, and the balance billing prohibition found in Labor Code § 413.042;
(2) reverses the trial court's grant of Insurers' plea to the jurisdiction (for failure to file suit within 45 days), which dismissed PHI's counter-petition for judicial review of the SOAH decision;
(3) reverses the portion of the trial court's summary judgment in favor of Insurers which determined PHI is entitled to reimbursement no greater than 125% of the Medicare rate under the existing medical fee guideline, remanding the cause to SOAH; and
(4) remands the case back to the trial court for proceedings and judgment consistent with the decision of the Supreme Court of Texas and the Third Court of Appeals.

**Discussion**

**Does the ADA preempt the § 413.042 balance billing prohibition?** The court says, "No." The court considers anew that this a question of whether, *on this record,* PHI established that—in combination—the fair-and-reasonable payment and the § 413.042 balance billing prohibition have a "significant effect" on its "prices for carrying injured customers by air."

As a summary judgment from the trial court, both appellate courts have noted three different tribunals—the Division, the ALJ, and the district court—have determined three different "fair and reasonable" amounts to which PHI was entitled, based on the same underlying evidence. As

the fair- and-reasonable amount to which PHI is entitled has not yet been finally determined, PHI cannot now show it would, in fact, recover significantly less for its services under the fair-and-reasonable standard than its full billed amount (its "price").

Note: The effect of this reasoning is unclear, as it may conflict with the Supreme Court's conclusion that from this record that the ADA does not preempt "the fair-and-reasonable standard [because it] does not have a significant effect on PHI's prices."

The court concludes that PHI did not meet its summary-judgment burden of proving whether the entire Act (the fair-and-reasonable standard and the balance billing prohibition) has a "significant effect on PHI's prices."

**Did the trial court have jurisdiction over Insurers' petition for judicial review?** The court says, "Yes".

PHI argued the Insurers had not exhausted its administrative remedies by not first requesting a benefit review conference (BRC) under Labor Code §§ 410.024(a) and 413.0312. Under Rule 133.307, that requirement applies to a request for Medical Fee Dispute Resolution filed on or after June 1, 2012.

It is undisputed that PHI first requested MFDR for these disputes before June 1, 2012. The requirement of a BRC is not applicable.

**Did the trial court err in granting Insurers' plea to the jurisdiction?** The court says, "Yes". The trial court dismissed PHI's petition for judicial review of the SOAH decision based upon Labor Code § 413.031(k-1)'s requirement that a petition for judicial review be filed within 45 days of the mailing of a SOAH decision.

Based upon recent Texas Supreme Court authority, the court of appeals holds that time deadline filing requirement is not a *jurisdictional* prerequisite to suit. The court holds that the trial court erred in granting Insurers' plea to the jurisdiction, dismissing PHI's counter-petition for judicial review. All of PHI's pleaded claims are now back at the trial court for consideration.

Note: The carriers could still prevail on any limitations defense raised, if the statutory time requirement is deemed "mandatory".

**What amount of reimbursement is appropriate?** The court says, "We don't know."

The trial court has not determined whether the "fair and reasonable" standard applies (which would potentially allow PHI to obtain reimbursement in the amount of 125% (or greater) of Medicare, up to and including its full billed charges; or whether a specific Division fee guideline applies (which would limit PHI's reimbursement to only 125% of Medicare).

The trial court's current bare finding the amount due is 125% of Medicare is reversed. This question goes back to the trial court to first determination the proper fee standard, then the fee amount under the facts of the case.

**Final footnote**

PHI has the option of appealing the court of appeals decision that the fair-and-reasonable standard in combination with the balance billing prohibition are not preempted by the ADA. In that case, that issue may go up stream to the Texas Supreme Court, and again to the U.S. Supreme Court. But, even if that decision were to be reversed by a higher court, the judgments of the court of appeals and supreme court have not reached the other ground asserted by carriers…that the McCarran-Ferguson Act (MFA) reverse preempts these matters of insurance regulation to the states. The determination by SOAH that the MFA does apply has never been reached (and reversed) on appeal…and perhaps, again, no petition to the U. S. Supreme Court would be ripe for review until the MFA matter is also resolved by the lower courts.

Full opinion at:

https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=57a08801-8ae5-4db5-b115-bc5f72c1d866&coa=coa03&DT=Opinion&MediaID=000bd8f3-8bde-41d4-84c2-82d146a86b7e