Air Ambulances

Can States Establish Fee Schedules?
McCarron-Ferguson Act

The McCarran-Ferguson Act leaves regulation of insurance to the states and provides, “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, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.” 15 USC § 1012. 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."  U.S. Dept. of Treasury v. Fabe, 508 U.S. 491, 113 S. Ct. 2202, 124 L. Ed. 2d 449 (1993).

Federal Courts have set out three elements for determining whether a state law controls over (reverse preempts) a federal statute:

(1) The federal statute does not specifically relate to the business of insurance; (2) the state law was enacted for regulating the business of insurance; and (3) the federal statute operates to invalidate, impair, or supersede the state law.
Nebraska Statute and Medical Services Fee Schedule

- Section 48-120(1)(a) of the Act provides, in part:
  - “The employer is liable for all *reasonable medical, surgical, and hospital services*. .. which are required by the nature of the injury. . . subject to the approval of and regulation by the Nebraska Workers' Compensation Court, *not to exceed the regular charge made for such service in similar cases.*”

- Section 48-120(2)(b) of the Act provides, in part:
  - “. . . the compensation court shall establish schedules of fees for such services. . .”

- The Medical Services Fee Schedule contains the following language:
  - For services not covered by this schedule, (e.g., prescription medication, prosthetic devices, durable medical equipment, and *ambulance services,* the actual charge shall be paid in full unless the payor has evidence that the actual charge exceeds the regular charge for such service in similar cases.

- Last summer is when I began to learn there was more to this issue.....
Federal Preemption?

In response to a query from administrative staff of the court, we received the following response from an insurance company:

“Our position is that the Nebraska fee schedule does not apply...pursuant to the Airline Deregulation Act of 1978 (ADA), which preempts the states’ ability to enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route or services of an air carrier (49 U.S.C. §41713(b)). The provider...for each injured worker was an air carrier as referenced under the ADA and is in fact operating pursuant to an FAA Part 135 Air Carrier Certificate.”

That was the first I had heard of this issues. When I checked into further, I found that Texas was also dealing with the issue.

NOTE: The preemption argument we received was from an insurance company. Texas was receiving the argument from an air ambulance company.
What was happening in Texas?

In a September 8, 2015 decision rendered after a lengthy procedural history, an Administrative Law Judge of the Texas State Office of Administrative Hearings determined that the Texas workers’ compensation statute was not preempted by the ADA and that the appropriate reimbursement was 149% of the Medicare rate. ALJ Craig R. Bennett reached the following conclusions of law in the case of In Re: Reimbursement of Air Ambulance Services provided by PHI Air Medical:

- The TWCA, Texas Labor Code § 401.001, et seq., including the relevant reimbursement requirements, is not preempted by the ADA. A separate federal law, the McCarran-Ferguson Act, 15 U.S.C. § 1011-1015, explicitly reserves the regulation of the business of insurance to the states. Accordingly, reimbursement of the services at issue is governed by the TWCA and the rules applying it.

- After further analysis of other Texas provisions, the determination was made that the proper reimbursement was 149% of the Medicare reimbursement amount.
What about other states?

In California there was a case that arrived at a different conclusion than Texas.

In *Enriquez v. Couto Dairy and Zenith Insurance Company*, 78 Cal. Comp. Cases 323 (2013) (copy attached), the California Workers’ Compensation Appeals Board found that the Airline Deregulation Act did preempt the state workers’ compensation fee schedule provision if the air ambulance provider was an air carrier as defined by the Airline Deregulation Act.

It should be noted that the *Enriquez* case did not include any discussion of the McCarran-Ferguson Act.

According to an article in WorkcompCentral there are other states with fee schedules for air ambulances:

The Airline Deregulation Act states, in part: “... no state or political subdivision thereof and no interstate agency or other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide interstate air transportation.” 49 USC § 41713(b). (Emphasis supplied).

The Airline Deregulation Act does not include a fee schedule.

The United States Supreme Court addressed the scope of the Airline Deregulation Act in *Morales v. TransWorld Airlines, Inc.*, 504 U.S. 374 (1992). The Court explained that in 1978, Congress determined that maximum reliance on competitive market forces would best further efficiency, innovation, and low prices. The preemption provision was added to the ADA ensure that the States would not undo federal deregulation with regulations of their own. *Morales, supra*, 504 U.S. at p. 388.

Wait!! What about the McCarron-Ferguson Act?
How does Medicare reimburse Air Ambulance services?

- Medicare has an Ambulance Fee Schedule that includes air ambulance services. The payment is “… based on the lesser of the actual charge or the applicable [Medicare] fee schedule amount.” 42 CFR § 414.610(a). There are separate formulas for calculating Medicare payment based on whether the ambulance is ground or air.

- Medicare has two different base rates, one for Fixed Wing (airplanes) and one for Rotary Wing (helicopters).
Here is the Medicare Ambulance Fee Schedule formula:

Base payment

- Relative value unit
- Ambulance conversion factor

Adjusted for geographic factors

- 70% labor-related portion, adjusted by geographic adjustment factor
- 30% non-labor related portion

Mileage payment

- Mileage
- Mileage rate

Total fee schedule ambulance payment

PE GDP CI
Here is the Medicare rates for Nebraska

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Is the issue resolved?

- In Nebraska, there was a single judge opinion that determined the “..... fair and reasonable charge for air ambulance services in similar cases to the current case would be 150% of the Medicare rate....”
- I do not believe that order was appealed.
- In Texas, the decision of the ALJ was appealed. I am not aware of any ruling in that case.
- In March of 2016, a Federal Judge in North Dakota ruled that the ADA prohibited the state from placing restrictions on air ambulance services.
- Nebraska has an Interim Study, LR554: “The purpose of this study is to review and examine information regarding air ambulance costs and the information available to consumers about such costs.”
- For now.....the answer to the question of whether or not fee schedules apply to Air Ambulance providers appears to depend on the state in which the service was provided.
Thank you.