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.

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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NATURE OF THE CASE

On its face, this case involves a fee dispute under the Kansas Workers Compensation Act ("KWCA") between an air ambulance service provider, EagleMed, L.L.C. ("EagleMed) and a workers compensation insurance carrier, Travelers Insurance ("Travelers"). However, it raises larger legal issues involving congressional intent in enacting the Airline Deregulation Act of 1978 ("ADA"); application of the federally mandated Medicare Fee Schedule; the Division of Workers Compensation's ability to review a medical service provider's charges for reasonableness; and the interplay of each of each of these issues.

And, the case raises the far more fundamental question of whether EagleMed should be allowed to circumvent regulations designed to ensure fair and equitable billing practices

by developing a business model designed to take advantage of Kansas employers and their workers compensation carriers who have absolutely no choice in accepting or declining EagleMed's services, and no opportunity to negotiate for a fair and equitable price of those services. The decision of the Workers Compensation Board ("the Board") in this matter would allow just that. After a significant amount of procedural wrangling, the Board ultimately affirmed the order of a Division of Workers Compensation hearing officer ("the Hearing Officer") that requires Travelers to pay EagleMed its unilaterally-set charges in full without any scrutiny as to reasonableness.

Because EagleMed's charges are limited by the federally mandated Medicare Fee Schedule and may be reviewed by the Division of Workers Compensation to determine whether the charges are reasonable, the Board erred as a matter of law. Alternatively, if the Board's decision was not in error, its disposition of the fee dispute— ordering Travelers to make payment in full—was improper in light of the Board's finding that it had no jurisdiction to evaluate EagleMed's charges.

STATEMENT OF THE CASE

Factual Background

This is a consolidated appeal involving four individual workers compensation fee disputes which were disposed of collectively by the Division of Workers Compensation. In all four cases, the injured workers were transported by air ambulance and the charge for that service is in dispute. The material facts are largely undisputed and were presented, without

objection, through the memoranda filed by the parties in the proceedings before the Hearing Officer.

EagleMed is a medical service provider which provides air ambulance transportation services to injured persons in Kansas. (R. Vol. 1, pp. 117-118).[1] In providing these services, EagleMed employs both rotary (helicopter) and fixed-wing aircraft specifically equipped for medical treatment and staffed with trained emergency responders. (R. Vol. 1, p. 183-184).

Since 1999, the air ambulance industry has grown across the United States. Specifically, from 1999 through 2008, the number of patients transported in this matter increased by 35% and the number of air ambulance helicopters increased by 88%. (R. Vol. 1, p. 184) (citing U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-907, AIR AMBULANCE: EFFECTS OF INDUSTRY CHANGES ON SERVICES ARE UNCLEAR, pp. 6-7 (Sept. 2010) [*available at* http://www.gao.gov/assets/320/310527.pdf]).

Customarily, helicopters, which comprise nearly 80% of air ambulance vehicles, are utilized to carry injury patients directly from the site of the accident to a trauma hospital. (R. Vol. 1, p. 184). Here, however, three of the four cases concern fixed-wing aircraft which transported a stable workers compensation patient from a rural Kansas hospital to a more advanced trauma center in Wichita. (*Id.*).

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[1] Because the four fee disputes were only informally consolidated by the Division of Workers Compensation, there are four separate records on appeal. Although for all purposes the four underlying claims were handled as one, there appear to be slight variations (or at least different pagination) for each record certified by the Director of the Division of Workers Compensation. Since the record for the fee dispute arising from the claim of Cody Crook (Docket No. 8,500,704, Appeal No. 17-117904-A) appears to be the most complete, Travelers' record references herein are to that record.

Air ambulance transportation companies such as EagleMed receive payment for their services via three primary sources: government programs such as Medicare and Medicaid, private health insurance companies, and patients not covered by health insurance. (R. Vol. 1, p. 184-186). Each category of payor is in a position to negotiate or receive discounted rates. (R. Vol. 1, p. 185). But, other entities, such as Travelers—a workers compensation insurance carrier—have not been afforded such an opportunity. (*Id.*).

Take Medicare patients for example. EagleMed must accept Medicare payment—which is determined by a federally mandated fee schedule (referred to herein as the "Medicare Fee Schedule" or "Federal Fee Schedule")—as payment in full. 42 C.F.R. § 414.61(c)(1) and (2). The Federal Fee Schedule was first developed by the Centers for Medicare and Medicaid Services ("CMS"), an agency within the Department of Health and Human Services, through negotiated rulemaking. (R. Vol. 1, pp. 185-186) It covers air ambulance transportation services specifically, payment for which consists of three primary components: a base payment, a mileage payment to the nearest appropriate facility, and a geographic adjustment factor. (*Id.*) The Federal Fee Schedule's creation was prompted by federal legislation in 1997, and the Schedule was phased in from 2002 through 2006. (*Id.*)

EagleMed accepts these payments from government-payor patients. It also negotiates lower rates with other payors such as private health insurance carriers and individual consumers who wish to become members of the EagleMed "membership program." (*See* http://www.flyeaglemed.com/about/membership). Workers compensation carriers such as Travelers, however, are at the not-so-merciful hands of EagleMed. For these payors,

EagleMed establishes a service rate far in excess of that charged to other categories of payors. (*Id.*)

Although ultimately not directly pertinent to the issues before the Court, it is worth noting that, like the federal government, the State of Kansas also regulates the prices charged by medical providers in the context of workers compensation through a fee schedule ("the KWCA Fee Schedule"). The authority for doing so is provided in K.S.A. 44-510i(c), which states, in part:

> The director shall prepare and adopt rules and regulations which establish a schedule of maximum fees for medical, surgical, hospital, dental, nursing, vocational rehabilitation or any other treatment or services provided or ordered by healthcare providers in rendered to employees under the Workers Compensation Act and procedures for appeals in review of disputed charged or services rendered by healthcare providers under this section:
>
> (1) The schedule of maximum fees ***shall be reasonable***, shall ***promote healthcare cost containment and efficiency*** with respect to the workers compensation healthcare delivery system, and ***shall be sufficient to ensure availability of such reasonably, necessary treatment, care and attendance*** to each injured employee to cure and relief the employee from the effects of the injury.

(emphasis supplied).

For a number of years, the Division of Workers Compensation has attempted to control the charges of air ambulance providers through the KWCA Fee Schedule. These efforts have been varied. For instance, in the 2010 KWCA Fee Schedule, reimbursement was

limited to 125% of the amount set forth in the 2009 Medicare Fee Schedule. (2010 Kansas Workers Compensation Schedule of Medical Fees, p. 167 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2010.pdf]). In 2011, this portion of the KWCA Fee Schedule was changed to provide: "Air ambulance services will be limited to billed charges as per 49 U.S.C., Section 41713(b) of the Federal Aviation Act." (2011 Kansas Workers Compensation Schedule of Medical Fees, p. 164 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2011.pdf]). This provision was the same in the 2012 KWCA Fee Schedule which was in effect at the time the charges were incurred in the four claims at issue here. (2012 Kansas Workers Compensation Schedule of Medical Fees, p. 167 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2012.pdf]). In 2014 the KWCA Fee Schedule read: "Reimbursement for ambulance services (both ground and air) will be limited to the emergency medical service's billed charge, less 10%." (2014 Kansas Workers Compensation Schedule of Medical Fees, p. 197 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2014.pdf]). And as of 2017 the KWCA Fee Schedule provides: "Reimbursement for air ambulance services are limited to the amount most commonly charged for the same or similar services in a given area . . . ." (2017 Kansas Workers Compensation Schedule of Medical Fees, p. 367 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2017.pdf]).

For the four workers whose injuries underlie the fee dispute brought before this court, EagleMed submitted invoices to Travelers in the amounts of:

CARLOS RIOS:

Description of Charges	HCPC	Quantity	Unit Price	Amount
Base Rate	A0430	1.0	17500.00	$17,500.00
Loaded Miles	A0435	43.0	80.00	3,440.00
Oxygen and Oxygen Supplies	A0422	1.0	587.25	587.25
EKG Monitoring 3 Leads	93041	1.0	70.02	70.02
TOTAL				**$21,597.27**

WILLIAM LEIKAM:

Description of Charges	HCPC	Quantity	Unit Price	Amount
Base Rate	A0430	1.0	17500.00	$17,500.00
Loaded Miles	A0435	133.0	80.00	10,640.00
EKG Monitoring 3 Leads	93041	1.0	70.02	70.02
Ativan (Lorazepam)	J2060	1.0	29.53	29.53
Oxygen and Oxygen Supplies	A0422	1.0	587.25	587.25
TOTAL				**$28,826.80**

CODY CROOK:

Description of Charges	HCPC	Quantity	Unit Price	Amount
Base Rate	A0431	1.0	17500.00	$17,500.00
Loaded Miles	A0436	95.0	163.61	15,542.92
TOTAL				**$33,042.95**

WAYNE TOMMER:

Description of Charges	HCPC	Quantity	Unit Price	Amount
Base Rate	A0431	1.0	17500.00	$17,500.00
Loaded Miles	A0436	92.0	165.35	15,212.20
Zofran	J2405	1.0	17.03	17.03
IV Push	96374	1.0	141.45	141.45
EKG Leads	93041	1.0	70.02	70.02
TOTAL				**$32,940.70**

(R. Vol. 1, pp. 187-188). EagleMed took the position that there could be no reduction of these charges pursuant to the KWCA Fee Schedule because states are precluded by the ADA

from regulating air ambulance rates. (R. Vol. 1, pp. 117-118, 124-126). But EagleMed does not stop there. It goes on to argue that the ADA precludes review of its charges *in any form*. In essence, it is EagleMed's position that regardless of the amount it chooses to charge for its services, these charges are beyond review—at least in the context of workers compensation.

It is important to note that, beyond the fact that these rates are unilaterally set by EagleMed, Travelers and other workers compensation carriers have absolutely no input in the decision to utilize EagleMed's services. (R. Vol. 1, p. 122). Not even the injured workers EagleMed transports have input in this decision. The decision to hire EagleMed is always made by first responders or other medical personnel— never by the party ultimately liable for EagleMed's charges. (*Id.*). In fact, medical personnel authorizing EagleMed's services only do so upon certifying that:

> I [medical personnel authorizing EagleMed's services] am NOT assuming any financial responsibility for the transportation services provided by: _____. The ambulance supplier agrees that it will bill only the patient or any applicable third party payor for any transportation cost.

(R. Vol. 1, p. 123).

Furthermore, as the itemizations above reveal, several concerns are raised by EagleMed's invoices. First, regardless of whether a fixed-wing or rotary aircraft is used, the base unit price for EagleMed's transportation services remains the same ($17,500). Then, in addition to the base rate, EagleMed adds medical charges regardless of whether those charges were subsumed in prior billing codes established by the Health & Care Professions Council

(HCPC). For instance, HCPC code A0430 includes HCPC codes 93041 and A0422, yet EagleMed billed HCPC codes A0422 and 93041 *in addition to* HCPC A0430. (R. Vol. 2, p. 429).

Not surprisingly, these billing practices raised concerns on the part of Travelers. In an effort to reach a compromise resolution, Travelers offered payment to EagleMed for each of the four injured workers in the amount EagleMed is required to accept under the Federal Fee Schedule, as adjusted for rural areas of Kansas and the type of aircraft used. Based upon these calculations, Travelers offered EagleMed payment as follows:

Carlos Rios:	$4,704.07
William Leikman:	$5,827.27
Cody Crook:	$8,010.67
Wayne Tommer:	$9,910.71

(R. Vol. 1, pp. 187-188).

These offers were rejected by EagleMed. (*Id.*).

Procedural History

After rejecting Travelers' compromise offers, EagleMed initiated a fee dispute proceeding in the Department of Labor, Division of Workers Compensation pursuant to K.S.A. 44-510j. (R. Vol. 1, p. 1). Notably, when presenting their positions to the Hearing Officer assigned to the dispute, the parties *agreed* that the KWCA Fee Schedule was preempted by the ADA and therefore did not apply to EagleMed's charges. However, they diverged significantly as to what would follow from preemption. Travelers took the position

that because EagleMed's charges were governed by federal law, its recovery should be limited by the Federal Fee Schedule. (R. Vol. 1, pp. 189, 199-201). In the alternative, Travelers argued that if the Federal Fee Schedule did not apply, the Division of Workers Compensation could still examine EagleMed's charges for reasonableness, because that is the standard that underlies the payment of medical expenses under both state and federal law. (R. Vol. 2, pp. 437-39). EagleMed, on the other hand, contended that preemption meant that the Division of Workers Compensation was compelled to order Travelers to pay EagleMed's full charges with no examination as to whether those charges were reasonable. (R. Vol. 1, pp. 128-130).

Notwithstanding the parties' agreement that the ADA preempted the KWCA Fee Schedule, the Hearing Officer, *sua sponte*, raised the issue of "reverse preemption" under the McCarran-Ferguson Act (MFA). That doctrine was explained by the Tenth Circuit as follows in *Western Insurance Co. v. A and H Insurance, Inc.*, 784 F.3d 725, 727 (10th Cir. 2015):

> The McCarran-Ferguson Act provides that "[n]o 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 U.S.C. § 1012(b). Thus, the McCarran-Ferguson Act gives rise to the doctrine of "reverse preemption," which, if applicable, can cause state insurance laws to trump federal laws that interfere with them.

In theory, if the reverse preemption doctrine applied here, the KWCA Fee Schedule would not be preempted by federal law and would apply to the parties' dispute. The Hearing

Officer asked the parties to address this issue in supplemental briefs. (*See* R. Vol. 1, pp. 230-249).

In their responses, Travelers and EagleMed were in agreement that reverse preemption should not apply because the KWCA Fee Schedule does not "relate[] to the business of insurance" as required under the MFA. Nevertheless, the Hearing Officer disagreed and found that MFA reverse preemption *did* apply and that the parties' fee dispute was governed by the KWCA Fee Schedule. (R. Vol. 2, p. 264). Both parties appealed this ruling to the Workers Compensation Board pursuant to K.S.A. 44-510j(d)(2). (R. Vol. 2, pp. 265-284). Ultimately, the Board reversed the Hearing Officer's decision, finding that "the [KWCA] Fee Schedule is preempted by the ADA, and the MFA does not reverse-preempt the ADA in this instance." (R. Vol. 2, p. 418). The Board remanded the matter to the Hearing Officer for substantive determination of the fee dispute.

On remand, the Hearing Officer conducted no proceedings addressing the substance of the fees dispute but instead found that, because of ADA preemption, the Division of Workers Compensation lacked jurisdiction to review EagleMed's charges. Despite finding a lack of jurisdiction, the Hearing Officer went on to order Travelers to pay EagleMed its charges in full. (R. Vol. 2, p. 421). Travelers appealed the Hearing Officer's order to the Board which affirmed the decision. (R. Vol. 2, p. 443). This appeal followed.

ISSUES PRESENTED

1. Did the Board err in concluding that EagleMed's charges are not limited by the by the federally mandated Federal Fee Schedule?

2. If the Federal Fee Schedule does not apply, did the Board nevertheless err in concluding that the Division of Workers Compensation lacks jurisdiction to review EagleMed's charges to determine whether they are reasonable and customary?

3. If the Division of Workers Compensation lacks jurisdiction over any determination regarding EagleMed's charges, did it also lack jurisdiction to order Travelers to pay those charges, and did the Board err by affirming that order?

ARGUMENTS AND AUTHORITIES

I.
STANDARD OF REVIEW

The issues identified above present questions regarding the interpretation of state and federal statutes, consideration of the parameters of federal preemption, and determination of the scope of the Division of Workers Compensation's jurisdiction. All of these issues involve questions of law that are subject to a *de novo* standard of review. *See Jeanes v. Bank of America, N.A.*, 296 Kan. 870, 873, 295 P.3d 1045 (2013) ("To the extent we are asked to interpret statutes, we exercise unlimited review."); *Wichita Terminal Ass'n v. F.Y.G. Investments, Inc.*, 48 Kan. App.2d 1071, Syl. ¶ 2, 305 P.3d 13 (2013) ("Because federal preemption involves an interpretation of law, appellate courts have an unlimited standard of review."); *Morgan v. City of Wichita*, 32 Kan. App.2d 147, 148, 80 P.3d 407 (2003) ("A

challenge to the district court's subject matter jurisdiction raises a question of law, and as a result, this court's standard of review is unlimited."); *Apodaca v. Willmore,* 306 Kan. 103, 106, 392 P.3d 529 (2017) ("Questions of law are reviewable *de novo* on appeal.").

In applying this standard of review, the appellate court does not grant deference to the lower court's legal conclusions. *Siruta v. Siruta*, 301 Kan. 757, 761, 348 P.3d 549 (2015). This is true even though the Division of Workers Compensation is charged with interpreting and implementing the KWCA. *See Douglas v. Ad Astra Information Systems*, 296 Kan. 552, 559, 293 P.3d 723 (2013) (making clear that the doctrine of operative construction has "been abandoned, abrogated, disallowed, disapproved, ousted, overruled, and permanently relegated to the history books").

II.
EAGLEMED'S CHARGES ARE LIMITED BY THE FEDERAL FEE SCHEDULE

The Board found, and the parties agreed, that the KWCA Fee Schedule is preempted by the ADA. The ADA's preemption provision is clear in this regard:

> Except as otherwise provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or any other provision ***having the force and effect of law related to a price, route, or service of an air carrier*** that may provide air transportation under this subpart.

49 U.S.C. § 4173(b)(1) (emphasis added). This preemption provision has been applied to air ambulance services. *See, e.g., Med-Trans Corporation v. Benton*, 581 F. Supp. 2d 721 (E.D.N.C. 2008); *Hiawatha Aviation of Rochester, Inc. v. Minnesota Dept. of Health*, 375 N.W.2d 496, 500 (Minn. Ct. App.1985), *aff'd*, 389 N.W.2d 507 (Minn. 1986); *Air Evac*

EMC, Inc. v. Robinson, 486 F .Supp. 2d 713, 722-23 (M.D. Tenn. 2007). *See also* KAN. ATT'Y GEN. OP. 2011-18, 2011 WL 6120326 (Dec. 6, 2011) ("Air ambulances are considered 'air carriers' for the purposes of the ADA, which means that state laws related to the price, route or service of air ambulances are expressly preempted.").

EagleMed contends that preemption means that its charges cannot be reviewed in any manner in the fee dispute proceedings it initiated. In other words, it seeks to take advantage of the enforcement mechanism provided by state law without subjecting its charges to any scrutiny. Travelers contends, however, that while the Division of Workers Compensation cannot establish a price for air ambulance services through the KWCA Fee Schedule, it can, when conducting a fee dispute proceeding involving a provider such as EagleMed, ensure that EagleMed's charges are in accordance with federal law.

As shown above, the ADA only preempts *state laws* that are related to the regulation of an air carrier's price. 49 U.S.C. § 41713(b)(1). The ADA carries no limitation on Congress's ability to enact *federal laws* regulating the fees charged for air ambulance services. While EagleMed is an "air carrier" for purposes of the ADA, it is not a commercial airline like Delta or United. In addition to being an air carrier, EagleMed is a medical provider and is subject to regulation as such. For while the ADA may preempt state law regulation of air carriers, it does not preempt federal law regulation of medical providers.

Congress has certainly not elected to simply allow air ambulances, which are both air carriers and medical providers, to set their own fees. Instead, Congress chose to regulate these services through the Balanced Budget Act of 1997, which added Section 1834(I) to the

Social Security Act (codified at 42 U.S.C. § 1395m(l)). The Act applies broadly to all "medical and other health services . . . furnished by a provider of services or by others under arrangement with them made by a provider of services . . ." 42 U.S.C. § 1395k(a)(2)(B). It further applies to all "suppliers," meaning: "a physician or other practitioner, a facility, or other entity (other than a provider of services) that furnishes items of services under this subchapter." 42 U.S.C. § 1395x(d). The Balanced Budget Act controls the prices that health service providers and suppliers may charge the patients they serve. In general, reimbursement under the Balanced Budget Act is limited to "the lesser of (A) ***the reasonable cost*** of such services, as determined by section 1395x(v) of this title . . . or (B) the customary charges with respect to such services," 42 U.S.C. § 1395f(b)(1) (emphasis added). Further, the Act provides that "[t]he reasonable cost of any services" is "the cost actually incurred," excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. § 1395x(v)(1)(A).

For air ambulances specifically, the "reasonable cost" is determined by a fee schedule established by virtue of 42 U.S.C. § 1395m(l). That statute mandates that a fee schedule be established to govern the payment of "ambulance services whether provided directly by a supplier or provider or under arrangement with a provider under this part through a negotiated rule making process . . . and in accordance with the requirements of this subsection." The prescribed fee schedule, commonly known as the "Medicare Fee Schedule," applies to all ambulance services whether they are provided by volunteer, municipal, private, or institutional providers. Likewise, the Federal Fee Schedule applies to

both ground ambulances and, as applicable here, air ambulances. 42 C.F.R.§ 414.61(c)(1) and (2).

The Fee Schedule was initially developed through the Centers for Medicare and Medicaid in consultation with "various national organizations representing individuals and entities who furnish and regulate ambulance services . . . ." *See* 42 U.S.C. § 1395m(l)(4). As noted above, it represents what Congress and federal agencies have determined is a "reasonable" charge for the services provided. As stated in 42 C.F.R. § 414.610(a), "payment for ambulance services is based on the lesser of the actual charge or the applicable fee schedule amount."

Most important to this dispute is the fact that the Fee Schedule is uniform and national in character and application, which evidences a clear Congressional intent for the schedule to apply to all categories of service providers, patients, and providers. This uniform application is accomplished via a pricing structure specifically tailored to the services being provided. That is, the Federal Fee Schedule takes into account the various factors relevant to a particular air transport. The Fee Schedule distinguishes between the type of aircraft used (setting different base rates for rotary aircraft and fixed-wing transports); factors in the location of the services being provided (allowing for slightly higher rates for rural areas in contrast to urban ones); and then provides for payment based on the air ambulances' loaded mileage for any given transport. 42 C.F.R.§ 414.610(c). The Federal Fee Schedule's uniform and national application—in conjunction with the broad application of the Balanced Budget Act—unmistakably demonstrates that Congress intended for the Schedule to govern the rates

charged by all air ambulance providers, such as EagleMed, and to all categories of patients and payors, such as Travelers.

Moreover, the Federal Fee Schedule's application to this dispute necessarily follows ADA preemption of the KWCA Fee Schedule. As has been stated by the Tenth Circuit Court of Appeals: "In the absence of clear evidence that Congress intended state law to define [a term of federal law] we must assume that federal law provides the definition." *Salt Lake Tribune Publishing Co., LLC v. Management Planning, Inc.*, 390 F.3d 684, 688 (10th Cir. 2004). Here, the parties are in agreement that Congress has not left air ambulance pricing to be determined by state workers compensation fee schedules. In the absence of state-level rate setting, the Division of Workers Compensation must turn to federal law for a proper determination of the permissive scope of EagleMed's pricing. That federal law comes in the form of the Federal Fee Schedule.

EagleMed, however, has argued, and presumably will continue to argue, that notwithstanding the Federal Fee Schedule's clear application, Congress intended for the ADA to completely rely on market forces to govern prices in the airline industry. (*See, e.g.,* R. Vol 2, p. 452). And it is true that the Supreme Court has stated that the ADA is intended to promote "efficiency, innovation, and low prices in the airline industry through 'maximum reliance on competitive market forces and on actual and potential competition.'" *Northwest, Inc. v. Ginsberg,* —U.S.—, 134 S. Ct. 1422, 1428 (2014).

But, what EagleMed misses is that it does not operate in the commercial airline industry. As noted above, EagleMed is not United Airlines, Southwest, or Delta. There is

no actual competition in the air ambulance transportation industry in western Kansas. In fact, there is not even a potential for competition, as the medical personnel employing EagleMed's services are never the "customers" who ultimately pay for EagleMed's services. The "customers" paying for EagleMed's services have no choice in selecting EagleMed and there are no "market forces" at work. This was recognized in the 2010 GAO report concerning air ambulances: "Air medical patients have limited influence on air medical markets and are not typically making the choice in terms of mode of transport or provider." U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-907, AIR AMBULANCE: EFFECTS OF INDUSTRY CHANGES ON SERVICES ARE UNCLEAR, p. 19 (Sept. 2010) (available at http://www.gao.gov/assets/320/310527.pdf). Simply stated, where there is no customer choice there can be no competition. *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 404 (3d Cir. 2016) (noting that depriving "customers of the ability to make a meaningful choice" breaks "the competitive mechanism"); *ZF Meritor, LLC v. Eaton Corp.*, 696 F. 3d 254, 285 (3d Cir. 2012) (finding anticompetitive conduct was present when, what little customer choice existed, was rendered meaningless); *Fortner Enterprises, Inc. v. U.S. Steel Corp.,* 394 U.S. 495, 512-14 (1969) (discussing anticompetitive effect of limitations on customer choice); *In re Cox Enterprises, Inc.*, 871 F.3d 1093, 1099, 1105-06 (10th Cir. 2017) (same).

While the ADA governs air ambulance pricing by preempting state establishment of rates and prices and, at least on its face, purporting to rely on market forces for all airline based transportation, there can be no dispute that the Balanced Budget Act—and the Federal

Fee Schedule in particular— likewise govern EagleMed's services. Accordingly, there is an inherent regulatory overlap regarding air ambulance transportation services. Other courts have addressed similar overlaps by interpreting the relevant federal laws in order to reconcile the two. *See, e.g., Ray v. Spirit Airlines, Inc.,* 767 F.3d 1220, 1221-22 (11th Cir. 2014) (finding that civil provisions of RICO could be reconciled with the ADA by finding that the such provisions "supplement[ed]" the ADA); *In re Patel*, 431 B.R. 682, 689 (Bankr. D.S.C. 2010) ("While there is some overlap between the application of the two statutes, they are not in conflict and can be read together to achieve a harmonious purpose."). *See generally In re Plaza Resort at Palmas, Inc.*, 741 F.3d 269, 277 (1st Cir. 2014) ("Statutes should be treated as a harmonious whole, and should be read together and not construed as divorced from their provisions." [citation omitted]); *Dierksen v. Navistar International Transportation Corp.*, 912 F. Supp. 480, 486 (D. Kan. 1996) ("Allegedly repugnant statutes are to be read together and harmonized if at all possible, to the end that both may be given force and effect." [citing *Harrah v. Harrah*, 196 Kan. 142, 409 P.2d 1007 (1966)]).

It is quite clear that the two overlapping laws can be reconciled by finding that the ADA's reliance on market forces to govern airline rates should be applied only where there is a market for competition, i.e., commercial airlines and similar industries. By contrast, the rates of air ambulance service providers are properly determined by the Federal Fee Schedule established at Congress's direction. Because there is no dispute here that EagleMed operates only in the field of air ambulance transportation services—and not in the commercial airline industry—the latter federal law applies to this dispute.

In short, after the Workers Compensation Board properly found that the KWCA Fee Schedule was preempted by the ADA, it should have then concluded that the Division of Workers Compensation was required to look to federal law to resolve the parties' fee dispute. That federal law comes in the form of the Federal Fee Schedule. Because Travelers has already offered payment in accordance with the Schedule, the Court should remand the case for entry of an order stating that those amounts are all that EagleMed is entitled to.

III.
EVEN IF THE FEDERAL FEE SCHEDULE DOES NOT APPLY, THE DIVISION OF WORKERS COMPENSATION CAN STILL REVIEW EAGLEMED'S CHARGES FOR REASONABLENESS

For the reasons discussed above, the Federal Fee Schedule applies to this dispute and establishes the fee that EagleMed can charge. But even if the Court finds differently, the Division of Workers Compensation may still review EagleMed's charges for reasonableness. This is true under both state and federal law.

Under the KWCA:

> Any contract or any billing or charge which any health care provider, vocational rehabilitation service provider, hospital person or institution enters into with or makes to any patient for services rendered in connection with injuries covered by the workers compensation act or the fee schedule adopted under this section, which is or may be in excess of or not in accordance with such act or fee schedule, is unlawful, void and unenforceable as a debt.

K.S.A. 44-510i(c)(3). This subsection's use of the disjunctive "or" between "workers compensation act" and "fee schedule" permits "fee schedule" to be struck from the statute—a result that is required in this case in light of the Board's order on the preemption issue—while allowing the remainder of the statute to be enforced.

Whether a charge is "in excess of or not in accordance with" the KWCA is then determined by K.S.A. 44-510i(c)(2) which provides:

> In every case, all fees, transportation costs, charges under this section and all costs and charges for medical records and testimony shall be subject to approval by the director ***and shall be limited to such as are fair, reasonable and necessary.***

(emphasis added).

The effect of these provisions of the KWCA is to afford the Division jurisdiction to review air ambulance service providers' charges. And while the KWCA contains no precise definition or standard as to what constitutes "fair, reasonable and necessary," it is clear any standard applied by the Division must be made on a fact specific or case-by-case basis. In the words of the Kansas Court of Appeals: "In other types of civil cases in which considerations of reasonableness were at issue, Kansas courts have considered all circumstances of the case, including a set of specific factors." *Graham v. Herring*, 44 Kan. App.2d 1131, 1133-34, 242 P.3d 253 (2010); *see also Fischer v. Magnolia Petroleum Co.*, 156 Kan. 367, 367, 133 P.2d 95 (1943) ("the court must consider all facts and circumstances which would affect reasonableness . . ."); *Jones v. Hansen*, 254 Kan. 499,509-10, 867 P.2d 303 (1994) (finding relevant duty of care was one that was "reasonable care under all circumstances."). Again, it is the KWCA's reasonable requirements along with EagleMeds desire to enforce its charges under the KWCA which requires such review.

The Board's preemption order, and arguments previously advanced by EagleMed, lead to the same result. The KWCA Fee Schedule which would otherwise be applicable to this

dispute is the 2012 version. Unlike the subsequent 2014 edition, the 2012 Schedule did not cap air ambulance service providers' rates at 10% less than their usual charges. The 2012 fee schedule merely establishes that air ambulances may charge their "usual and customary charges as per 49 U.S.C. § 41713(b) of the Federal Aviation Act." (2012 Workers Compensation Schedule of Medical Fees, p. 167 [*available at* https://www.dol.ks.gov/Files/PDF/med_fees_2012.pdf]). Accordingly, when ruling on the preemption issue, the Board found that application of the 2012 version of the KWCA Fee Schedule or application of the ADA itself, led to "the same result." (R. Vol. 2, p. 419).

EagleMed has acknowledged that it must charge "usual and customary" rates in accordance with the Federal Aviation Act (R. Vol. 2, p. 454). Nevertheless, it argues that "usual and customary" is determined by only looking at *its own* charges. (*See* R. Vol. 2, p. 455: "Instead, 'usual and customary' means the amount the air carrier generally charges for the same services provided in similar circumstances."). This of course leads to an absurd result. If EagleMed always charges workers compensation claimants and insurers like Travelers an inflated rate not charged to any other category of patient, then this must be its "usual and customary" rate, thereby justifying the charges in the future. Contrary to EagleMed's position in this regard, determining whether EagleMed's charges are "usual and customary" requires Division review—just as would be the case if the Division reviewed the charges for reasonableness.

Whether EagleMed's charges are reviewed for reasonableness under the KWCA or customariness, as EagleMed has indicated is appropriate, the effect is the same because there

is no practical difference between the two concepts. Both require an analysis of Eaglemed's pricing structure across all categories of payors. As the Tenth Circuit has held in applying federal law regarding ERISA plans, a "usual and customary fee is the reasonable fee; the fee a prudent person would expect to pay based on the prevailing market rate." *Geddes v. United Staffing Alliance Employee Medical Plan*, 469 F.3d 919, 930 (10th Cir. 2006) (citation omitted).

The Division has jurisdiction to make this determination. In so doing it is not setting the rate that EagleMed can charge in derogation of ADA preemption—it is simply assuring that its charges are "reasonable" and "customary" as required by both state and federal law. And if it finds that the charges violate the law, it can decline to enforce them. But EagleMed wants no part of such a review because it cannot reasonably argue that its reasonable or customary charge is one that is five times that charged to another category of payor. EagleMed, much like other air ambulance services providers across the nation, has vehemently opposed the actual review of its charges, going to great lengths to keep its pricing structure and customary prices across the various categories of payors a secret.

When this fee dispute was first initiated before the Division of Workers Compensation, Travelers cited various portions of a 2010 Government Accountability Office report which represented one of the first governmental acknowledgments of the inequitable billing practices of air ambulance service providers such as EagleMed. Since that time, and since the filing of this appeal, the GAO has issued another report on the topic. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-637, AIR AMBULANCE: DATA COLLECTION AND

TRANSPARENCY NEEDED TO ENHANCE DOT OVERSIGHT (July 2017), (*available at* http://www.gao.gov/assets/690/686167.pdf). This report again discusses the inequitable nature of air ambulance pricing. One statistic which particularly stands out is the price increase for air ambulance services in comparison to the consumer index price between 2010 and 2014. GAO-17-637, p. 11. During that period, "the median prices charged for helicopter air ambulance services has approximately doubled" from about $30,000 to $50,000—which is up from a median of $13,000 in 2007, representing "an increase of 283 percent over the past decade." *Id.*

But, the biggest takeaway from the most recent GAO report is not the blatant unfairness of air ambulance pricing—that much has been known for some time now—it is the need "[t]o increase transparency and obtain information to better inform decisions on whether to investigate potentially unfair or deceptive practices in the air ambulance industry . . . ." GAO-17-637, p. 28. Although the 2017 report focuses on the Department of Transportation's regulatory oversight, which is in place for all air carriers, the conclusion that greater transparency is needed holds true in the context of state enforcement of charges incurred under a workers compensation statutory scheme as well. That is to say, state inquiry into EagleMed's pricing structure and practices—whether for reasonableness or customariness—is a necessary prerequisite to enforcement of EagleMed's charges.

Moreover, when this matter was before the Division of Workers Compensation, EagleMed opposed state review of its charges and billing practices by relying heavily on the U.S. District Court for the District of Wyoming's decision in *EagleMed, LLC v. Wyoming ex*

rel. Dept. of Workforce Services, 227 F. Supp.3d 1255 (D. Wyo. 2016). That decision granted EagleMed injunctive relief requiring the Wyoming Department of Workforce Services (the payor for workers compensation claims in that state) to pay whatever invoices EagleMed submitted to them. 227 F. Supp.3d at 1281-82. The Hearing Officer in this case specifically relied upon and adopted the reasoning of that decision. (R. Vol. 2, p. 421).

However, on August 22, 2017, the Wyoming Court's injunction was overturned by the Tenth Circuit Court of Appeals. *EagleMed LLC v. Cox*, 868 F.3d 893, 907 (10th Cir. 2017). The Tenth Circuit recognized that the case before it involved "the ill-conceived intersection of the Airline Deregulation Act's broad preemption provision with states' attempts to administer financially sound workers' compensation programs in the face of skyrocketing air-ambulance bills." 868 F.3d at 906. It held that the only result required by federal preemption was an order prohibiting the use of Wyoming's state fee schedule to determine the charges EagleMed could file. Federal law did not, and could not, require the workers compensation payor to pay whatever charges were submitted by EagleMed, and enforcement of those charges was a matter of state, not federal, law:

> In this case, the only federal violation that occurred was Wyoming's enactment and application of a statute which provided that ambulance providers, including air-ambulance providers, would be reimbursed in accordance with a fixed rate schedule. The injunctive relief ordered in the district court's initial judgment—enjoining Defendants from enforcing the preempted statute and rate schedule, as they related to air-ambulance claims—was sufficient to remedy this federal violation.

> The district court's amended judgment, on the other hand, went well beyond what was necessary to remedy the federal violation, placing an affirmative duty on state officials to reimburse in full all air-ambulance claims submitted to the Workers' Compensation Division. ***However, any such possible duty would exist as a creation only of state, not federal, law. Plaintiffs have not identified a single provision in the Airline Deregulation Act or any other federal statute which would require Defendants to make any payment of air-ambulance claims whatsoever, much less payment at whatever rates Plaintiffs choose to charge them.*** The question of how Defendants should administer the state Worker's Compensation Act without enforcing the preempted rate schedule against air-ambulance carriers is a question of state law, and any duty to pay the claims remains a state duty, not a federal duty.
>
> Federal law establishes no duty for states to pay the air-ambulance claims of injured workers who are covered by state workers' compensation statutes. To the extent that Defendants may be required to pay such claims, it is state law, not federal law, that requires such action . . . .

868 F.3d at 905-06 (emphasis added).

If this Court affirms the Board and thereby the Hearing Officer's order directing Travelers to pay EagleMed's charges in full without allowing for any review of those charges, then the Court would be setting a precedent which would, for all practical purposes, be identical to the injunctive relief which the Tenth Circuit struck down in *Cox*. In other words, should the Court find that Travelers must pay EagleMed in full in these four cases, without any state review of the charges, then the same must be true for all future air ambulance charges as well. It is clear, under the Tenth Circuit's holding in *Cox,* that this is not a permissible result. Rather the Division of Workers Compensation has jurisdiction to review the charges, determine if they are reasonable and customary, and decline to enforce

the charges if they are not. In sum, if EagleMed wants the benefit of state enforcement of its charges, it must also concede state review of the same.

IV.
IF THE DIVISION OF WORKERS COMPENSATION HAS NO JURISDICTION THEN IT CANNOT COMPEL PAYMENT OF EAGLEMED'S CHARGES

As noted above, despite finding that the Division of Workers Compensation has no jurisdiction to either apply the federally mandated Medicare Fee Schedule or review EagleMed's charges for reasonableness, the Hearing Officer proceeded to hold that EagleMed "is entitled to payment of its outstanding billed charges in full." (R Vol. 2, p. 421). Likewise, the Board held:

> The Board does not have jurisdiction to rule on whether the ADA violates the Medicare fee schedule, nor does the Board have jurisdiction to rule on the reasonableness of air ambulance charges. To do either would violate federal preemption through the ADA.

(R. Vol. 2, p. 543). However, instead of vacating the Hearing Officer's order due to lack of jurisdiction, the Board affirmed the Hearing Officer's order requiring Travelers to pay the full amount of EagleMed's charges. (*Id.*).

It is a fundamental rule of law that a court or other tribunal must have jurisdiction in order to decide an issue before it. Jurisdiction, by definition, "is the power of a court to hear and decide a matter. Jurisdiction is not limited to the power to decide a matter rightly but includes the power to decide the matter wrongly." *State v. Sims*, 254 Kan. 1, Syl. ¶ 4, 62 P.2d 359 (1993); *see also Shriver v. Sedgwick County Board of Comm'rs*, 189 Kan. 548, 553-54, 370 P.2d 124 (1962); *Ford v. Valmac Industries, Inc.* 494 F.2d 330, 331 (10th Cir. 1974)

(stating jurisdiction involves the "power to adjudicate"). "In the absence of jurisdiction a court is powerless to act . . ." *In re Estate of Heiman*, 44 Kan. App. 2d 764, 766, 241 P.3d 161 (2010). And it has long been stated that "[w]here there is clearly no jurisdiction over the subject-matter, any authority is usurped authority . . ." *Smith v. Casner*, 2 Kan. App. 591, 592, 44 P. 752 (1896).

When the Board reviewed the Hearing Officer's order, it found it necessary to determine whether the Division has "jurisdiction to determine whether the invoices of EagleMed are reasonable, customary and necessary as required by the Kansas Workers Compensation Act." (R. Vol. 2, p. 544). Despite the Board's finding that it lacked jurisdiction to rule on the issues before it, it nonetheless affirmed the Hearing Officer's order which required Travelers to pay EagleMed its charges in full. Affirming the Hearing Officer's order—and requiring Travelers to pay the full amount of EagleMed's charges—necessarily required a finding that EagleMed's charges are reasonable or customary as required by the Workers Compensation Act.

Once the Board determined that neither it nor the Hearing Officer had no jurisdiction to review the reasonableness of EagleMeds charges, it lacked the power to enter an order which required Travelers to pay those charges as if they were indeed reasonable. The Division either has jurisdiction to review EagleMed's charges or it lacks jurisdiction to do anything. There is no middle ground. *See Murriel-Don Coal Co. v. Aspen Insurance UK Ltd.*, 790 F. Supp. 2d 590, 595 (E.D. Ky. 2011) ("But just as one cannot be a little bit pregnant or a little bit dead, the notion that courts can have a little bit of jurisdiction—enough

for a quick peek at the merits of a claim, but no more—runs contrary to bedrock principles."). That is why it is well established that "[i]f jurisdiction is lacking, the action must be dismissed." *Varner v. Gulf Insurance Co.*, 254 Kan. 492, 496, 866 P.2d 1044 (1994). *Accord In re Miller*, 228 Kan. 606, Syl. ¶ 2, 620 P.2d 800 (1980) (when a court lacks jurisdiction, "its authority in respect thereto extends no further than to dismiss the case").

A court cannot find that it lacks jurisdiction and then order a party to do something. But that is precisely what both the Hearing Officer and the Board did here. If, in fact, the Division of Workers Compensation is without jurisdiction to consider EagleMed's charges, then this matter should be remanded with directions to vacate the order which now exists.

CONCLUSION

For the reasons stated above, one of three alternative orders of relief is appropriate in this matter:

(1) Should the Court find that the federally mandated Medicare Fee Schedule is applicable to this dispute, the Board's Order should be reversed and the matter remanded for the entry of an order limiting EagleMed's charges to those allowed by that Fee Schedule.

(2) Should the Court find that the Medicare Fee Schedule is inapplicable, but that the Division of Workers Compensation has authority to review EagleMed's charges prior to enforcement, then reversal of the Board's Order and remand requiring that EagleMed's charges be reviewed for reasonableness is appropriate.

(3) Should the Court find that the Division lacks jurisdiction to enforce the Medicare Fee Schedule or to review EagleMed's fees for reasonableness, then remand for dismissal is required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17thth day of November, 2017, a true and correct copy of the foregoing Appellant's Brief was emailed to:

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