

The McCarran-Ferguson Act and the ADA

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The 2016 U.S. District Court North Dakota decision was a blow to states' efforts to control the ever-increasing costs of air ambulance transports. With the proliferation of helicopter air ambulance bases across the nation and the increasing cost of an air medical flight, now approaching seventy-five to one hundred thousand dollars per patient transport, states have taken an interest in managing their own insurance costs as well as regulating the air ambulance industry within their respective state. States have long maintained the authority to regulate emergency and medical care within their states. However, providing air ambulance services introduces conflict between the authority of states and the federal government to regulate providers. Numerous challenges to states authority have drawn lines whereas state licensure of medical providers and adherence to medical care standards is accepted; while regulation authority for air transport, medical equipment and configuration within the aircraft, safety equipment and training, remain under federal control. Air ambulance operators, those providing air ambulance aviation services, have successfully relied on the 1978 Airline Deregulation Act to prevent state intrusion into certificates of need, geographic service areas, and price controls. The test under the Airline Deregulation Act is whether state regulation crosses the line of controlling price, routes or service of an air carrier.

In the McCarran-Ferguson Act, Congress delegates states' authority to regulate insurance. As a means of controlling the cost of air ambulance transports, especially for cases under a state's workers' compensation insurance program where the state has a direct interest in controlling costs, states have relied on their authority under the McCarran-Ferguson Act. The test under the McCarran-Ferguson Act is the state's purpose to regulate the business of insurance.

The Airline Deregulation Act of 1978 (49 U.S.C. Section 41713)

The Airline Deregulation Act (ADA) preempts states from enacting any "law, regulation, or other provision having the effect of law related to price, route, or service of an air carrier." The purpose of the ADA was to deregulate the passenger airline industry to encourage competition and efficiency while lowering prices, expanding services, and enhancing safety. The ADA has been used successfully in many judicial and administrative proceedings to prohibit states and municipalities from implementing regulations that attempt to regulate the rates, routes or services of air carriers, including Helicopter Air Ambulances (HAA).

The McCarran-Ferguson Act of 1945 (15 U.S.C.A. § 1011 et seq.) – State control over insurance.

The McCarran-Ferguson Act (MFA) provides that state law shall govern the regulation of insurance and that no act of Congress shall invalidate any state law unless the federal law specifically relates to insurance. The act thus mandates that a federal law that does not specifically regulate the business of insurance will not preempt a state law enacted for that purpose. A state law has the purpose of regulating the insurance industry if it has the "end, intention or aim of adjusting, managing, or controlling the business of insurance". The MFA does not prevent the federal government from regulating the insurance industry. It provides only that states have broad authority to regulate the insurance industry unless the federal government enacts legislation specifically intended to regulate insurance and to displace state law.

“No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, unless such Act specifically relates to the business of insurance.”

Airline Deregulation Act vs. McCarran-Ferguson Act

Several states have active challenges as to whether the MFA or the ADA is primacy when a state wishes to set rates for HAA reimbursement for state-funded insurance programs such as Worker’s Compensation.

Alabama, Alaska, Georgia, Hawaii, Illinois, Nebraska, North Dakota, Ohio, Tennessee, Washington, Wyoming and the District of Columbia have fee schedules for HAA.

Some of these states that have imposed set fee schedules for HAA have been challenged by air operators demanding payment at 100% of charges as they are federally recognized Air Carriers and therefore not subject to the limitations of state fee schedules, arguing the ADA prohibition on price, routes and services of air carriers limits states authority to restrict payment.

Texas

PHI Air Medical, January 2012

PHI argued several medical fee disputes with the Department of Worker’s Compensation claiming 100% of charges based upon the ADA restriction on states

infringement on price, routes and service of air carriers. In this first filing, the Department agreed with PHI that the state rules are preempted by the ADA, but, carrying the argument, it refused to award any reimbursement as the ADA prevents the state from enforcing any of its rules pertaining to air carriers in these disputes.

SOAH - PHI Air Medical v. Texas Mutual Insurance Company, Docket number 454-12-7770.M4

This was a case appealing a decision of the Division of Workers' Compensation. The Air Operator, PHI, maintained that the Federal Aviation Act, as amended by the Airline Deregulation Act of 1978 preempts the authority of the Texas Labor Code to apply its medical fee schedule amount.

The Texas Mutual Insurance Company argued that the McCarran-Ferguson Act exempts The Texas Workers' Compensation fee schedule from preemption by the Federal Aviation Act, as amended by the Airline Deregulation Act of 1978.

This threshold legal issue was considered by the Texas State Office of Administrative Hearings (SOAH). It held that "the Airline Deregulation Act does not preempt state worker's compensation rules and guidelines that establish the reimbursement allowed for the air ambulance services rendered to injured workers (claimants)." SOAH found that "In particular, the McCarran-Ferguson Act explicitly reserves the regulation of insurance to the states and provides that any federal law that infringes upon that regulation is preempted by the state insurance laws, unless the federal law specifically relates to the business of insurance. In this case, there is little doubt that the worker's compensation system adopted in Texas is directly related to the business of insurance." The Administrative Law Judge concluded that the ADA – which does not regulate insurance – does not preempt the Workers' Compensation Act nor the ability of the Division of Workers' Compensation to establish reimbursement rates and timelines for reimbursement. The insurance system itself is designed for effective cost containment, and reimbursement rates are a key component of the system. The medical fee guidelines and payment rules are part of the business of insurance and, pursuant to the MFA, the ADA does not preempt or invalidate them, even as applied to air ambulance services."

The Texas Department of Workers' Compensation ruled on hundreds of air medical fee disputes based upon this SOAH decision.

PHI Air Medical v. Texas Mutual Insurance Company, January 14, 2014

This was a fee dispute heard by the Texas Department of Insurance Division of Workers' Compensation. PHI argued that Texas does not have a fee schedule for HAA and that PHI charges are reasonable and customary and should be paid at 100% of charges. PHI also argued that the ADA precludes state regulation of rates and routes. Texas Mutual Insurance agreed that PHI is entitled to payment at a "fair and reasonable amount" which it set at 125% of the Medicare rate according to the 2002 Texas Medical Fee Guidelines.

In its findings, the Division citing the SOAH decision agreed that its jurisdiction in this case is governed by the MFA and is not preempted by the ADA. However, the claim by PHI was denied for failure to file a timely appeal and thus waived its rights to a resolution.

MedTrans Corporation AirMed v. Texas Mutual Insurance Company, September 12, 2014

MedTrans argued that air ambulance services should be compensated at 100% of billed charges, citing that states cannot regulate the prices, routes or services of the air ambulance industry under the ADA. They also referred to a memorandum issued by the Division of Workers' Compensation referring to medical fee dispute decisions holding that the ADA applies to air ambulance services and that the Division of Worker's Compensation is "preempted from enforcing a regulation related to a price of an air ambulance."

The Division found, however, that the legal issue was determined in PHI v. Texas Mutual that "The Airline Deregulation Act does not preempt state worker's compensations rules and guidelines that establish the reimbursement allowed for the air ambulance services." Further MedTrans waived their right to dispute resolution under the Workers' Compensation Act due to untimely filing.

PHI Air Medical v. East Texas Educational Insurance Association, January 5, 2015

PHI argued that Texas does not have a specific fee schedule for air ambulance services and they should be paid on usual, customary, and reasonable charges, however they argued that as an Air Carrier the state is precluded by the ADA from regulation of rates and routes. The insurance company had determined a lesser amount.

In its decision the Division of Workers' Compensation referred to the SOAH decision, "the Airline Deregulation Act does not preempt state worker's compensation rules and guidelines that establish the reimbursement allowed for the air ambulance services."

The Division determined that PHI was entitled to \$0.00 reimbursement due to failure to file a timely appeal.

SOAH - Reimbursement of Air Ambulance Services Provided by PHI Air Medical, Docket number 454-15-0681.M4, September 8, 2015

At this point, the Department had heard over 250 disputes basing their decision on the earlier SOAH ruling that the MFA governed the business of insurance and applied over the ADA preemption in worker's compensation disputes.

This case involved a collective appeal of 33 claims involving workers' compensation by PHI before the State Office of Administrative Hearings (SOAH). In each case, carriers reimbursed less than PHI's billed charges. Administrative Law Judge Bennett, the same Administrative Law Judge who decided the first SOAH appeal, issued an order remanding the 33 cases back to the Division of Workers' Compensation finding that the ADA did not preempt application of the Texas Workers' Compensation Act to the fee disputes. The Division subsequently issued a decision to reimburse PHI its full charges for the 33 cases. The insurance carriers then requested a hearing before the SOAH to contest the Division's decision.

The underlying legal issues in this case is whether the Texas Workers' Compensation Act is preempted by the ADA. It was previously found that Texas law was not preempted by the ADA because the Workers' Compensation law was clearly regulating the business of insurance where the MFA "explicitly reserves regulation of insurance to the states and provides that any federal law that infringes upon that regulation is prompted by state insurance laws, unless the federal law specifically relates to the business of insurance." PHI asked for reconsideration of the previous decision. On reconsideration, the prior ruling was upheld, the MFA applies in this case, that Texas can determine proper reimbursement for air ambulance services provided to workers' compensation recipients. PHI is entitled to reimbursement within the limits of the Texas Workers' Compensation Act.

In considering what amount of reimbursement for air ambulance services would be fair and reasonable under Texas law, consideration was given to how much PHI recovers from all its Texas patients. Overall PHI recovers 125% of Medicare rates, or less, from 72% of patients. Full charges would be two to three times that amount and would exceed what is customary and "does not achieve effective medical cost control."

Insurance carriers argued for reimbursement rate of 125% of the Medicare rate, a

percentage determined for other non-air ambulance providers by Texas rules, for air ambulance services under workers' compensation. The Judge found that 149% of Medicare rates is fair and reasonable reimbursement, supports the cost structure for PHI and provides a reasonable profit. The Judge determined that PHI is entitled to 149% of Medicare rates for each of the 33 cases.

Florida

Jiminez-Ruiz v. Spirit Airlines, Inc., December 8, 2011

Jiminez-Ruiz sustained injuries as a passenger when he slipped on a ramp while deboarding in Puerto Rico. Spirit Airlines cited the ADA in asking the U.S. District Court in Puerto Rico to dismiss the case. The District Court held that the Plaintiff could bring suit for negligence although the claim pertained to a "service" provided by Spirit referring to a Ninth Circuit Court of Appeals decision where the court found that "Congress did not intend to preempt passengers' run-of-the-mill personal injury claims" in passing the ADA.

Bailey v. Rocky Mountain Holdings, LLC., October 6, 2015

This case was heard by the U.S. District Court for the Southern District of Florida. The Plaintiff argued that the air ambulance provider's billing and collection practices violated Florida laws. Under Florida's Personal Injury Protection Act, "an emergency care provider may charge the insurer and injury party only a reasonable amount which for emergency air transport is limited to 200 percent of Medicare rates. The Act further states that the provider cannot bill or attempt to collect amounts in excess of 200% of Medicare rates. The court determined that challenges to billing and collection practices have a very strong connection with the price and are expressly disallowed by the ADA's preemption provision, which intentionally leaves the price of such services to the competitive market. Further the court rejected the Plaintiff's argument that the MFA preempts the ADA, "the MFA was intended only to protect state insurance regulation from inadvertent intrusion by the federal government and not to insulate the same from every federal law."

California

Enriquez v. Couto Dairy and Zenith Insurance Company

The California Workers' Compensation Appeals Board found that the ADA did preempt the state workers' compensation fee schedule. The Board did not consider the MFA.

California Shock Trauma Air Rescue v. State Compensation Insurance Fund, March 31, 2011 – U.S. Ninth Circuit Court of Appeals

In *California Shock Trauma Air Rescue v. State Compensation Insurance Fund*, the Federal Court dismissed a claim by CALSTAR seeking to avoid the California Worker's Compensation Official Medical Fee Schedule citing CALSTAR was asking the federal court for an advisory opinion as to the preemption of the Fee Schedule, something it lacked the power to do.

In 2010, CALSTAR and others successfully lobbied the Division of Workers' Compensation to adopt an amendment to the air ambulance service fees section in the official medical fee schedule with the Secretary of State. The amended regulation exempts "air carriers," as defined in the federal Airline Deregulation Act of 1978, from the application of the fee schedule.

North Dakota

Valley MedFlight v. Department of Health, March 2016 – U.S. District Court

In 2015 the North Dakota legislature, in response to complaints over high bills, passed a law creating a primary air ambulance provider list that required providers to accept insurance payment as payment in full. A federal judge ruled that the ADA prohibited the state from placing restrictions on air ambulance services, and that fee schedule restrictions were overreaching and an attempt at price controls specifically prohibited by the ADA.

Kansas

EagleMed, LLC v. Travelers Insurance, March 2016

In October, 2015, in a fee dispute brought by EagleMed, the Kansas Department of Workers' Compensation issued an order upholding the Kansas Workers' Compensation Fee Schedule citing as justification the Texas decision in *PHI vs. Texas Mutual Insurance Company* that held the MFA applied over the ADA, "The Hearing Officer determined that because the Kansas Workers' Compensation Act was enacted for the purpose of regulating the business of workers' compensation insurance, the MFA precluded ADA preemption of the Fee Schedule." EagleMed appealed to the Kansas Workers' Compensation Board.

In this case both EagleMed and Travelers Insurance agreed that the ADA preempts the

application of the Fee Schedule to air ambulance services. Without consideration of the Fee Schedule, the dispute was over how much EagleMed should be paid. Travelers argued that the ADA preemption effectively binds EagleMed to the federal Medicare Fee Schedule. EagleMed argued that it is entitled to 100% of charges. The Board agreed that the Fee Schedule is preempted by the ADA, but did not determine an amount of reimbursement for EagleMed noting that the Fee Schedule did not address air ambulance services, and the ADA does not address payment. The case was remanded back to the Department to determine a fair and reasonable amount.

Montana

The State of Montana is taking a more methodical approach. The 2015 Montana Legislature passed a joint Senate and House resolution to study membership-based ambulance services to determine the impact on health insurance, healthcare access, and healthcare costs. Since February, 2016, the State Auditor's Office has convened a work group to study membership-based air ambulance programs, and draft legislation. Air Ambulance Membership is a subscription based enrollment that defrays a portion of the cost of air ambulance transport for its subscribers.

During the summer of 2016, the workgroup heard from air ambulance providers and insurers and conducted detailed cost analyses. A bill has been drafted that would allow insurers to assume payment responsibility by notifying out-of-network air ambulance providers of coverage of insured patients. Notice would limit a providers' ability to balance bill the patient or otherwise seek collection from the patient. The bill stipulates that payment for out-of-network claims be paid at in-network rates or lower. The bill also outlines the independent dispute resolution process. Clearly the bill is aimed at the "business of insurance" and controlling cost as protected by the MFA. As the bill has yet to be introduced, the outcome is uncertain.

The link to the Montana workgroup can be found at <http://leg.mt.gov/css/committees/interim/2015-2016/Economic-Affairs/Committee-Topics/Ambulance/ambulance-memberships.asp>

Conclusion

For the most part, state administrative decisions under workers' compensation claims where a state has a direct interest in the workers' compensation insurance program, and a state can demonstrate that regulation is for the "purpose of regulating the business of insurance," the MFA is supported over arguments for preemption by the ADA.

In cases brought before federal courts there is more skepticism of state efforts to address excessive charges as regulation of “price, routes and service” of air carriers, which is expressly prohibited by the ADA. However, the federal courts have recognized that the ADA was never intended by Congress to give blanket protection to air carriers as noted in the Florida personal injury case, *Jiminez-Ruiz v. Spirit Airlines, Inc.* The North Dakota and Montana efforts directed at insurance present a renewed effort to manage the escalating costs of air ambulance transport.

It is worth noting that the ADA preemption against state control over air ambulance pricing has only been applied to air operators that bill patients for air ambulance transport. It is not known if traditional air medical programs (i.e. a healthcare organization contracts with an air operator for aviation services – the healthcare organization bills for the air medical transport) would also be exempt as an indirect air carrier from any state control over air ambulance pricing.