Appeal No.17-117903-A
(Consolidated with Appeal Nos.
17-117904-A, 17-117905-A & 17-117906-A)

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EAGLEMED, LLC

Medical Provider/Appellee,

vs.

TRAVELERS INSURANCE,

Insurance Carrier/Appellant.

REPLY BRIEF OF APPELLANT

On Petition for Review from the Workers Compensation Board
Docket Nos. 8,500,703; 8,500,704; 8,500,705 & 8,500,706

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND RULES:

OTHER AUTHORITIES:

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The overarching theme of the response brief submitted by appellee EagleMed, LLC in this matter is quite plain: EagleMed is above scrutiny. Thus, while every other medical provider furnishing services under the Kansas Workers Compensation Act (KWCA) is bound to charges that are fair, reasonable and necessary, EagleMed is free to charge amounts that are unfair, unreasonable and unnecessary. And there is nothing anyone, including the Division of Workers Compensation, can do about it.

EagleMed clothes itself in this mantle of unassailability through the Airline Deregulation of 1978 (ADA), which determined that price controls for air transportation are best left to market forces. But unlike the commercial airlines with which the ADA was most

concerned, EagleMed has virtually no competition and there are therefore no market forces that create any form of self-regulation or consumer protection. Federal law has recognized this. Notwithstanding the fact that the ADA is applicable to air ambulance services, federal statutes ***do*** regulate the prices those services can charge. EagleMed claims, however, that it can escape this regulation because its services here were not provided under a federal scheme, but rather a state workers compensation system. Thus, EagleMed is in the enviable position of being able to unilaterally set its charges outside the jurisdiction of either a state or federal regulatory framework.

But, when EagleMed wants to ***enforce*** its charges, it is more than happy to invoke the assistance of the Kansas Division of Workers Compensation. Thus, according to EagleMed, while the Division has no power whatsoever to question EagleMed's charges, it is fully empowered—in fact, obligated—to compel the payment of those charges.

If EagleMed's arguments are correct, then it certainly is good to be EagleMed. Fortunately, the law is not as restricted as EagleMed would like, and EagleMed is not allowed to have its cake, eat it, and resell it at a profit, all at the same time.

ARGUMENTS AND AUTHORITIES

As the Court is aware, EagleMed's position in this appeal is that it is entitled "to an award of its full billed charges, both under the applicable workers'-compensation fee schedule and, alternatively, applying the ADA and Kansas severability analysis." (Brief of Appellee, p. 11). In support of its position, EagleMed provides the Court with a detailed account of the federal regulation and deregulation of the airline industry (although it would

be more accurate to say *commercial* airline industry). This includes a discussion of the general rules which apply in the context of federal preemption under the ADA. (Brief of Appellee, pp. 14-23).

While Travelers disagrees with certain aspects of this discussion—particularly with respect to the scope and significance of Department of Transportation ("DOT") oversight—much of it is not in dispute. That is, there is no dispute that the Federal Aviation Act of 1958 ("FAA") was the ADA's predecessor and that the ADA was enacted to replace the FAA's rate-setting process with a market-based approach (although, again, all of this was done in the context of the *commercial* airline industry). Likewise, there is no dispute that air ambulances are "air carriers" under the ADA or that the ADA includes an express preemption provision found in 49 U.S.C. § 41713(b)(1). There is also no dispute that state-law principles of statutory interpretation apply to questions of severability. Thus, in the interest of efficiency and recognition of the directives found in Supreme Court Rule 6.05, Travelers will not delve into the nuances of the parties' differences with respect to these matters.

However, a brief response is necessary on a couple key points. Before addressing those points though, it is necessary to briefly return to a "30,000 foot view" of the issues which must be decided by the Court in this case. In this regard, *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995)—a cased and relied on by EagleMed—as illustrative.

The plaintiffs in *Wolens* were participants in American Airlines' frequent flyer program who brought a class action lawsuit against the airline alleging consumer fraud and

breach of contract. 513 U.S. at 219. American defended on the grounds that these claims were preempted by the ADA. *Id.* The Court ultimately agreed with American with respect to the consumer protection claims, but did not agree that the ADA preempted state review and enforcement of the contract claims. *Id.* According to the Court, the contract claims presented essentially two issues:

> First, who decides (here, courts or the DOT, the latter lacking contract dispute resolution resources for the task)? On this question, all agree to this extent: None of the opinions in this case would foist on the DOT work Congress has neither instructed nor funded the Department to do. Second, where is it proper to draw the line (here, between what the ADA preempts, and what it leaves to private ordering, backed by judicial enforcement)?

513 U.S. at 234. The Court decided both issues in favor of the frequent flyer participants, finding state courts were the proper authorities to decide the contract dispute, even if there was an intersection with the ADA. 513 U.S. at 234-35. With respect to the necessary "line drawing," the Court took the "middle course" drawing its line in a manner which allowed the state court to interpret and enter a judgment on the contract at issue without running afoul of the ADA. *Id.*

The issues set forth in *Wolens* are strikingly similar to this case. (Brief of Appellant, p. 12; Brief of Appellee, p. 4). However, the "who decides" question is essentially a non-issue here—in fact, Travelers would say that the "who decides" question is entirely not at issue as the parties are in general agreement that the Division of Workers Compensation has jurisdiction to address this fee dispute. However, the Board, has placed this matter in issue in light of its disposition of this case. *See infra* Part II. EagleMed is the one that initiated this

fee dispute before the Division of Workers Compensation. And while EagleMed argues that the DOT is the only entity with any economic regulatory authority over it (Brief of Appellee, pp. 16-18), it nonetheless, seeks Division enforcement of its voluntary undertakings.[1]

Accordingly, it is truly the permissible "line drawing" which is at the heart of this dispute, i.e., what can the state do without running afoul of the ADA? EagleMed draws its line at *anything* which would "reduce" its billed rates. (Brief of Appellee, pp. 26-27). The other end of the spectrum would be a state fee schedule which sets blanket statutory caps on what an air ambulance service may charge and requires the service to reduce its fees accordingly. The parties are in agreement that this level of regulation would violate ADA preemption. Travelers, however, takes the "middle course." *See Wolens,* 513 U.S. at 234. Under this approach, when EagleMed requests that the Division enforce EagleMed's charges, it is appropriate for the Division to subject EagleMed's invoices to at least *some* level of scrutiny before doing so. Such review may be for purposes of determining whether the charges are "usual and customary" or "fair, reasonable, and necessary." This is consistent not only with the purpose of the workers compensation act, but with federal law.

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[1] The parties apparently disagree as to whether EagleMed's services, and ultimately this fee dispute, involve voluntary undertakings on behalf of EagleMed, which argues it is required by statute and regulation to (1) respond to all service calls, and (2) seek Division enforcement for disputed invoices covering services provided to injured Kansas workers. (Brief of Appellee, pp. 39-40). EagleMed's analysis, however, stops a step short. It seems to have forgotten that it is a private entity which voluntarily chose to enter the air ambulance market. Certainly, one would presume that EagleMed was aware of the relevant regulations when it nonetheless proceeded into the marketplace. *See Marshall v. Barlow's, Inc.* 436 U.S. 307, 338 (1978) ("[B]usinesses are required to be aware of and comply with regulations governing their business activities."); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 273 (1932) ("It must be conceded that all businesses are subject to some measure of public regulation.").

I.
STATE REVIEW IS PERMISSIBLE

A. The "Usual and Customary" Standard Requires State Review

It appears that EagleMed's preferred result in this case is for the Court to apply the 2012 Workers Compensation Fee Schedule, which EagleMed contends would allow it to recover its charges in full. (Brief of Appellee, pp. 11-12). In this regard, EagleMed faults Travelers for "essentially ignor[ing]" the 2012 schedule. (Brief of Appellee, p. 23). This is an odd accusation when, within the same brief, EagleMed asserts that "[a] fee schedule directly setting air ambulance rates is obviously preempted." (Brief of Appellee, p. 26). Thus, it is EagleMed's position that a state fee schedule is not to be ignored unless it actually does something to control costs—in which case it *must* be ignored.

The problem for EagleMed is that the 2012 fee schedule *does* do something—it requires the charges of an air ambulance to be "usual and customary." Despite EagleMed's acknowledgment of that standard, it dismisses it by equating "usual and customary" with its "bills in full." (Brief of Appellee, p. 25). This result defies the plain meaning of the term.

Where a statutory term is not defined within the relevant statutory scheme, as is the case here, "the 'words . . . are assumed to bear their 'ordinary, contemporary, common meaning.'" *Midwest Crane & Rigging, LLC v. Kansas Corporation Commission*, 306 Kan. 845, 851, 397 P.3d 1205 (2017). Accordingly, Kansas courts frequently turn to dictionary definitions to inform their decisions as to the meaning of such terms. *See, e.g.*, *id.* ("Dictionary definitions are good sources for the 'ordinary, contemporary, common' meanings of words."); *State v. Ward*, —Kan.—, —P.3d—, 2018 WL 385738, at *10 (Kan.

Sup. Ct. Jan. 12, 2018) ("But plain words should be given their ordinary meaning, and dictionary definitions can be good sources for such meaning.").

Here, Black's Law Dictionary defines "usual" as "1. Ordinary; customary. 2. Expected based on previous experience, or on a pattern of course of conduct to date." BLACK'S LAW DICTIONARY 1777 (10th ed. 2014). And a similar definition is provided in the Merriam-Webster Dictionary: "1. Accordant with usage, custom, or habit; 2. Commonly or ordinarily used; 3. Found in ordinary practice or in the ordinary course of events." MERRIAM-WEBSTER DICTIONARY (Online ed. 2018). Black's Law in turn defines "custom" and the adjective form of "customary" as "(a) practice that by its common adoption and long, unvarying habit has come to have the force of law." BLACK'S LAW DICTIONARY 468 (10th ed. 2014). Again the definition found in Merriam-Webster is similar: "commonly practiced, used or observed." MERRIAM-WEBSTER DICTIONARY (Online ed. 2018).

The import of the foregoing is clear: Determining whether something is usual or customary requires a comparison to and consideration of the subject's prior practices. Or, in the context of this case, the Division must review EagleMed's charges to determine whether they are in fact consistent with EagleMed's prior practices and those of others. This of course requires a comparison of charges billed for similar services and to all categories of payors. EagleMed cannot simply declare that its charges in the context of workers compensation are commensurate with charges in other areas. That is precisely what a review would—or would not—establish. The simple acceptance of a bill submitted without review is improper as it would do nothing to inform the reviewer as to EagleMed's prior practices.

Other states have reached the same conclusion within their workers compensation statutory schemes. The court in *Geisinger Health System v. Bureau of Workers' Compensation Fee Review Hearing Office*, 138 A.3d 133, 138-39 (Pa. Commw. Ct. 2016), addressed this issue squarely, stating:

> In this case, there is nothing in the context of the language surrounding the term to indicate that the statutory definition of 'usual and customary charges' means that a provider should receive its actual charges. If that were the case, the General Assembly would have drafted the [statute] to read 'a provider's customary and usual charge' rather than 'the usual and customary charge.'

The court went on to hold that the term "usual and customary" required the charges to be determined by the "charge most often made by providers of similar training, experience and licensure for that specific treatment, accommodation, product or services in the geographic area where the treatment, accommodation product or service is provided." *Id.* at 139. *See also Midwest Neurosurgery, P.C., v. State Farm Insurance Companies*, 686 N.W.2d 572, 579 (Neb. 2004) (finding phrase "usual and customary" meant the amount the "provider typically charges other patients for the services that it provided to the injured party.").

Importantly, state review of this nature does not violate even the most broadly defined principles of ADA preemption advanced by EagleMed. In its broadest application, 49 U.S.C. § 41713(b)(1) only prohibits a state from "'impos[ing]' the State's 'own substantive standards' and policy views on an air carrier's prices." (Brief of Appellee, p. 27 [alteration by EagleMed]). Simply reviewing EagleMed's charges to determine whether such charges are usual and customary is a purely objective, factual inquiry. If the Division of Workers

Compensation determines a charge to *not* be usual and customary, it may simply decline to enforce it; it need not set a charge that *is* usual and customary as EagleMed so ardently contends would violate the ADA. There is no significant difference between an objective inquiry of this nature and one which applies rules of contract interpretation in resolving a dispute between a private party and a commercial airline. The latter, of course, has already been accepted as permissible under the ADA by the Supreme Court. *Wolens*, 513 U.S. at 234-35.

B. Reasonableness Requires State Review

A similar result occurs if the Court follows EagleMed's alternative argument—that the Kansas severability analysis (rather than simple application of the 2012 Fee Schedule) requires an award of EagleMed's charges in full—to its proper end. Here, Travelers agrees with EagleMed that K.S.A. 44-574 provides a presumption of severability of any preempted provision of the KWCA. And in light of such presumption, the offending provisions should be struck if doing so will "make the statute constitutional and the remaining provisions [can still] fulfill the purpose of the statute." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 913, 179 P.3d 366 (2008).

Here, both parties agree that the offending provision is the fee schedule (to the extent the parties disagree as to this point, both parties proceed under the presumption that the fee schedule is inapplicable in context of the severability analysis, Brief of Appellee, p. 25). And just as EagleMed explained in its brief, once the preempted provisions of K.S.A. 44-510i(e) and 44-510i(c)(2) are struck from the Act, the Court is left with the "fair, reasonable, and

necessary" language found in K.S.A. 44-510i(c)(2). (Brief of Appellee, pp. 25-27).[2] Contrary to EagleMed's assertion however, requiring air ambulance charges to be fair, reasonable, and necessary within the plain and ordinary meaning of those terms does not violate the ADA. Just as was discussed above, even under the broadest interpretations of the ADA's preemption provision, state review of air ambulance billings is permissible when the state is proceeding in a manner which does not enforce a state's subjective policies by imposing a price.

Just as is the case with respect to reviewing an air ambulance's bills for usual and customariness, a reasonableness review is entirely objective in nature. Such review simply requires the Court to consider the relevant circumstances. (*See* Brief of Appellant, p. 21 [citing cases discussing the considerations necessary to determine reasonableness]). For air ambulance billings, the relevant factors should at the very least include consideration of the type of aircraft used (rotary versus fix-wing), the location of the services being provided (rural versus urban), and the loaded miles of transport. Perhaps unsurprisingly, these are the factors applicable under the Federal Fee Schedule established by the Centers for Medicare and Medicaid Services which represent what Congress and its delegated federal policymakers have determined are reasonable rates for an air ambulance's services. (Brief of Appellant, pp. 15-16).

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[2] To be precise, EagleMed argues that the "fair, reasonable, and necessary" language may be struck from the Act as preempted, or, in the alternative, can remain while being interpreted in a manner which does not offend the ADA's express preemption provision. (Brief of Appellee, pp. 32-33).

As such, a Court considering these factors would be safely applying federal policy, not its own. Thus, to the extent the Court has concern that allowing the state to review an air ambulance's charges for reasonableness would impermissibly involve application of state policy to a degree sufficient enough so as to constitute a decision which has "the force and effect of law," the Court may nonetheless allow state review of the charges at issue by ordering the Division to limit its review to the factors which are clearly acceptable federal policy, i.e., the factors set forth in the Federal Fee Schedule.

Just as EagleMed explained in its brief, the Court is permitted under the state's severability analysis to reinterpret "fair, reasonable, and necessary" in a manner which would not violate the ADA. (Brief of Appellee, pp. 32-33). If state review which imposes state substantive standards or policies violates the ADA as EagleMed contends, there can be no dispute that state review which involves only consideration and application of federal policy does not run afoul the ADA.

To be clear, Travelers is not advancing new arguments as to why the Federal Fee Schedule *itself* should displace the KWCA fee schedule and apply to this dispute. Travelers will stand on its arguments set forth in its opening brief in this regard. Travelers, however, is simply making the point that, even if the Court decides this case by either (1) applying the 2012 Fee Schedule; or (2) striking the schedule and reinterpreting the KWCA's "fair, reasonable, and necessary" language so as to not violate the ADA, the Division's work is not done. EagleMed's charges in this case—or any future case—cannot simply be accepted as submitted. If EagleMed wishes to enforce its charges via the fee dispute provisions set forth

in the KWCA it must accept some level of scrutiny as to those charges. Objective review of those charges or application of clearly acceptable federal policy does not violate the ADA.

C. State Review Serves the Kwca's Purpose and Does Not Violate the ADA.

While Travelers discussed "severability" in its opening brief, it did not go into detail regarding the purposes of the KWCA. It should go without saying that striking the applicable fee schedule provision from the KWCA, and interpreting the remaining portions of the Act in the manner discussed above, would in fact serve the purposes of the KWCA. However, a short response is necessary here as EagleMed appears to take the absurd position that entering an order which requires the Division to order Travelers—and, therefore, all similarly situated payors in the future—to pay EagleMed literally whatever it so chooses, somehow ***actually serves the purposes of the Workers Compensation Act.***

In isolation it may be true that "the KWCA's overall goal [is] protecting both employees and employers from the financial losses associated with employees' on-the-job injuries. (Brief of Appellee, p. 29, citing *Green v. Burch*, 164 Kan. 348, 355, 189 P.2d 892 (1948)). This stated purpose, however, is markedly different from the one which is found in EagleMed's concluding remarks on this topic. (Brief of Appellee, p. 33). There, EagleMed states that the line it wishes to draw—requiring full payment of its charges with no scrutiny—"further[s] the purposes of the Workers' Compensation Act by ensuring that air ambulance bills are paid by insurers rather than employees or employers." *Id.*

There is no legal authority for the position that the purpose of the KWCA is to ensure that air ambulance bills are paid by insurers. In fact, the authority cited by EagleMed directly

contradicts this argument. Again, the purpose of the Act is to protect employees and employers from the financial losses associated with on-the-job injuries. *See, e.g., Green*, 164 Kan. at 355. No articulation of the purpose of the Act describes a goal to force payment from insurance carriers as EagleMed suggests. EagleMed fails to recognize that the KWCA allows for self-insured group funds. *See* K.S.A. 44-581 *et seq.* In fact, all state workers are the beneficiaries of a self-insured group fund consisting of the various state agencies. *See* K.S.A. 44-575 *et seq.* This means that it could and may often be a private employer or the state itself forced to pay the devastating charges submitted to it by EagleMed.

Certainly an order which requires Travelers, which stands in the same shoes as a private employer, to pay whatever inflated rate EagleMed wishes to charge would be inapposite with the goal of protecting Kansas employers and their employees from financial loss arising out of work related injuries. Furthermore, it would be imprudent to assume that, even if all Kansas employers possessed workers compensation insurance, such insurers would not be forced to pass on the consequences of EagleMed's inflated rates to its insureds—Kansas employers whom the KWCA seeks to protect.

Moreover, an order of the nature EagleMed requests would quite clearly be identical to the one which the Tenth Circuit Court of Appeals just struck down in EagleMed's Wyoming fee dispute. *EagleMed, LLC v. Cox*, 868 F.3d 893, 907 (10th Cir. 2017). Although Travelers' argument in this regard is set forth in its opening brief (Brief of Appellant, pp. 24-26), Travelers does note that the *Cox* case turned on more than a simple act of comity between a federal court and state authorities. (*See* Brief of Appellee, p. 43). And while such

issues may be absent in this state court proceeding, it obvious that an order which effectively gives EagleMed a blank check funded by the accounts of Kansas employers and the state itself is overly broad and improper, and certainly not required by the ADA or any other provision of federal law. *See Cox*, 868 F.3d at 906 ("Federal law establishes no duty for states to pay the air ambulance claims of injured workers who are covered by state workers compensation statutes.").

II.
THE BOARD'S DISPOSITION WAS IMPROPER

EagleMed asserted that "Travelers argues in the alternative that the Division lacked jurisdiction over this dispute and that the award of full billed charges to EagleMed must be vacated on this basis." (Brief of Appellee p. 44). EagleMed's recount of Traveler's position with respect to the Board's jurisdiction over this matter and disposition of the fee dispute is slightly misplaced.

While this "who decides" question may be subject to this Court's *de novo review*, Travelers does not believe it is at issue. It is simply Travelers' position that, *if* the Division lacked jurisdiction to resolve the fee dispute, as it so held (R. Vol. 2., p. 543), then it similarly lacked jurisdiction to order Travelers to make payment in full. Such is a fundamental rule of law, as reflected by the authorities cited in Travelers' opening brief. (Brief of Appellant pp. 27-29).

Finally, a brief response is necessary to EagleMed's novel argument that, despite the Board's use of the word "jurisdiction", the Board did not *actually* mean it lacked "jurisdiction." In this regard, Travelers points out that, in the context of interpreting statutes,

Courts proceed under the assumption that "statutory words . . . have been consciously chosen with an understanding of their meaning, and intentionally used with the legislature having meant what it said." *Salina Journal v. Brownback*, 54 Kan. App. 2d 1, 12, 394 P.3d 134 (2017), *rev. denied* (Oct. 12, 2017). The same presumption applies when a court speaks. *See In re Estate of Anderson*, 19 Kan. App. 2d 116, 123, 865 P.2d 1037 (1993) ("We operate under the assumption that our Supreme Court means what it says when it sets out a point of law . . . ."), *rev. denied*, 254 Kan. 1007 (1994). The only logical conclusion from the Board's use of the word "jurisdiction" five times, is that the Board in fact meant "jurisdiction."

But again, it is not the Board's jurisdiction which Travelers takes issue with. It is the Board's disposition—ordering Travelers to make payment in full—which contravenes the Board's finding that it lacked jurisdiction.

CONCLUSION

If EagleMed wishes to utilize the machinery of the Division of Workers Compensation to enforce its charges, then those charges must be subject to some level of scrutiny to ensure that they are "usual and customary" and "fair reasonable and necessary"—standards that exist under both state and federal law. A review of this nature does not create a rate in violation of the ADA, but simply determines whether the state will participate in the enforcement of EagleMed's rate. If the state is powerless to conduct a review, then it is also powerless to order Travelers to pay EagleMed's charges.

For the reasons stated herein and in Travelers' opening brief, the case should be remanded to the Division for review or, in the alternative, dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of February, 2018, the foregoing Appellant's Reply Brief was submitted to the Clerk of the Appellate Courts for filing through the eFlex system, and that a courtesy copy was emailed to:

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