Appeal No. 17-117903-A

(Consolidated with Appeals 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,

v.

TRAVELERS INSURANCE,
Insurance Carrier/Appellant.

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

RESPONSE BRIEF FOR APPELLEE EAGLEMED, LLC

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INTRODUCTION

This is not a difficult case. Appellee EagleMed, LLC ("EagleMed") is an air carrier that transported four severely injured employees insured under workers'-compensation policies issued by Appellant Travelers Insurance ("Travelers"). EagleMed submitted bills for these transports based on its ordinary rates. Travelers paid EagleMed only a fraction—approximately 1/4—of the billed charges for each transport. EagleMed then initiated this dispute before the Division of Workers' Compensation ("DWC" or "Division"), seeking payment in full. The Division agreed that Travelers is required to pay for the lifesaving air ambulance services EagleMed provided to its insureds.

There are, as the Division found, at least two independent bases for awarding EagleMed its full billed charges. *First*, the applicable fee schedule promulgated by the Division provides that air ambulance transport is to be reimbursed in the amount of the provider's ordinary rate for the service. *Second*—as the applicable fee schedule itself explicitly recognizes—federal law precludes state authorities from requiring EagleMed to accept a reduced rate. Specifically, the Airline Deregulation Act of 1978 ("ADA") invalidates any state-law provision "having a connection with or reference to [the] rates, routes, or services" of a federally registered "air carrier." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 387-88 (1992) (discussing 49 U.S.C. § 41713(b)(1)). Air ambulance providers such as EagleMed are "air carriers" under the statute (as Travelers does not dispute). Accordingly, as numerous courts around the country have held, the ADA invalidates workers'-compensation fee schedules and rules that impose lowered reimbursement rates for air ambulance transports. *See EagleMed, LLC v. Cox*, 868 F.3d

893, 905 (10th Cir. 2017); *Air Evac EMS, Inc. v. Cheatham*, No. 2:16-CV-05224, 2017 WL 4765966, at *8 (S.D.W. Va. Oct. 20, 2017); *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp. 3d 930, 947 (D.N.D. 2016). Even if the applicable rate schedule did not provide for payment in full pursuant to the ADA, ADA preemption leads to the same result: Once the invalid rate-setting provisions are struck from the Kansas Workers' Compensation Act ("KWCA" or the "Act"), pursuant to well-established principles of statutory interpretation, the remaining, valid provisions of the KWCA call for payment of EagleMed's billed charges.

Travelers attempts to complicate this straightforward analysis (supported by extensive analogous authority) by ignoring and mischaracterizing the applicable law. As an initial matter, it barely acknowledges the applicable fee schedule, which calls for full payment. Instead, it claims that the federal Medicare rate applies in these Kansas workers'-compensation proceedings. But as the relevant statute, regulations, and common sense indicate, the Medicare rate applies only to care provided to individuals enrolled in the Medicare program. Neither Travelers' misreading of the applicable federal statute nor its misplaced policy arguments can alter this fact.

Next, Travelers claims that if the Medicare rate does not apply, the Division should engage in rate setting on a case-by-case basis under a "fair, reasonable and necessary" standard. But such a standard, if applied to air ambulance prices, would still "hav[e] a connection with or reference to [the] rates, routes, or services" of a federally registered "air carrier" and therefore be preempted. *Morales*, 504 U.S. at 384. Indeed, a central purpose of the ADA was to *end* reasonableness review of air carrier rates.

Finally, Travelers argues in the alternative that the Division lacked jurisdiction and the order of full payment must be vacated. That is wrong. The Division had jurisdiction under the applicable statutory scheme to adjudicate this ordinary fee dispute. What the Workers' Compensation Appeals Board ("WCAB" or the "Board") recognized—in a portion of its order that Travelers misreads—was that it lacked statutory authority to take the actions Travelers seeks of either (1) applying the Medicare fee schedule to a Kansas workers'-compensation dispute; or (2) undertaking reasonableness review. The KWCA, as correctly interpreted in light of ADA preemption, allows neither. But the Board's inability to take the unlawful actions Travelers desires did not deprive it of jurisdiction to follow the law and award EagleMed payment in full.

This Court should affirm the Board's order requiring Travelers to pay EagleMed's full billed charges.

STATEMENT OF ISSUES

I. Is Appellee EagleMed entitled to recover its ordinary billed charges in full for air ambulance services provided to Kansas workers'-compensation insureds, pursuant to either (1) the applicable fee schedule promulgated by the Division of Workers' Compensation, which provides that air ambulance providers are entitled to "usual and customary" charges in light of the Airline Deregulation Act of 1978 ("ADA"); or (2) the ADA itself, which preempts any state-law provision imposing a reduced price on an air ambulance provider?

II. Did the Division of Workers' Compensation have jurisdiction to hear this fee dispute concerning air ambulance services provided to workers'-compensation insureds?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

EagleMed is a federally-regulated air carrier that provides life-saving emergency air ambulance services to critically ill and injured patients. R.I, 136-81 (transport records describing emergency care); R.II, 330, 332 (federal certificates authorizing EagleMed operations). (EagleMed follows Travelers' practice and cites herein to the record for the fee dispute arising from the claim of Cody Crook throughout this brief. *See* Brief of Appellant 3 n.1.) With bases in Kansas, EagleMed maintains a fleet of air ambulances ready to respond at a moment's notice to medical emergencies, often in rural or remote locations that lack sophisticated medical services. *See* R.I, 136-81; R.II, 415; Kan. Stat. Ann. § 65-6135(a). Its air ambulances quickly transport patients facing serious illness or life-threatening emergencies, while medical professionals provide in-flight care. Some emergency transports originate at the scene of an accident, while others take place when a medical facility determines that a patient requires immediate, emergency transport to a hospital that can provide a higher level of care. *See, e.g.*, R.I, 137, 143, 153-54, 160-61 (describing medically necessary, emergency transports of patients to facilities offering needed trauma services).

EagleMed does not self-dispatch, but is required by law to offer service 24 hours per day, every day of the year. *See* Kan. Stat. Ann. § 65-6135(a). It must transport any patient that requires its services, regardless of insurance coverage or ability to pay. *See* Kan. Stat. Ann. § 65-6135 (providing for revocation of emergency services permits in instances of "incompetence" or "unprofessional conduct"); Kan. Admin. Reg. § 109-1-

1(r)-(t), (ff), (ddd) (defining "incompetence" and "unprofessional conduct" as failing to provide needed care in emergency situation); U.S. Gov't Accountability Office, GAO-17-637, Air Ambulance Data Collection and Transparency Needed to Enhance DOT Oversight 5 (2017), available at http://www.gao.gov/assets/690/686167.pdf ("2017 GAO Report") ("[A]ir ambulance providers respond to emergencies without regard for a patient's ability to pay and provide the same service regardless of the amount the provider will ultimately be compensated for the transport."); *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d 403, 405 (Kan. 2017) ("[J]udicial notice may be taken of matters of public record in other . . . governmental bodies."); *Cities Serv. Gas Co. v. State Corporation Comm'n*, 192 Kan. 707, 714, 391 P.2d 74 (1964) (court may take judicial notice of administrative "matters of public record"). As such, EagleMed transports patients with commercial insurance, Medicaid or Medicare, workers' compensation coverage, and no insurance. *See* U.S. Gov't Accountability Office, GAO 10-907, Air Ambulance: Effects of Industry Changes on Services Are Unclear 5 (2010), available at http://www.gao.gov/assets/320/310527.pdf ("2010 GAO Report"); *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d at 405. Generally, at the time of transport, EagleMed does not know the insurance status of the patient.

The life-saving care that EagleMed provides is expensive. Each EagleMed aircraft is customized to accommodate patient transport and in-flight medical care and must be staffed by multiple crews of pilots, paramedics, and nurses to be ready twenty-four hours a day. *See* Kan. Stat. Ann. § 65-2891; Kan. Admin. Reg § 109-2-11; 2017 GAO Report at 16. EagleMed incurs the costs for all transports, and as a private company, must fund its

operations from payments for its services, unlike subsidized nonprofits. *See* 2017 GAO Report at 16. The payments received from uninsured patients or patients covered by Medicaid or Medicare are substantially below EagleMed's costs. *See id.* at 13. Such underpayments contribute to escalating prices for emergency air ambulance transportation, as the cost of uncompensated and undercompensated care must be shifted to other commercial payors. *See id.* at 17. To continue to provide air ambulance service for everyone regardless of insurance status—as required by law—EagleMed must receive its billed charges for a sufficient proportion of its flights to offset the losses it incurs when it transports uninsured or underinsured patients. *See id.* at 16-17.

II. PROCEDURAL HISTORY

A. Initial Proceedings

EagleMed provided emergency air ambulance services to four severely injured workers' compensation patients insured by Travelers. R.I, 136-37 (noting physician-authorized "emergency patient transport" of Wayne Tommer to a facility that could provide "higher level trauma services"); R.I, 142-43 (noting physician-authorized "emergency patient transport" of William Leikam to facility offering higher-level trauma care because "[t]ransport by another method to the appropriate facility would take too long"); R.I, 153-54 (noting physician-authorized "emergency patient transport" of Cody Crook to facility offering trauma surgery where "[t]he Patient's condition is too critical to allow for longer transport time by ground"); R.I, 160-61 (noting physician-authorized "emergency patient transport" of Carlos Rios to a higher-level trauma facility where "[t]he Patient's condition is too critical to allow for longer transport time by ground" and "[t]ransport by another

method would not provide necessary level of care"). EagleMed billed Travelers for the transports in keeping with its ordinary billing rates; but Travelers was willing to pay only a small fraction of the billed amounts for each patient (approximately 25% percent of the EagleMed's charges). *See* Brief of Appellant 7-9 ("Br."). EagleMed requested medical fee dispute assistance from the DWC, requesting that it be "reimbursed at 100% of billed charges." *See* R.II, 251.

At that time, the parties assumed that the applicable fee schedule was one that provided that air ambulance providers must be reimbursed at a rate of 90% of their billed charges. *See* Kansas Workers Compensation 2014 Schedule of Medical Fees at 197; *see also, e.g.*, R.I, 187 (Travelers brief citing 10% reduction to billed charges). Travelers took the position that the ADA preempts the application of the KWCA fee schedule and that the "states' fee schedules [should be] replaced by a federal fee schedule"—specifically, the fee schedule applicable to Medicare patients. *See* R.II, 251. EagleMed agreed that under the ADA, "the State is precluded from setting a fee" for air ambulance transports, R.I, 124; but it disagreed that the federal Medicare fee schedule governed in this Kansas workers'-compensation proceeding, R.I, 208-09. EagleMed maintained that it was entitled to its full billed charges, although it was willing (as it has repeatedly stated throughout this dispute) to accept the fee schedule's 90% reimbursement rate on a voluntary basis. R.I, 203, 207.

Despite the fact that both parties agreed that under the ADA, any fee schedule setting EagleMed's reimbursement rate is preempted, the Hearing Officer *sua sponte* held that under the McCarran-Ferguson Act, Kansas workers'-compensation law "reverse

preempted" the ADA, and the fee schedule applied. R.II, 258-64. Both parties appealed to the Kansas Workers Compensation Appeals Board ("WCAB" or "Board").

B. First Appeal

On appeal before the Board, the parties recognized for the first time that the claims at issue here occurred under the fee schedule for 2012, which does not set EagleMed's reimbursement rate. Instead, it provides that "[a]ir ambulance services will be limited to usual and customary charges as per 49 U.S.C., Section 41713(b) of the Federal Aviation Act." Workers Comp. Schedule of Med. Fees 167 (effective January 1, 2012) ("2012 Fee Schedule"); *see also* R.II, 413 (quoting 2012 Fee Schedule). The Board therefore addressed whether the ADA preempts the 2012 Fee Schedule. It held, first, that contrary to the Hearing Officer's holding, McCarran-Ferguson Act "reverse preemption" does not apply. R.II, 417. Second, the Board found that in light of the language of the 2012 Fee Schedule, it did not need to finally resolve the question "whether the Fee Schedule or the ADA sets pricing for air ambulance services for Kansas workers compensation claims." *Id.* Because the 2012 Fee Schedule directly incorporates the ADA, "both our Fee Schedule and the ADA lead us to the same result—pricing is based on the ADA." R.II, 418. The Board reversed and remanded to the Hearing Officer for a determination of the amount owed. *Id.*

C. Proceedings on Remand

On remand, the Hearing Officer held that the Division was "without authority to set the rate of payment for air ambulance services in workers compensation claims, either through the rate-setting regulatory process or through administrative decision rendered in

a specific case regarding whether contested charges are reasonable and necessary." R.II, 420-21. It recognized "[i]n either course of action, the state is setting the 'price of an air carrier,'" which is expressly preempted by the ADA. R.II, 421. It further held that EagleMed "is entitled to payment of its outstanding billed charges in full." *Id.*

Travelers once again appealed to the WCAB.

D. Second Appeal

On its second appeal, Travelers challenged the award of EagleMed's full billed charges. *First*, it argued that the federal Medicare payment rate should apply in Kansas Workers' Compensation proceedings. R.II, 432-37. *Second*, it argued that if the Medicare schedule did not apply, the Division should determine a lower rate applying the "fair, reasonable, and necessary" standard contained in Kan. Stat. Ann. § 44-510i(c)(2). R.II, 437-43. In response, EagleMed asserted that the Medicare fee schedule does not apply to patients insured under the Kansas Workers' Compensation program; and that the ADA precludes states from imposing lowered rates on air carriers under a "fair, reasonable, and necessary" standard. R.II, 455-62.

The Board affirmed the hearing officer's order directing Travelers to pay EagleMed's charges in full. It held that enforcing the Medicare fee schedule in a Kansas Workers' Compensation proceeding would violate both the ADA and the Division's statutory authority. R.II, 541-42. And it similarly held that it would be improper under the ADA for the Division to evaluate EagleMed's fees under a "reasonableness" standard. R.II, 542-43.

Although not in the record, following the Board's decision, Travelers moved for reconsideration. It argued that because the Board had used the word "jurisdiction" when stating that it lacked authority to set air ambulance rates, the Board was required to vacate, rather than affirm, the hearing officer's order. The Board denied Travelers' motion for reconsideration.

Travelers then filed these consolidated appeals.

SUMMARY OF ARGUMENT

Issue I: The Division correctly held that under the ADA and the KWCA, Travelers is required to pay EagleMed's billed charges in full. In general, the ADA prohibits all state regulation of the prices of federally regulated "air carriers." The ADA represents a major deregulatory initiative pursuant to which Congress (1) ended federal "reasonableness" review of air carrier prices; (2) gave the Department of Transportation ("DOT") economic supervisory authority over air carriers—including air ambulance providers—to ensure a functioning market for air carrier services; and (3) expressly preempted all state regulation of air carrier rates, whether by statute or on a case-by-case, common-law basis. Where the ADA preempts state laws in part, their further application is determined by applying state principles of statutory interpretation, including severability rules.

Applying these principles, EagleMed 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. The fee schedule compels this result because—in explicit recognition of the ADA's applicability—it directs that air ambulance providers receive their ordinary billed charges for workers'-compensation transports. And the ADA,

operating in conjunction with Kansas rules of statutory interpretation, also compels this result: The federal statute invalidates those portions of the KWCA that purport to require a lower reimbursement rate for air ambulance services; while the remaining portions of the KWCA, properly interpreted in light of the overarching purpose of the KWCA, can and should be applied to require payment of EagleMed's charges in full. This interpretation of the Act furthers its purpose, which is to protect both employees and employers from financial losses resulting from on-the-job injuries.

Travelers attempts to avoid this result by mischaracterizing the applicable law. *First*, it argues that the federal Medicare fee schedule applies in this Kansas workers'-compensation proceeding. That is contrary to the law and common sense: the relevant federal statutes and regulations make clear that the Medicare rate applies only to Medicare patients. Travelers attempts to muddy the statutory analysis by invoking supposed policy considerations, but these speculative concerns cannot override the explicit directives of the Medicare statutes and the ADA.

Second, Travelers argues that the Division can apply a "fair, reasonable and necessary" standard on a case-by-case basis to reduce EagleMed's reimbursement. But such a standard is preempted by the ADA, because it amounts to rate regulation just as much as an across-the-board fee schedule does. Trying to avoid preemption, Travelers suggests that EagleMed has accepted reasonableness review by pursuing this dispute before the Division, but that assertion has no foundation in the ADA or other applicable law. It also ignores that EagleMed is unable to refuse to transport workers'-compensation patients and unable to pursue its claims outside of the DWC system.

Travelers further claims support for reasonableness review of EagleMed's charges in (1) a recent report from the Government Accountability Office ("GAO"); and (2) a recent Tenth Circuit decision finding ADA preemption of a workers'-compensation fee schedule. But neither source endorses Travelers' position; in fact, the opposite is true. The GAO report notes that the ADA preempts state regulation of air ambulance rates; moreover, it shows that federal regulators are doing their job—so that there is no place for state rate regulation in the field. The Tenth Circuit case, *Cox*, 868 F.3d 893, similarly finds that the ADA preempts state rate-setting. In the passages relied upon by Travelers, the Tenth Circuit simply recognized that a federal court (because of its limited power in the state realm) cannot order state officials to pay state funds under state law. Neither the Division nor this Court is bound by any such restriction.

In sum, the award of EagleMed's full billed charges was legally correct, and this Court should affirm it.

Issue II: The Division had jurisdiction over this dispute. The KWCA endows the Division with jurisdiction to hold informal and formal hearings regarding reimbursement disputes; and, if those hearings do not fully resolve a claim, to entertain appeals before the WCAB. This ordinary fee dispute was well within that statutory grant of jurisdiction.

Travelers, seizing upon the Board's statement that it did not have "jurisdiction" to apply the Medicare fee schedule or undertake reasonableness review, claims that the Division lacked jurisdiction over the dispute as a whole and that the order below should be vacated. But the Board simply found—correctly—that in light of ADA preemption it lacked statutory authority to apply a lesser rate and was required to order payment at the

billed amount. It never held that it lacked jurisdiction altogether. The Division's jurisdiction was proper, and this Court can and should affirm its order.

ARGUMENT AND AUTHORITIES

I. THE DIVISION CORRECTLY DETERMINED THAT EAGLEMED IS ENTITLED TO RECOVER ITS FULL, CUSTOMARY BILLED CHARGES.

A. Standard Of Review

Pursuant to the KWCA, *see* Kan. Stat. Ann. § 44-556, this Court's review is governed by the Kansas Judicial Review Act ("KJRA"). *Olds-Carter v. Lakeshore Farms, Inc.*, 45 Kan. App. 2d 390, 394, 250 P.3d 825, 829 (2011). Under the KJRA, "[t]he burden of proving the invalidity of agency action is on the party asserting invalidity." Kan. Stat. Ann. § 77-621. This Court may grant relief only if one of the enumerated grounds for setting aside agency action is satisfied. Kan. Stat. Ann. § 77-621(c); *see also White v. Kansas Health Policy Auth.*, 40 Kan. App. 2d 971, 976, 198 P.3d 172, 177 (2008) ("The court may only grant relief from a[n] agency action when one of the circumstances set forth in K.S.A. 77-621(c) has occurred."). Relevant to the first Issue, this Court may hold an agency action invalid where "the agency has erroneously interpreted or applied the law." Kan. Stat. Ann. § 77-621(c). This Court undertakes plenary, *de novo* review of questions of law. *See Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 559, 293 P.3d 723, 728 (2013) (holding, in workers'-compensation case, that statutory interpretation question is "a question of law over which our review is unlimited").

B. Federal Law Prohibits the Enforcement of State Law to the Extent It Sets "Air Carrier" Rates.

Pursuant to the ADA, state authorities are precluded from applying state-law standards to set the prices of federally regulated "air carriers"—a category that includes air ambulance providers. Although Travelers has always conceded that ADA preemption is relevant to this fee dispute, it so extensively misrepresents the nature of the applicable federal law (as well as related questions of state law) that it is necessary to set forth the basic operative principles here.

1. The Federal Government Has Deregulated the Market for "Air Carrier" Services, Including Air Ambulance Services.

The ADA effectuated a transformation of the market for air carrier services in the United States. Before 1978, the air transportation industry was heavily regulated by federal authorities. Specifically, the Federal Aviation Act of 1958 ("FAA") gave the Civil Aeronautics Board ("CAB") broad authority to set rules governing air travel, including the authority to establish and review air carrier prices. *See* FAA, Pub. L. No. 85-726, 72 Stat. 731; *Watson v. Air Methods Corp.*, 870 F.3d 812, 815 (8th Cir. 2017) (en banc) ("Before the ADA, the [CAB] possessed broad power to regulate the interstate airline industry, including the authority to prescribe routes and fares."); *Moss v. CAB*, 430 F.2d 891, 893 (D.C. Cir. 1970) ("*Moss I*") (describing process for reviewing air carrier rates in accordance with specified statutory criteria). The CAB's mandate, with respect to establishing air carrier prices, was essentially to apply a "reasonableness" standard. *See Moss v. CAB*, 521 F.2d 298, 308 (D.C. Cir. 1975) ("*Moss II*") ("Reasonable rates, in this regulated industry as in others, are those which are as low as possible but still allow the

industry to provide 'adequate and efficient service' and earn a reasonable rate of return, thus assuring its ability to attract necessary capital in the future."). In 1978, however, Congress determined that a market-based, rather than a regulatory, approach would best serve the industry. It passed the ADA to "largely deregulate[] domestic air transport." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).

DOT Supervisory Authority Over "Air Carriers": A key part of this transformation was to unwind the CAB and end the practice of federal administrative rate-setting. *See Watson*, 870 F.3d at 815 ("The ADA largely deregulated domestic air transportation and provided for the eventual termination of the [CAB]."). In the CAB's place, the ADA charged the Department of Transportation with economic oversight of air carriers, with an explicit mandate to promote "maximum reliance on competitive market forces and on actual and potential competition." 49 U.S.C. § 40101(a)(6), (a)(12)(A); *see also id.* § 40101(a)(12) (stating statutory goal of "encouraging, developing, and maintaining an air transportation system relying on actual and potential competition").

In furtherance of this statutory directive to promote a functioning market for air carrier services, the Secretary of Transportation has authority, where it is "in the public interest," to "investigate and decide whether an air carrier . . . has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation." 49 U.S.C. § 41712(a); *see also Morales*, 504 U.S. at 391 (discussing DOT's supervisory authority over air carriers). If the Secretary finds that an air carrier has committed an unfair or deceptive practice or unfair method of competition, she has further authority to enjoin the offending conduct. *See* 49 U.S.C. § 41712(a). The

Department actively responds to concerns regarding air carriers' conduct, including sanctioning air carriers for unfair pricing practices. *See, e.g.*, *Edelman v. Middle E. Airlines Airliban*, DOT Order No. 2015-11-4 (Nov. 5, 2015), available at https://cms.dot.gov/sites/dot.gov/files/docs/eo_2015-11-4.pdf (sanctioning air carrier for deceptive practice where it inflated prices by misrepresenting taxes charged); Letter from Blane Workie, Assistant Gen. Counsel, Aviation Enforcement & Proceedings, DOT, to Jon-Peter F. Kelly, Assistant Gen. Counsel, Delta Air Lines, Inc. (July 24, 2015) (announcing investigation of allegations that Delta Airlines engaged in price gouging), available at https://www.transportation.gov/sites/dot.gov/files/docs/2015-7-24-Investigation-Letter-DL-1.pdf.

DOT supervision therefore provides a backstop to the market-based approach to air carrier services that the ADA generally adopted, ensuring that consumers who believe they have been unfairly treated have an outlet for their claims. Congress specifically intended that this federal agency, rather than state lawmakers, play this role. As the Supreme Court has noted, "[t]he Secretary of Transportation is . . . equipped, as courts"—and states—"are not, to survey the field nationwide, and to regulate based on a full view of the relevant facts and circumstances." *Nw. Airlines, Inc. v. Cty. of Kent*, 510 U.S. 355, 366-67 (1994).

***Air Ambulance Providers Are "Air Carriers" Under the ADA*:** Air ambulance providers such as EagleMed are "air carriers" within the meaning of the ADA. Specifically, EagleMed (like other air ambulance providers) holds certificates under Parts 119, 135, and 298 of the FAA's regulations to provide "interstate air transportation." *See* R.II, 330, 332; 49 U.S.C. § 40102(a). As courts around the country have held—including

with respect to EagleMed itself—such federally certified air ambulance providers qualify as "air carriers" and are subject to the ADA. *See EagleMed, LLC v. Wyoming ex rel. Dep't of Workforce Svcs., Workers' Compensation Div.*, 227 F. Supp. 3d 1255, 1278 (D. Wyo. 2016), *aff'd* 868 F.3d 893; *Valley Med Flight*, 171 F. Supp. 3d at 933-34; *Bailey v. Rocky Mtn. Holdings, LLC*, 136 F. Supp. 3d 1376, 1380 (S.D. Fla. 2015); *Schneberger v. Air Evac EMS, Inc.*, No. 16-843-R, 2017 WL 1026012 at *2 (W.D. Okla. Mar. 15, 2017); *Med-Trans Corp. v. Benton*, 581 F. Supp. 2d 721, 731-32 (E.D.N.C. 2008); *Hiawatha Aviation of Rochester, Inc. v. Minn. Dep't of Health*, 389 N.W. 2d 507, 509 (Minn. 1986).

Accordingly, the DOT exercises oversight authority over air ambulance carriers just as it does over commercial airlines. Indeed, the DOT has made clear that it considers air ambulance providers to be "air carriers" and to fall within its authority. *See, e.g.*, Letter from James R. Dann, Deputy Assistant Gen. Counsel, DOT, to Donald Jansky, Assistant Gen. Counsel, Tex. Dep't of State Health Servs. 1 (Feb. 20, 2007) (confirming that air ambulances are "subject to Federal regulation that otherwise affects air carriers"), attached as Appendix A; Letter from D.J. Gribbin, Gen. Counsel, DOT, to Honorable Greg Abbott, Tex. Att'y Gen. (Nov. 3, 2008) (explaining the DOT's position that the ADA preempts certain provisions of Texas law as applied to air ambulance providers), attached as Appendix B; *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d at 405; *cf. Louis v. McCormick & Schmick Restaurant Corp.*, 460 F. Supp. 2d 1153, 1154 & n.4 (C.D. Cal. 2006) (recognizing that judicial notice may be taken of agency opinion letters). The DOT's website is specifically designed to field complaints regarding air ambulance providers. *See* DOT, *Air Travel Complaint – Comment Form*,

https://airconsumer.dot.gov/escomplaint/ConsumerForm.cfm (select "AIR AMBULANCES (ALL)" from "Airline/Company" drop-down menu). And the agency has in the past exercised its § 41712 authority over air ambulance providers specifically, ordering them, for example, to alter their public representations about their services. *See, e.g.*, *BestCare EMS, Ltd.*, DOT Order No. 2013-11-14 (Nov. 20, 2013), available at https://www.transportation.gov/airconsumer/eo-2013-11-14; *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d at 405; *Louis*, 460 F. Supp. 2d at 1154 & n.4.

Moreover, at present, federal regulators are actively considering issues relating to the very subject of this dispute: air ambulance pricing. *See generally* 2017 GAO Report at 9 (setting forth preliminary assessment of air ambulance pricing and possible next steps in oversight process). The DOT has responded to the GAO report, concurring with some of its recommendations and outlining planned changes to its mechanisms for fielding consumer complaints about air ambulance providers, as well as its plans to assess possible disclosure requirements. Letter from Bryan Slater, Assistant Sec'y. for Admin., DOT, to John Michael Mulvaney, Dir., Office of Mgmt. and Budget (Sept. 18, 2017) ("Slater Letter"), attached as Appendix C; *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d at 405; *Cities Serv. Gas Co.*, 192 Kan. at 714; *Louis*, 460 F. Supp. 2d at 1154 & n.4.

Contrary to Travelers' assertion, Br. 13-20, the federal Centers for Medicare and Medicaid ("CMS") do not have economic regulatory authority over air ambulances generally. The DOT possesses that authority. *See* 49 U.S.C. § 41712(a). CMS has simply

established a fee schedule for air ambulance reimbursements that applies solely within the confines of the federal Medicare program. *See infra* Part I.D.1.

2. ADA Preemption Precludes States from Setting Air Ambulance Reimbursement Rates.

In keeping with the ADA's overall deregulatory aim, and to "ensure that the States would not undo federal deregulation with regulation of their own," *Morales*, 504 U.S. at 378, the statute includes an express preemption provision. It provides:

> [A] State . . . may not enact or enforce a law, regulation, or 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. § 41713(b)(1). This provision guarantees that to the extent any oversight in the field remains appropriate, air carriers should have a single, federal regulator, rather than being subjected to "a patchwork of state . . . laws, rules, and regulations." *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008) (interpreting identical express preemption provision of the Federal Aviation Authority Authorization Act); *see also Morales*, 504 U.S. at 379 (noting DOT's enforcement authority over air carriers); *In re Korean Air Lines Co.*, 642 F.3d 685, 694 (9th Cir. 2011) (noting Congress's finding that "federal regulation insures a uniform system of regulation" (quoting H.R. Rep. No. 98-793, at 4 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 2857, 2860)).

Consistent with the goal of forestalling state regulation of air carriers, the ADA's preemption provision has "an expansive sweep." *Morales*, 504 U.S. at 384 (citation omitted). As the Supreme Court has explained, "[t]he ordinary meaning of [the words 'related to'] is a broad one . . . express[ing] a broad pre-emptive purpose." *Id.* at 383. The

provision encompasses any state-law provision "having a connection with or reference to [the] 'rates, routes, or services'" of "an air carrier." *Id.* at 384 (citation omitted); 49 U.S.C. § 41713(b)(1); *see also Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) (discussing "the expansive phrase 'relate[d] to'").

The ADA's preemption provision therefore plainly encompasses state statutes and regulations that expressly target air carriers. It also goes further, extending to many state common-law rules when applied to air carriers. In *Wolens*, 513 U.S. 219, as well as *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014), the Supreme Court clarified when a state common-law rule is preempted by explicating what it means to "enforce a . . . provision *having the force and effect of law*," 49 U.S.C. § 41713(b)(1) (emphasis added). The key distinction, it held, is "between what the State dictates and what the [air carrier] itself undertakes." *Wolens*, 513 U.S. at 233. While the ADA does not preclude "relief to a party who claims and proves that an [air carrier] dishonored a term the [air carrier] itself stipulated," it does "stop[] States from imposing their own substantive standards with respect to rates, routes, or services." *Id.* at 232-33. When a state-law provision reflects the state's own policy views, it has "the force and effect of law" under the ADA and is preempted. *See id.* at 229; *Ginsberg*, 134 S. Ct. at 1429 (holding that a provision "has 'the force and effect of law'" when it involves a "binding standard[] of conduct that operate[s] irrespective of any private agreement" (quoting *Wolens*, 513 U.S. at 229 n.5)).

3. Where State Rules Are Preempted, Further Questions Regarding the Relevant State Statutory Scheme Are Determined Under Applicable State-Law Principles of Statutory Interpretation.

Finally, determining the consequences of ADA preemption requires interpretation of state law under state principles of statutory interpretation. Specifically, where preemption precludes the application of a state statute in part or to a particular class of entities—here, "air carriers"—it does not follow that the entire statute becomes inoperative. *See U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 509 n.8 (1993) (Where federal preemption applies "[the] state statute . . . need not be treated as a package which stands or falls in its entirety."). Rather, the question becomes whether the invalid portion of the state statute can be severed from the rest.

It is well established that severability is a question of state law, to be determined under state principles of statutory construction. *See id.* ("[T]he severability of the various priority provisions is a question of state law."); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 196-97 (1983) (similar); *Bishop v. Smith*, 760 F.3d 1070, 1093 (10th Cir. 2014) (similar); *Panhandle E. Pipeline Co. v. State of Okla. ex rel. Comm'rs of Land Office*, 83 F.3d 1219, 1229 (10th Cir. 1996) (similar). In Kansas, that inquiry is guided by legislative intent. "If from examination of a statute it can be said that the act would have been passed without the objectionable portion and if the statute would operate effectively to carry out the intention of the legislature with such portion stricken, the remainder of the valid law will stand." *Bd. of Cty. Comm'rs of Johnson Cty. v. Jordan*, 303 Kan. 844, 870, 370 P.3d 1170, 1186 (2016).

C. This Court Should Affirm the Board's Order Because both the Applicable Kansas Workers' Compensation Fee Schedule and The ADA Require Payment in Full.

Applying these principles and the KWCA, EagleMed is entitled to an award of its full, customary billed charges for the transports at issue in this case. Indeed, this is true both as a matter of the applicable workers'-compensation fee schedule and as a matter of ADA preemption, because the relevant fee schedule—which Travelers essentially ignores—recognizes that the ADA applies and directs that air ambulance providers receive their customary rates for transports of workers'-compensation insureds. It therefore leads to the same result as the ADA preemption analysis itself.

1. The 2012 Workers' Compensation Fee Schedule for Air Ambulance Requires Payment of the Provider's Usual Billed Charges.

In general, the KWCA requires the Director of Workers' Compensation ("Director") to promulgate fee schedules governing reimbursement for health care services provided to workers'-compensation patients. *See* Kan. Stat. Ann. § 44-510i(c). With respect to reimbursement, the Act provides that a health care provider that has rendered services to a workers'-compensation patient "shall be paid *either* such health care provider['s] . . . usual and customary charge for the . . . care . . . *or* the maximum fees as set forth in the schedule, *whichever is less*." Kan. Stat. Ann. § 44-510i(e) (emphasis added).

However, the 2012 Workers' Compensation Fee Schedule—applicable here—simply provides, in recognition of the ADA's prohibition against states prescribing air carrier rates, that air ambulance providers should be paid their "usual and customary charge." Specifically, the 2012 Fee Schedule states,

> GENERAL: Reimbursement for ambulance services (ground only) will be limited to the emergency medial service's billed charges, less 10%. Air ambulance services will be limited to usual and customary charges as per 49 U.S.C., Section 41713(b) of the Federal Aviation Act.

See R.II, 413 (quoting 2012 Fee Schedule). Section 41713(b) of the FAA is, of course, the ADA's express preemption provision. The fee schedule therefore reflects that ADA preemption applies to air ambulances and invalidates any state-law provision "having the force and effect of law related to" an air ambulance provider's "price[s], route[s], or service[s]," 49 U.S.C. § 41713(b). *See supra* Part I.B.2; *infra* Part I.C.2. Accordingly—and in contrast to ground ambulance providers, which must accept a 10% discount on their bills—air ambulance providers are entitled under the fee schedule to the amount they would normally bill for a given transport, or their "usual and customary charges."

Indeed, the Board recognized as much in it is Order disposing of the first appeal in this matter. It found that "[t]he 2012 Fee Schedule does not set a price for airline ambulance charges, other than directing us to the ADA." R.II, 417. It accordingly concluded that "the issue of whether the ADA preempts the Division from establishing rates of payment for air ambulance services is moot"—because the Division does not establish any rate of payment that is different from the air ambulance provider's billed charges. R.II, 418.

The simplest route to affirmance on this Court's *de novo* review is to hold that the applicable 2012 Fee Schedule is not preempted because it does not set air ambulance rates in a manner contrary to the ADA. Rather, it directs that air ambulance providers receive

their billed charges. The 2012 Fee Schedule, therefore, can and should be applied, and Travelers must pay the disputed bills in full.

Travelers states that both parties agreed below that the applicable fee schedule was preempted, *see, e.g.*, Br. 9; but this is an incomplete and inaccurate representation. At the outset of this dispute, the parties did not recognize that the 2012 Fee Schedule governed and, instead, mutually assumed that the operative fee schedule was the more recent 2015 version, which imposed a 10% discount on air ambulance fees. *See* R.II, 417 & n.11. Only later did the parties recognize that the 2012 Fee Schedule applies. *Id.* Accordingly, EagleMed's initial position that the fee schedule was preempted—while accurate with respect to a fee schedule that imposed a 10% discount on air carrier rates—did not address the 2012 Fee Schedule. The 2012 Fee Schedule is not preempted; EagleMed has never asserted that it is; and it resolves this dispute.

2. The ADA, in Conjunction with Applicable Kansas Principles of Statutory Interpretation, Requires Payment of Air Ambulance Providers' Usual Billed Charges.

In the alternative, any fee schedule or other standard applied to reduce EagleMed's rates is preempted under the ADA. That means that even if the 2012 Fee Schedule could not be applied—which it can—the outcome of this case would be the same: Travelers must pay EagleMed's full billed charges. The analysis here entails the additional step of applying Kansas statutory interpretation principles to the KWCA, but it is no less straightforward.

Two subsections of § 44-510i of the Act putatively affect the reimbursement rate for the air-ambulance transports at issue here. *First*, as noted above, § 44-510i(e) states

that a health care provider that has rendered services to workers'-compensation patients "shall be paid either such health care provider['s] . . . usual and customary charge for the . . . care . . . or the maximum fees as set forth in the schedule, whichever is less." *Second*, § 44-510i(c)(2)—relied upon by Travelers—provides that as a general matter, "all fees . . . [and] charges under this section . . . shall be limited to such as are fair, reasonable, and necessary." Both of these provisions are preempted to the extent they are applied to reduce the rate for air ambulance transport below the provider's usual billed charge. Both are either severable from the statute or can be interpreted in a manner that poses no ADA problem, so that EagleMed is entitled to its full billed charges under the remaining provisions of the KWCA.

***ADA Preemption*:** As already set forth, the ADA preempts any state-law rule "having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713. This rule displaces both any fee schedule that applies a reduced rate for air ambulance services and any standard applied on a case-by-case basis to achieve the same end, including the "fair, reasonable and necessary" standard set forth in Kan. Stat. Ann. § 44-510i(c)(2).

A fee schedule directly setting air ambulance rates is obviously preempted. When the state unilaterally prescribes air carrier rates, in imposes a binding state standard that explicitly "relate[s] to" air ambulance prices and will have a "forbidden significant effect" on them. *Morales*, 504 U.S. at 387-88; *see also Wolens*, 513 U.S. at 229 n.5 (states cannot impose a "binding standard[] of conduct that operate[s] irrespective of any private agreement") (quotations and citation omitted). The ADA does not permit this.

Unsurprisingly, courts have repeatedly held that under the ADA, state workers'-compensation programs cannot apply fee schedules to air ambulance providers. *See Cox*, 868 F.3d at 905 (holding that Wyoming workers'-compensation statute "and the associated rate schedule for ambulance services are preempted by the Airline Deregulation Act to the extent that they set maximum reimbursement rates for air-ambulance services provided to injured workers covered by the Wyoming Worker's Compensation Act"); *Cheatham*, 2017 WL 4765966 at *8 (holding that ADA preempts mandatory fee schedules imposed on air ambulance rates by West Virginia workers'-compensation system and public employees insurance system); *Valley Med Flight, Inc.*, 171 F. Supp. 3d at 947 (holding that ADA preempts mandatory fee schedule imposed by North Dakota workers'-compensation system). The same holds true here.

The ADA also preempts the "fair, reasonable and necessary" standard of Kan. Stat. Ann. § 44-510i(c)(2) to the extent it is applied to reduce air ambulance reimbursement rates. Assessing EagleMed's prices under such a rule would obviously "relate to" its "price[s]" and "service[s]" and have "the forbidden significant effect upon fares," because it would involve a regulatory determination of an applicable rate. *See Morales*, 504 U.S. at 387-88. Further, a "fair, reasonable and necessary" standard, as applied to evaluate air ambulance prices, would have "the force and effect of law" under the rule established in *Wolens* and *Ginsberg*. The inquiry would involve "impos[ing]" the State's "own substantive standards" and policy views on an air carrier's prices. *Wolens*, 513 U.S. at 232. Under the ADA, this is improper.

It does not matter that the "fair, reasonable and necessary" standard would be applied on a case-by-case basis. The Supreme Court has held that "the ADA's deregulatory aim can be undermined just as surely by a state common-law rule"—which is applied case by case—"as it can by a state statute or regulation." *Ginsberg*, 134 S. Ct. at 1430. "[I]t defies logic to think that Congress would disregard real-world consequences and give dispositive effect to the form of a clear intrusion into a federally regulated industry." *Id.* What matters is whether the state is "impos[ing] [its] own public polic[y] or theor[y] of competition or regulation on the operations of an air carrier." *Wolens*, 513 U.S. 229 n.5. Indeed, the very cornerstone of the ADA was to eliminate the practice of federal reasonableness review of air carrier prices. *See supra* Part I.B.1. And by including the preemption provision, Congress intended to prevent the states from "undo[ing] federal deregulation with regulation of their own." *Morales*, 504 U.S. at 378. It would defy the central purpose of the ADA to allow state agencies to reduce air ambulance reimbursement rates under a reasonableness standard.

***Kansas Severability Analysis*:** Because federal law precludes both a state-established fee schedule requiring EagleMed to accept a reduced rate (assuming, counterfactually, that such a fee schedule applied here) and the application of a "fair, reasonable and necessary" standard to reduce the rate for air-ambulance transport, the next question is how to interpret the KWCA in light of federal preemption. In particular, this Court must ask whether the invalid portions of the Workers' Compensation Act can be severed from the remainder of the Act. *See supra* Part I.B.3. They can. Or, in the case of

the "fair, reasonable and necessary" standard, it can alternatively be interpreted in a manner that avoids the preemption problem altogether.

As a general matter, again, severability is a question of state legislative intent. *See Bd. of Cty. Comm'rs of Johnson Cty.*, 303 Kan. at 870, 370 P.3d at 1186. Courts will "sever[] a provision from a statute if to do so would make the statute constitutional and the remaining provisions could fulfill the purpose of the statute." *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 913, 179 P.3d 366, 391 (2008). A presumption of severability applies in this case because the KWCA specifies that "[i]f any provision or clause of this act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable." Kan. Stat. Ann. § 44-574. This severability clause "is direct evidence of legislative intent" that the statute be severable. *Gannon v. State*, 304 Kan. 490, 520, 372 P.3d 1181, 1199-200 (2016) (per curiam); *see also Morrison*, 285 Kan. at 913, 179 P.3d at 391 ("An argument in favor of severability is stronger if an act has a severability clause.").

Here, the statutory purpose to bear in mind is the KWCA's overall goal of protecting both employees and employers from the financial losses associated with employees' on-the-job injuries. *See Green v. Burch*, 164 Kan. 348, 355, 189 P.2d 892, 897 (1948) ("The general scheme of [the Act] has been to enable those engaged in operating hazardous industries to compensate workmen injured therein . . . [and] to place the burden of compensation for accidents to employees upon the industry rather than upon the individual employer.") (alterations and citations omitted); Kan. Stat. Ann. § 44-501b ("It is the intent

of the legislature that the workers compensation act shall be liberally construed . . . for the purpose of bringing employers and employees within the provisions of the act."). The Act aims to make injured workers whole, *see Kinder v. Murray & Sons Constr. Co.*, 264 Kan. 484, 493, 957 P.2d 488, 495 (1998) ("The goal of workers' compensation is to restore earning power lost as a result of injury."); while at the same time insulating employers from tort liability resulting from injuries suffered by employees, *see* Kan. Stat. Ann. § 44-501b(d) (eliminating employer liability for injuries covered by the Act). This purpose can readily be furthered by severing (or reinterpreting) the preempted portions of § 44-510i.

First, the references to the fee schedule can easily be struck from § 44-510i(e), when applied to air ambulance providers, so that it simply provides for payment of their "usual and customary charge." In its entirety, this subsection reads as follows:

> All fees and other charges paid for such treatment, care and attendance, including treatment, care and attendance provided by any health care provider, hospital or other entity providing health care services, shall not exceed the amounts prescribed by the schedule of maximum fees established under this section or the amounts authorized pursuant to the provisions and review procedures prescribed by the schedule for exceptional cases. With the exception of the rules and regulations established for the payment of selected hospital inpatient services under the diagnosis related group prospective payment system, a health care provider, hospital or other entity providing health care services shall be paid either such health care provider, hospital or other entity's usual and customary charge for the treatment, care and attendance or the maximum fees as set forth in the schedule, whichever is less.

Kan. Stat. Ann. § 44-510i(e). Applying ADA preemption and Kansas severability principles, this provision can be interpreted to read as follows in the air ambulance context:

> ~~All fees and other charges paid for such treatment, care and attendance, including treatment, care and attendance provided by any health care provider, hospital or other entity providing health care services, shall not~~

~~exceed the amounts prescribed by the schedule of maximum fees established under this section or the amounts authorized pursuant to the provisions and review procedures prescribed by the schedule for exceptional cases.~~ With the exception of the rules and regulations established for the payment of selected hospital inpatient services under the diagnosis related group prospective payment system, *a health care provider, hospital or other entity providing health care services shall be paid* ~~either~~ *such health care provider, hospital or other entity's usual and customary charge* for the treatment, care and attendance ~~or the maximum fees as set forth in the schedule, whichever is less~~.

Kan. Stat. Ann. § 44-510i(e) (emphasis added). So construed, the provision's conflict with federal law is cured, because the fee schedule no longer sets a reduced rate for air ambulance reimbursements but rather requires the insurer to pay the provider's usual charge. (This version of the statute would only apply in the air ambulance context. Under ordinary severability principles, when a given statutory term is preempted or unconstitutional in one application, it is severed from the statute in that application. It continues to have force in contexts where it can validly be applied. *See, e.g.*, *St. Thomas-St. John Hotel & Tourism Ass'n. Inc. v. Gov't of U.S. Virgin Islands ex rel. Virgin Islands Dep't of Labor*, 357 F.3d 297, 302-04 (3d Cir. 2004) (holding that a law restricting the grounds for termination of employees was preempted as applied to supervisors, but not preempted as applied to other employees).)

The foregoing, "severed" version of the statute furthers the purposes of the KWCA because it ensures that the employee is made whole—because his or her bill for air ambulance services is paid in full—while the employer is also shielded from liability—because the insurer pays the employee's debt for air ambulance services. Indeed, the 2012 Fee Schedule essentially incorporates this severability analysis into a fee schedule by

requiring the insurer to pay the air ambulance provider's "usual and customary charges." R.II, 413.

Second, the "fair, reasonable, and necessary" language in § 44-510i(c)(2) can similarly be struck from the statute as applied to air ambulance providers—or, alternatively, construed to be in harmony with the ADA. Subsection (c) as a whole instructs the Director to "prepare and adopt rules and regulations which establish a schedule of maximum fees" for medical services rendered to covered employees, as well as "procedures for appeals and review of disputed charges or services rendered by health care providers under this section." Kan. Stat. Ann. § 44-510i(c). Subsection (c)(1) then establishes criteria that the Director must take into consideration in setting the fee schedule; subsection (c)(2) provides that "[i]n every case, all fees [and] charges under this section . . . shall be limited to such as are fair, reasonable and necessary"; and subsection (c)(3) provides that any bill "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."

There are at least two ways to interpret § 44-510i(c) in order to reconcile it with the ADA while preserving the purposes of the Act. As applied to air ambulance providers, the entirety of § 44-510i(c)(2)—which imposes the "fair, reasonable and necessary" standard—could be struck. This would eliminate any "reasonableness" inquiry or limitation on air ambulance rates. And it would—similar to eliminating the reference to the fee schedule in § 44-510i(e)—accomplish the purposes of the KWCA by making the employee whole and shielding the employer from liability.

Alternatively, this Court could hold that air ambulance providers' billed charges, as established by the provider voluntarily in the market under the supervision of the DOT, are "fair, reasonable and necessary" as a matter of law. By including air ambulance providers within the definition of "air carriers," Congress expressed its intention that the market, subject to the supervision of the DOT (rather than state regulators), would be the most effective and beneficial means of establishing air ambulance rates. *See supra* Part I.B.1. In keeping with this intent, EagleMed's billed rate has been set in accordance with the particular exigencies of the market for air ambulance services, *see infra* at 38, while the DOT operates as a backstop ready to field any consumer complaints about unfair pricing. It is both logical and consistent with the ADA to hold that the prices set in the deregulated but federally supervised market are "fair, reasonable and necessary" for the purposes of the KWCA. While under *Wolens* and *Ginsberg*, the "fair, reasonable and necessary" standard cannot be applied to require air ambulance provider to accept *less* than they would voluntarily agree to, it would not violate the ADA to hold that air ambulances billed charges—determined by them voluntarily—are always "fair, reasonable and necessary" as a matter of law.

Such a holding would address the federal preemption problem by eliminating any reduction of air ambulance prices under the guise of applying a state-law reasonableness standard. *See State v. Casady*, 289 Kan. 150, 152, 210 P.3d 113, 116 (2009) ("If there is any reasonable way to construe a statute as constitutionally valid, the court must do so."). And it would, again, further the purposes of the Workers' Compensation Act by ensuring that air ambulance bills are paid by insurers rather than employees or employers.

In sum, Kansas principles of statutory interpretation and severability dictate that § 44-510i can and should be interpreted in a manner that recognizes ADA preemption and nevertheless ensures that the central goals of the KWCA are served. Subsection (e) can readily be construed to direct that air ambulance providers be paid their "usual and customary charge" for services to workers'-compensation insureds. And the "fair, reasonable and necessary" language in Subsection (c)(2) can either be struck from the statute, as applied to air ambulance providers; or construed in harmony with federal law. Whichever of these approaches this Court adopts, EagleMed is entitled to its full billed charges for the claims at issue here.

D. Travelers' Arguments for Applying a Reduced Reimbursement Rate All Fail.

Travelers' contrary arguments all either ignore or misrepresent the legal principles that govern this dispute.

1. The Federal Medicare Fee Schedule Does Not Apply in Kansas Workers' Compensation Proceedings.

Travelers first argues that the federal Medicare fee schedule applies in this Kansas Workers' Compensation dispute. Br. 13-20. But it cites no court or other authority holding that the Medicare fee schedule can be applied to non-Medicare patients. Such a ruling here would be the first of its kind. In fact, the relevant federal statutes and regulations clearly establish that—as common sense also indicates—Medicare rates apply within the bounds of the Medicare program, and not elsewhere.

The relevant statute—Part B of the Medicare subchapter in the Social Security Act, 42 U.S.C. § 1395j *et seq.*—"establish[es] a voluntary insurance program to provide

medical insurance benefits in accordance with the provisions of this part *for aged and disabled individuals who elect to enroll under such program.*" 42 U.S.C. § 1395j (emphasis added). (Those eligible are principally U.S. citizens or legal permanent residents age 65 or over. *See* 42 U.S.C. § 1395*o*.) The statute and accompanying regulations govern only "[t]he benefits provided to an individual *by the insurance program established by this part*"—*i.e.*, Medicare Part B. *Id.* § 1395k(a) (defining "[s]cope of benefits") (emphasis added). Similarly, entities entitled to recover payment under the Medicare program include "a physician or other practitioner, a facility, or other entity . . . that furnishes items or services *under this subchapter*," meaning Medicare as a whole. 42 U.S.C.A. § 1395x(d). Nowhere does the statute call for the creation of an air ambulance fee schedule applicable outside of the Medicare context.

Unsurprisingly, the Centers for Medicare & Medicaid Services ("CMS"), when promulgating the Medicare air ambulance fee schedule, confined itself to its statutorily authorized task. As it explained, its "final rule establishes a fee schedule *for the payment of ambulance services under the Medicare program.*" *Medicare Program; Fee Schedule for Payment of Ambulance Services and Revisions to the Physician Certification Requirements for Coverage of Nonemergency Ambulance Services*, 67 Fed. Reg. 9100-01, 9100 (Feb. 27, 2002) (emphasis added); *see also* Centers for Medicare & Medicaid Servs., U.S. Dep't of Health & Human Servs., ICN 006835, Ambulance Fee Schedule 2 (Dec. 2016), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/AmbulanceFeeSched_508.pdf ("Section 4531(b)(2) of the Balanced Budget Act of 1997 added Section 1834(l) to the Social Security Act (the

Act), which mandated the implementation of a national Ambulance FS *for Medicare Part B ambulance transport claims* with dates of service on or after April 1, 2002.") (emphasis added); 42 C.F.R. § 414.610(a) ("*Medicare* payment for ambulance services is based on the lesser of the actual charge or the applicable fee schedule amount.") (emphasis added). Moreover, contrary to Travelers' argument, the Medicare Fee Schedule does not represent a "reasonable" nationwide reimbursement rate, and it was never meant to. Established in 2002, the schedule was based on data from 1998—almost twenty years ago. At that time, CMS did not consider air ambulance providers' actual costs per service because "these data [did] not exist." 67 Fed. Reg. at 9104, 9117. Further, private claims were not factored into the Medicare air ambulance fee schedule. Instead, the Medicare program devised its rates based on the total that was paid in 1998 on Medicare claims for both ground and air ambulances. *Id.* at 9117-18. Nor did the fee schedule, which falls under Medicare Part B, account for the price of "uncompensated care," as Medicare Part A does, despite the fact that air ambulances, like hospitals, must take patients regardless of their ability to pay. In addition, the economy and air ambulance market have significantly changed since implementation of the Medicare Fee Schedule, *see* 2010 GAO Report at 8-9, and yet Medicare payment rates have only been adjusted for inflation, about 2% each year. For all of these reasons, the Medicare rates are not a fair benchmark for other payors.

In short—to state the obvious—the Medicare Part B statute and regulations apply to Medicare insureds; and to providers such as EagleMed when they serve Medicare patients. The Medicare fee schedule does not apply outside the Medicare context. It does

not purport to be a nationally applicable "Federal Fee Schedule," Br. 13. There is no such thing.

Travelers attempts to bolster its claim that the Medicare fee schedule governs with a policy argument that the ADA supposedly applies with less force outside the commercial airline context. Br. 17-19. The premise of this argument—that there is supposedly "overlap" between the ADA and the Medicare fee schedule necessitating judicial resolution—is fundamentally wrong, for the reason just stated: Medicare does not apply here. This policy argument is therefore entirely irrelevant. Moreover, supposed policy concerns without any basis in the record do not justify ignoring the plain text of the ADA, which applies to all "air carriers." Courts do not rewrite statutes on the basis of speculative policy misfires or perceived unfairness. *See Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 (2017) ("[W]e resist speculating whether Congress acted inadvertently."); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (stating that it is "never [the] job" of a reviewing court "to rewrite a constitutionally valid statutory text under the banner of speculation" and that it is "quite mistaken to assume . . . that whatever might appear to further the statute's primary objective must be the law") (alterations and citation omitted); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (Where a statute contains an express preemption provision, as the ADA does, "[t]he plain text of the [statute] begins and ends [the] analysis."); *Cox*, 868 F.3d at 904 (rejecting policy-based argument against preemption and finding that there was not a "single textual reason" to carve out air ambulances from the ADA's preemption provision).

(It also happens that Travelers' policy-based arguments, in addition to being legally irrelevant, are factually wrong. There is, contrary to Travelers' contentions, a functioning market for air ambulance services that keeps prices competitive. Specifically, providers such as EagleMed compete to obtain preferred provider agreements with health care facilities; and price, alongside other factors such as quality and location, is an important component in those facilities' contracting decisions. EagleMed keeps its rates as low as it can while remaining in business. EagleMed's billed charges reflect (1) its high fixed costs, including maintaining specially equipped aircraft and multiple crews of pilots and medical staff at the ready, 24 hours per day; and (2) the need for cross-subsidization among payors. A large portion of EagleMed's patients are either uninsured or underinsured—including those covered by the federal Medicare program, which pays less than EagleMed's per-flight costs. *See supra* at 7. Such underpayments contribute to the rising costs of air ambulance transport, because EagleMed must offset its losses from transporting those patients to stay in business. *See supra* at 7. If Travelers is allowed to pay the Medicare rate, this will simply mean that more costs are shifted on to other private payors. But in any event, the Medicare rate is, as a matter of law, inapplicable here.)

The ADA applies here. The Medicare fee schedule does not. This Court therefore need not consider the interplay between the ADA and Medicare or any other issue of supposed "regulatory overlap" raised by Travelers. *See* Br. 18-19.

2. The Division Cannot Apply a "Fair, Reasonable and Necessary" Standard To Set a Reduced Rate for Air Carrier Services.

Travelers next argues that if the Medicare fee schedule does not apply, the Division may still apply the "fair, reasonable and necessary" standard to impose a lower rate on EagleMed. Br. 20-24. As already demonstrated, the application of a "fair, reasonable and necessary" standard to air carrier prices is preempted by the ADA and is, indeed, precisely the type of regulatory inquiry the ADA as a whole intended to do away with. *See supra* Parts I.B.1-2, I.C.2. Trying to avoid ADA preemption, Travelers claims that EagleMed has effectively agreed to review under the "fair, reasonable and necessary" standard; and that a recent GAO report and Tenth Circuit decision support its position. These arguments all fail.

***EagleMed Has Never Explicitly or Impliedly Agreed to Reasonableness Review*:** Travelers suggests that reasonableness review is appropriate because of "EagleMed[']s desire to enforce its charges under the [KWCA]." Br. 21. Travelers provides no legal basis for this assertion, and the relevant authority all points the other way. The ADA broadly prohibits state rate-setting in the market for air carrier services, including in state workers'-compensation systems in analogous circumstances. *See Cox*, 868 F.3d at 905; *Cheatham*, 2017 WL 4765966, at *8; *Dwelle*, 171 F. Supp. 3d at 947.

Moreover, EagleMed does not voluntarily choose to participate in the KWCA system. EagleMed generally does not know the insurance status of patients at the time of transport, and it is precluded by law from refusing payment on the basis of a patient's insurance status. *See supra* at 5-6 (citing Kan. Stat. Ann. § 65-613; Kan. Admin. Reg.

§ 109-1-1(r)-(t), (ff), (ddd)). When it does provide transport to a workers'-compensation insured in Kansas, it is required to seek reimbursement within the KWCA system. *See* Kan. Stat. Ann. § 44-510j(h) (providing that health care providers accept the terms of the Act by providing services to workers'-compensation insureds and precluding providers from attempting to collect in court or through other channels until final adjudication of a claim within the Workers' Compensation system). Once a claim is submitted within the mandatory KWCA system, the ADA forbids the Division from requiring EagleMed to accept a lower, state-set amount for its transports. Rather, the KWCA must be interpreted in a manner consistent with federal law. *See supra* Part I.C.2. (Elsewhere, Travelers asserts—without record support—that EagleMed accepts less than its full billed charges from other commercial insurers. See Br. 4. In fact, a majority of commercial insurers pay EagleMed's bills in full.)

Travelers further argues that because EagleMed asserted during the administrative proceedings that it is entitled to its "usual and customary" rates under the 2012 Fee Schedule, it has somehow agreed to reasonableness review under the "fair, reasonable and necessary" standard. Br. 22-23 (citing R.II, 454). This is illogical and wrong. To again state the obvious, the phrase "usual and customary" does not include the word "reasonable." The plain meaning of "usual and customary" is the amount normally charged for a given transport under similar circumstances—*i.e.*, EagleMed's ordinary billed charges. Moreover, EagleMed drew the "usual and customary" language from the 2012 Fee Schedule, which incorporates by reference the ADA's preemption provision. *See* R.II, 454 (arguing for full payment under the 2012 Fee Schedule and/or the ADA). As already

explained, that Fee Schedule is properly understood to entitle EagleMed to its ordinary billed charges for any given transport.

Travelers cites a definition of "usual and customary" drawn from "federal law regarding ERISA" plans, Br. 23, but there is no basis for adopting that federal-law definition in this context. On the contrary, the 2012 Fee Schedule, by referring to the ADA, indicates that "usual and customary" means a provider's billed charges as determined in the marketplace. There is, in sum, no sense in which EagleMed's position that the Division should award its "usual and customary" charges amounts to an agreement to substantive reasonableness review of the amount of those billed charges.

***The 2017 GAO Report Provides No Support to Travelers*:** Travelers next relies on the recent report on the air ambulance market from the Government Accountability Office, claiming that it supports the application of the "fair, reasonable and necessary" standard here. But the 2017 Report is expressly to the contrary: it finds that "the ADA preempts state-level regulation of prices, routes, and services of air carriers, including air ambulance providers." 2017 GAO Report at 18.

Moreover, the GAO report, and the DOT's more recent response to it, both reflect the fact that federal regulators are currently providing oversight of air ambulance pricing practices. Such federal oversight is the sole mechanism Congress contemplated for addressing any unfairness concerns about air ambulance pricing. *See supra* Part I.B.1. Far from indicating that "state inquiry into EagleMed's pricing structure and practices . . . is a necessary prerequisite to enforcement of EagleMed's charges," Br. 24, the GAO report and ensuing DOT response, *see* Slater Letter, demonstrate *precisely why* state inquiry into air

ambulance pricing is inappropriate: because undertaking such an inquiry would usurp the ongoing role of Congressionally-designated federal regulators.

EagleMed v. Cox *Provides No Support to Travelers*: The Tenth Circuit's recent decision in the *Cox* case is, if anything, even more unfavorable to Travelers. In *Cox*, the Tenth Circuit *affirmed* a Wyoming district court's holding that the ADA preempts a Wyoming workers'-compensation fee schedule "to the extent that [it] set[s] forth a mandatory maximum reimbursement rate for air-ambulance claims," and it further *affirmed* the district court's "initial order of injunctive relief . . . permanently enjoining Defendants from enforcing the rate schedule against air-ambulance services." *Cox*, 868 F.3d at 907. Travelers contends that because the Tenth Circuit reversed a separate part of the federal district court's injunction—ordering the Wyoming Workers' Compensation Division to pay EagleMed's full billed charges—that somehow means that the Division must undertake reasonableness review before ordering Travelers to pay EagleMed. Br. 25-26.

Travelers' argument mischaracterizes the *Cox* decision and fundamentally misunderstands the respective roles of federal and state authorities in our federal system. *Cox* did not hold that it is "impermissible" for a state workers'-compensation agency or court to order an insurer to pay an air ambulance provider's full billed charges, Br. 26. Rather, *Cox* held that it is beyond the authority of a federal court issuing an injunction against state officials to require them to pay money out of the state's coffers to cure a federal preemption problem. *See Cox*, 868 F.3d at 905 ("In fashioning injunctive relief against a state agency or official, a district court must ensure that the relief ordered is no

broader than necessary to remedy the federal violation . . . [A] federal court may not enjoin a state official to follow state law.").

As *Cox* held, and as already explained, *see supra* Part I.B.3, ADA preemption goes no further than invalidating certain parts of the relevant state workers'-compensation law. *See* 868 F.3d at 905 ("[T]he 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 follow-on question—whether and how to apply the state statute in light of the invalidation of some of its provisions—is a question not of federal law answered by the ADA, but a question of state law answered by state principles of statutory interpretation, including severability. As the *Cox* court put it, "[t]he 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." *Id.* at 906.

In light of the state-law nature of this duty, and the comity-based principle that "a federal court may not enjoin a state official to follow state law," *id.* at 905, the Tenth Circuit held that it was improper for the *federal* district court there to order *state* officials to take a particular action respecting payment. *See id.* at 906 n.3 ("[T]he proper remedy [for an ADA violation] would seem to be the preemption of [the conflicting state] statute, not the forced payment of air-ambulance claims from state coffers."). But there is nothing whatever improper about *state* administrative officials, or a *state* court, determining that in light of ADA preemption, the proper interpretation of the KWCA is to sever the offending

portions of the statute and order payment of full billed charges. In fact, that is precisely what the workers'-compensation authorities did in state administrative proceedings after *Cox* was decided. Order Granting Mots. for Summ. J. and Denying Mot. for Summ. Disposition, *Air Methods Corp. v. Wyoming*, No. 2012-10285 C102 *et al.* (Wyo. Office of Admin. Hearings Aug. 14, 2017), attached as Appendix D; *see also* Kan. Stat. Ann. § 60-412(c); *id.* § 60-409; *In re Nwakanma*, 397 P.3d at 405. Nothing in *Cox* even remotely suggests that it was improper for the Division to order Travelers' to pay the disputed claims in full as a matter of state law; or that it would be improper for this Court, on *de novo* review, to apply the KWCA (as partially preempted by the ADA) and affirm that order.

In sum, Travelers nowhere identifies any reason why EagleMed should not receive its full billed charges in light of ADA preemption. Pursuant to either the 2012 Fee Schedule or the KWCA when interpreted in light of the ADA, EagleMed is entitled to payment in full for the transports at issue in this dispute.

II. THE DIVISION OF WORKERS' COMPENSATION HAD JURISDICTION TO HEAR THE UNDERLYING FEE DISPUTE.

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. This argument is based on a misconstruction of the WCAB's decision affirming the hearing officer's order and is entirely meritless.

A. Standard of Review

Again, pursuant to the KWCA, *see* Kan. Stat. Ann. § 44–556, this Court's review is governed by the Kansas Judicial Review Act. *Olds-Carter*, 45 Kan. App. 2d at 394, 250

P.3d at 829. Travelers bears the burden of proving the invalidity of the underlying agency action on the basis of one of the statutorily enumerated grounds. *See* Kan. Stat. Ann. § 77-621. As relevant to the second Issue, this Court may grant relief if "the agency has acted beyond [its] jurisdiction." Kan. Stat. Ann. § 77-621(c). This Court undertakes plenary, *de novo* review of questions of agency jurisdiction. *See Vann v. Employment Sec. Bd. of Review*, 12 Kan. App. 2d 778, 780, 756 P.2d 1107, 1109 (1988) ("It is the function of the courts, not of administrative agencies, to determine whether an agency has acted within the scope of its authority.").

B. The Division of Workers' Compensation Had Jurisdiction Over the Underlying Fee Dispute.

1. The Underlying Fee Dispute Was Properly Before both the Hearing Officer and the WCAB.

The KWCA provides the Division with jurisdiction to conduct both informal and formal hearings regarding disputed health-care-provider bills. *See* Kan. Stat. Ann. § 44-510j(c)-(d); *see also id.* § 44-549(a) (establishing rules for venue in such hearings). The Act also creates the WCAB and provides that "[t]he board shall have exclusive jurisdiction to review all decisions, findings, orders, and awards of compensation of administrative law judges under the workers compensation act." *Id.* § 44-555c(a); *see also id.* § 44-510j(d)(2) (providing for appeals to Board from decisions of hearing officers); *id.* § 44-549(b) (establishing powers of Director and Board). None of these jurisdictional provisions is affected by ADA preemption.

This dispute was initially brought for an informal hearing pursuant to Kan. Stat. Ann. § 44-510j(a)-(c), *see* R.I, 55, 115; and then—after no agreement was reached—set

for a formal hearing pursuant to Kan. Stat. Ann. § 44-510j(d), *see* R.I, 115-16. Upon conclusion of the formal hearing, Travelers appealed to the WCAB pursuant to § 44-510j(d)(2), *see* R.II, 536. There was no jurisdictional defect in any of these proceedings before the Division, and its final order is therefore proper and—subject to this Court's review—binding.

2. The WCAB Correctly Held That the Division Cannot Regulate Air Ambulance Fees, but This Did Not Deprive It of Jurisdiction Over This Dispute.

The Board ultimately determined, of course, that it was without authority to take any action limiting or regulating air ambulance reimbursement rates. *See* R.II, 543. As the final order put it, "[t]he Board does not have jurisdiction to rule on whether the Medicare fee schedule voids a provision of the ADA," and "[t]he Board does not have the jurisdiction to make any ruling on the reasonableness of air ambulance charges that has the effect of reducing the amount owed to EagleMed." R.II, 542-43. Travelers claims that these statements indicate that the Board lacked jurisdiction altogether. Br. 27. That is incorrect.

While the Board certainly used the word "jurisdiction," it never suggested that it lacked jurisdiction over the fee dispute entirely such that it was precluded from entering a valid final order. On the contrary, the Board specifically noted that it "has jurisdiction to hear appeals relating to medical fee disputes made pursuant to [Kan. Stat. Ann.] § 44-510j(d)(2)." R.II, 536. Rather, the Board's conclusion that it lacked power to apply the Medicare fee schedule or reduce EagleMed's charges under a reasonableness standard accurately reflects the statutory nature of its powers.

As the Board explained at the outset of its analysis of the ADA preemption issues, under Kansas law administrative agencies "are creatures of statute[,] and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes." R.II, 541 (citing *Denning v. Johnson Cty.*, 299 Kan. 1070, 1077, 329 P.3d 440, 445 (2014)). Accordingly, in response to Travelers' request that the Board (1) apply the federal Medicare fee schedule; or (2) apply a "fair, reasonable and necessary" standard, the Board evaluated whether there was a statutory basis authorizing it to do either. R.II, 541-43.

First, the Board determined that there was no basis in any state statute for applying the federal Medicare fee schedule in this Kansas workers'-compensation dispute. R.II, 542 ("[T]he Medicare fee schedule only applies to Medicare claims, not Kansas workers compensation claims."). The Board further determined that were it to apply the Medicare fee schedule in this state administrative proceeding—where federal law neither dictates nor authorizes such an action—it would in effect be setting air ambulance prices, contrary to the ADA. *Id.* ("If the Board were to rule the Medicare fee schedule applies, we would effectively be enforcing a law relating to the price an air carrier may charge, which directly violates the ADA."). For the reasons already stated, both of these determinations were correct. *See supra* Part I.D.1.

Second, the Board determined that under the ADA, any "reasonableness" evaluation of EagleMed's fees was a matter for federal, rather than state authorities—specifically, the DOT. R.II, 542 (stating that "[w]hether EagleMed's charges are unreasonable is a matter of federal jurisdiction and may not be decided by the Board," and citing authorities

discussing the DOT's supervisory role over air carriers). As set forth above, this was also accurate and means that the fee-setting provisions of the KWCA must be severed from the remainder of the statute. The result is that, in light of ADA preemption, there is no valid statutory basis for the Board to undertake a "reasonableness" evaluation. *See Denning*, 299 Kan. at 1077, 329 P.3d at 445 ("[A]ny exercise of authority claimed by the agency must come from within the statutes.") This was also correct. *See supra* Part I.C.2.

The Board was therefore entirely right when it concluded that it lacked authority—or, to use its word, "jurisdiction"—to take the actions Travelers requested. But the fact that it had no authority to apply invalid or inapplicable statutes to regulate EagleMed's prices did not deprive it of the power to resolve the dispute as a whole. Rather, pursuant to the applicable statutory scheme (as construed in light of severability principles, *see supra* Part I.C.2), it retained overall jurisdiction as well as the authority to award EagleMed its customary billed charges.

At bottom, Travelers' jurisdictional argument is based on a misreading of isolated phrases in the Board's order. Travelers claims that because the Board used the word "jurisdiction," it supposedly found that it lacked jurisdiction over the entire dispute. As just explained, the Board made no such finding. Even if it had, however, it would have been incorrect; the applicable KWCA provisions gave the hearing officer and the Board the power to resolve fee disputes. *See supra* Part II.B.1. And this Court is not bound by the Board's statements on this point in any way. Rather, this Court undertakes its own de novo evaluation of agency jurisdiction, *see Vann*, 12 Kan. App. 2d at 780, 756 P.2d at 1109, and can affirm even where the agency reached the right result for the wrong reason,

see In re Colo. Interstate Gas Co., 258 Kan. 310, 317, 903 P.2d 154, 159 (1995) ("[An agency] decision which reaches the right result will be upheld even though the tribunal may have relied upon the wrong ground or assigned erroneous reasons for its decision."). Because there was no jurisdictional defect below, this Court should hold that the WCAB had jurisdiction to resolve this dispute.

CONCLUSION

For the foregoing reasons, the Board's Order should be AFFIRMED.

Respectfully submitted,

/s/ J. Phillip Gragson
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2018, I electronically filed the above and foregoing Response to Petition for Review with the appellate clerk, and emailed a true and correct copy to:

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APPENDIX A

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

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FEB 20 2007

Donald Jansky, Assistant General Counsel
Office of General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756-3199

Dear Mr. Jansky:

This responds to your invitation for our comments on a November 17, 2006 memorandum on Federal preemption and state regulation of EMS air ambulances, which you sent to the Air Medical Committee of the Texas Governor's EMS and Trauma Advisory Council. In general, we found your memorandum to be accurate in its description of the areas in which State regulation of air ambulances is preempted by Federal law.

As background, an air ambulance is considered for Federal regulatory purposes an "air carrier," as that term is defined at 49 U.S.C. § 40102(a)(2), since it holds out transportation services by air to the public. As a result, air ambulances are subject to Federal regulation that otherwise affects air carriers.

Your memorandum addresses several primary areas of State regulatory interest in air ambulance activities, which might be categorized as ones relating to (1) aviation safety, (2) economic requirements, such as setting of maximum rates, insurance minimums, and advertising, and (3) medical services. Of these three areas, Federal transportation regulation and, accordingly, Federal preemption of State transportation regulation, is most extensive in connection with aviation safety. Generalization is more difficult when it comes to preemption of State economic regulation, given both the great variety of sub-classifications falling under the general rubric of "economic regulation," and the wide variability of impacts that such regulations may have upon air carriers. As a result, State economic regulation that affects air carriers, and proposals for such regulation, are best reviewed on an *ad hoc* basis. In this area, the primary guidepost is, as you cite, the statutory preemption of State regulation "related to a price, route, or service of an air carrier," codified at 49 U.S.C. § 41713(b). While other Federal agencies may regulate aspects of medical services and their delivery, this Department has relatively few requirements that touch on this area. As a result, of the three regulatory categories noted, States would be most free – at least from the standpoint of *air transportation* regulation – to enact and enforce State or local legal requirements with regard to medical services, particularly as delivered to patients/passengers in the cabins of the aircraft.

1) State regulation of aviation safety matters, including minimum standards for aircraft, pilots, and "weather minimums."

We agree with your conclusion that it appears to be "well-settled" that Federal law and regulations preempt the States from establishing requirements dealing with aviation safety. We consider Federal safety regulation of air carrier operations to be plenary, and note that the Federal Aviation Administration (FAA), a modal administration of the US Department of Transportation (DOT), sets and administers an extensive regime of safety regulation covering aircraft, airmen, airspace, air traffic and operations, and air carrier and operators for compensation or hire. See, e.g., 14 Code of Federal Regulations (CFR) parts 21 through 139.

2) Indirect State regulation, by requiring accreditation by an outside body.

It is axiomatic that a State may not regulate indirectly what it cannot regulate directly. If a State cannot itself regulate matters of aviation safety, it cannot achieve the same result indirectly, by requiring the "accreditation" of a body that sets aviation safety standards. If, however, the matter is not preempted – as would be the case in various areas dealing exclusively with medical care – then the result is permissible and can be attained either directly with specific State requirements, or indirectly, through accreditation requirements.

3) State regulation of air carrier economic matters, including rates, insurance requirements, or when and where air ambulances can fly.

We also agree with your conclusion that 49 U.S.C. § 41713(b), read together with 49 U.S.C. Chapters 411, 415, and 417 et al., would preempt any State regulation relating to rates, advertising, scheduling, and routing of air ambulances. Your view is also supported by court precedents. See, for example, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) [State regulation of deceptive advertising of air carrier pre-empted; words "relating to" in 49 U.S.C. § 41713(b) express "a broad pre-emptive purpose"]; *American Airlines v. Wolens*, 513 U.S. 219 (1995) [airline's charges in the form of mileage credits for free tickets and upgrades relate to "rates," and application of State consumer protection laws to them are preempted]; *Arapahoe County Public Airport Authority v. FAA*, 242 F. 3d. 1213 (10th Cir. 2001), *cert. den.* 534 U.S. 1064 [Airport authority's prohibition on operating constituted impermissible regulation of routes and services].

As to insurance requirements, you are correct in noting that Federal law and regulations expressly address requirements of air carrier liability insurance for injuries, death and/or property damage to third parties caused by the crash of an aircraft. 14 CFR § 205. We would consider State requirements for such or similar insurance, or minimum coverage levels for such or similar insurance, etc. to be preempted. However, if the State requirement requires insurance covering other perils, the issue would have to be addressed on a case-by-case basis. For example, were the peril one of medical malpractice by emergency medical technicians or other medical professional staff, we

would expect this not to be preempted by Federal transportation laws because the service being provided is not reasonably related to *aviation* activity.

4) Limitation of Federal preemption to interstate transportation.

It is technically correct that Section 41713(b)'s preemption is limited to services performed in interstate and foreign air transportation and in connection with the transportation of mail.[2] However, the realities of modern aviation, coupled with the realities of modern commercial activity, make the distinction between interstate and intrastate aviation activities all but academic. Modern aircraft are easily able to fly interstate distances, and even helicopters that fly shorter routes are capable of, and do fly when required, much longer ones. Routes interconnect, with many of the passengers flying between two points in State actually originating in, or destined for, another State. Air traffic is controlled without regard to State boundaries, passengers are flown irrespective of State of their citizenship, packages are taken that will ultimately ship to another State, etc. And, interestingly, section 41713 does not leave Alaska – the State most able to make out a case for intrastate air services – to make its case for any exceptions based on inapplicability of the "interstate air transportation" requirement, but instead makes an *express* exclusion for certain activities in that State (at § 41713(b)(2)).

In this era, it is almost inconceivable that a carrier would *want* to be limited to only intrastate service. Even in the air ambulance business in a State as large as Texas, we would think operators as a matter of course would wish to have the capability of picking up an organ donor in Baton Rouge or Oklahoma City, or provide transport to an out-of-State location where some unique specialized care might be available. Moreover, even were we to posit for argument's sake that certain air ambulance activities could be deemed only intrastate in character, we assume from the examples you have given that Texas' motivation is to enact or enforce requirements on those activities that are more *rigorous* than those afforded under Federal law. If that is indeed the case, one would have to question why a carrier would wish to be subject to *more rigorous* requirements when by doing so it would only be *precluded* from offering its services on a broader basis.

Finally, any operator with Federal air carrier authority is to be accorded the protections of the Federal preemption provision, regardless of its precise flight operations. Thus no practical niche is carved out for only its intrastate operations.

Given our experience, we are of the view that consideration of trying to carve out intrastate service as a mechanism to avoid preemption would neither be a realistic nor productive exercise.

[2] Section 41713 applies to "air carriers," which is defined at 49 U.S.C. § 40102(a)(2). That definition in turn mentions "air transportation," which is defined later as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft," 49 U.S.C. § 40102(a)(5).

5) Regulation of medical services provided inside the air ambulance, including minimum requirements for medical equipment, and the training and licensure requirements of the medical crew.

We believe your conclusion here – that such regulation would not be preempted by Federal law – is generally correct. While the aircraft and its flight safety aspects are FAA regulated, the medical service portions of an air ambulance operation (such as medical equipment and services) are not, again except for their flight safety aspects (for example, safe storage of equipment). We would only caution that the FAA does have some minimum requirements for medical personnel aboard an aircraft *qua* possible flight crew rather than medical personnel. See FAA Ops Inspectors handbook (Order 8400.10, chapter 39, chapter 5, section 1, para. 1336 and 1337, chapter 5, section 4) and FAA advisory circulars (AC 135-14A and 135-15A), (which if you do not have we can supply). Because this area is often not reducible to bright line standards, we suggest that a particular equipment/service issue with possible FAA safety implications be raised with local FAA safety inspectors for their review.

6. Existence of other State or Federal law that may limit Texas' ability to establish minimum standards for air ambulance providers.

Aside from the few supplemental citations noted above, we believe your research was quite comprehensive and that you have correctly identified the key elements of Federal aviation law that impact upon State regulation of air ambulances. (Of course, we cannot speak to any Federal authorities that may exist in the hospital or medical care areas, such as those exercised by the Department of Health and Human Services.)

Thank you for bringing these issues to our attention. We would be happy to answer any questions on the matters addressed in this memorandum.

Sincerely,

James R. Dann
Deputy Assistant General Counsel

APPENDIX B

U.S. Department of Transportation
Office of the Secretary of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
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November 3, 2008

By Telecopier (512) 472-6538

Honorable Greg Abbott
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

Dear General Abbott:

Re: Response to Request No. 0719-GA

This responds to your office's June 17, 2008 request for comments from the U.S. Department of Transportation (Department or DOT) on whether 49 U.S.C. Section 41713(b)(1) of the Airline Deregulation Act (ADA) preempts certain provisions of the Texas Health and Safety Code (HSC) and Texas Administrative Code (TAC). By letter dated June 4, 2008, Donald Lakey, M.D., Commissioner of Texas' Department of Health Services, requested an opinion from your office on whether Section 41713(b)(1) preempts HSC Section 773.011 on "Subscription Programs" and the State rule at TAC Part 1, Chapter 157, Subpart B, Section 157.11(l), each of which impose requirements on companies offering air ambulance subscription services in Texas. You kindly copied the Department on your initial response to Mr. Lakey (which explained your office's intent to issue an opinion by December 1, 2008), and invited comments from DOT on the issue.

We appreciate your patience as the Department has considered the important issues presented in your letter and prepared these comments. As explained below, we believe that the State law and regulations grant State officials significant discretion in regulating matters "related to a price, route, or service of an air carrier," and thus violate Section 41713(b). We recognize, however, the State's traditional role in regulating the proper administration of medical care to patients within its borders. Thus, also as explained below, nothing in this letter is intended to prevent the State from regulating in that area.

The Express Preemption Provision in Section 41713(b)(1)

Section 41713(b)(1) of the ADA includes the following express Federal preemption provision:

> A State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or 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....49 U.S.C. § 41713(b)(1).

Because an air ambulance service provider qualifies as an "air carrier,"[1] the issue of whether or not Section 41713(b)(1) preempts the Texas requirements depends, in turn, on whether the State requirements are "related to a price, route, or service of an air carrier that may provide air transportation." *Id.* We believe that the State requirements, if broadly construed, are so "related."

Supreme Court Interpretations of the Preemption Provision

The U.S. Supreme Court has broadly interpreted the words "related to a price, route or service," from Section 41713(b)(1). As illustrative examples, we refer you to the decisions in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); and *Rowe v. New Hampshire Motor Transportation Association*, 128 S.Ct. 989 (2008).

In *Morales*, the Supreme Court affirmed a permanent injunction enjoining State enforcement of airline advertising guidelines developed by the National Association of Attorneys General. Among other things, the guidelines included requirements governing the font size and content of disclaimers identifying fare restrictions, and under certain circumstances prohibited the use of such words as "sale," "discount," and "reduced" in fare advertisements. The Court held that, "One

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[1] An "air carrier," as defined in 49 U.S.C. Section 40102(a)(2), includes both "direct" and "indirect" air carriers. Therefore, an air ambulance service provider that is an air carrier may be a "direct" air carrier, which has operational control over the aircraft flown, or an "indirect" air carrier, which does not itself operate aircraft but, since 1983, has been licensed by exemption to sell air ambulance air transportation services to the public on condition that it contracts with a properly licensed direct air carrier to operate the air ambulance flight. *See* Order 83-1-36 (January 12, 1983), issued by the Civil Aeronautics Board (predecessor to DOT in airline economic regulation). Thus, the term "air ambulance service provider" or "air ambulance operator" as used in this letter refers to both types of companies, which qualify as "air carriers" for purposes of Section 41713(b)(1).

cannot avoid the conclusion that these aspects of the guidelines 'relate to' airline rates. In its terms, every one of the guidelines enumerated above bears a 'reference to' airfares (citation omitted)...And, collectively, the guidelines establish binding requirements as to how tickets may be marketed if they are to be sold at given prices." *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 389. Rejecting the defendant's argument that restrictions on rate advertising did not "relate to" the rates themselves, the Court interpreted the words "related to" as prohibiting any State action *"having a connection with or reference to"* airfares. *Id.* at 384 (emphasis added).[2]

In *Wolens*, participants in American Airlines' frequent flier program alleged that American, through certain restrictions on program benefits, violated Illinois' Consumer Fraud Act and breached its contracts with plaintiffs. The Supreme Court found that the ADA preempted the claims under Illinois' statute, holding that the law's restrictions "related to" both rates and services:

> We need not dwell on the question whether plaintiffs' complaints state claims "relating to [air carrier] rates, routes, or services." *Morales*, we are satisfied, does not countenance the Illinois Supreme Court's separation of matters "essential" from matters unessential to airline operations. Plaintiffs' claims relate to "rates," *i.e.*, American's charges in the form of mileage credits for free tickets and upgrades, and to "services," *i.e.*, access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates. *American Airlines, Inc. v. Wolens*, 513 U.S. at 226.

The Court further held that, "In light of the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves, and not at all to the States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services, we conclude that [the ADA] preempts plaintiffs' claims under the Consumer Fraud Act." *Id.* at 228. The Court permitted plaintiffs, however, to pursue their State common law breach of contract claims: "...terms and conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's enact[ment] or enforce[ment] [of] any

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[2] The Court also rejected an argument that the ADA preempts only "state laws specifically addressed to the airline industry," as opposed to laws of "general applicability" (in *Morales*, governing the travel industry generally) that happen to interfere with the ADA's preemption provision. The Court held that such a position "ignores the sweep of the 'relating to' language." *Id.* at 387.

law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [the ADA]." *Id.* at 228-29 (citation omitted).

In *Rowe*, the Supreme Court struck down State regulations governing the delivery of tobacco products into Maine, pursuant to the preemption provision in the motor carrier deregulation statute -- for which Congress "borrowed language" from the ADA's preemption provision so as to "incorporate" judicial interpretations of the ADA. *See* 49 U.S.C. § 14501(c)(1); *Rowe v. New Hampshire Motor Transport Association*, 128 S.Ct. at 993-94. The State regulations obligated tobacco retailers to use only carriers who required a valid identification from the package addressee, and, for purposes of a prohibition against "knowingly" transporting tobacco products into Maine, imputed to carriers knowledge of the contents of any package delivered to either a licensed Maine tobacco retailer or a company included on Maine's list of "unlicensed" tobacco retailers. *Id.* at 994. The Court held that the motor carrier law preempted the challenged provisions because "the effect of the regulation is that carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of the regulations, the market might dictate." *Id.* at 996.

Refusing to create a "public health" exception to the statute, moreover, the Court stated as follows:

> Maine's inability to find significant support for some kind of "public health" exception is not surprising. "Public health" does not define itself. Many products create "public health" risks of differing kind and degree. To accept Maine's justification in respect to a rule regulating services would legitimate rules regulating routes or rates for similar public health reasons. And to allow Maine directly to regulate carrier services would permit other States to do the same. Given the number of States through which carriers travel, the number of products, the variety of potential adverse public health effects, the many different kinds of regulatory rules potentially available, and the difficulty of finding a legal criterion for separating permissible from impermissible public-health-oriented regulations, Congress is unlikely to have intended an implicit general "public health" exception broad enough to cover even the shipments at issue here. *Id.* at 997.

The Court in *Rowe* summarized matters as follows, citing *Morales*:

> In *Morales*, the Court determined: (1) that "[s]tate enforcement actions having a connection with, or reference to carrier 'rates, routes, or services' are preempted...; (2) that such pre-emption may occur even if a state law's effect on rates, routes or services "is only indirect"...; (3) that, in respect to preemption, it makes no difference whether a state law is 'consistent' or 'inconsistent' with federal regulations [that is, whether compliance with both is possible]...; and (4) the preemption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption-related objectives." *Id.* at 995.

Despite the Supreme Court's broad interpretation of "related to" as used in Section 41713(b)(1), the Court in *Morales* made clear that Federal law does not preempt those State laws affecting rates, routes, or service in only a "tenuous, remote, or peripheral...manner." *Morales v. Trans World Airlines, Inc.*, 504 U.S. at 390. Thus, as examples, Federal courts have rejected preemption challenges to State prevailing wage laws and State whistleblower statutes, which affect transportation providers only as members of the general public and have only a tenuous relationship to their particular operations. *See, e.g., Californians for Safe & Competitive Dump Truck Transportation v. Mendonca*, 152 F.3d 1184 (9th Cir. 1998) (prevailing wage law case); *Blanche v. Airtran Airways, Inc.*, 342 F.3d 1248 (11th Cir. 2003) (ADA did not preempt claim against airline under Florida Whistleblower statute).

Air Ambulance Cases Under the ADA

A few courts have faced, specifically, preemption challenges to State laws governing air ambulances. In *Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d 507 (Minn. 1986), the Minnesota Supreme Court affirmed a decision that the ADA preempted a law authorizing a State official to deny a license to an air ambulance operator based on an analysis of the need for such services within the State. The Court recognized the Federal Aviation Administration's regulations on air taxi operators -- including air ambulance operators -- and held that, "If an air carrier registers under 14 C.F.R. § 298 to operate as an air taxi operator and is authorized by the [Civil Aeronautics Board] to provide an air ambulance service to an area including a portion of Minnesota, then the statement that a license from the state is required before that authority can be exercised would be directly contrary to [the ADA]." *Id.* at 509. The Court clarified its holding as follows: "Our ruling that the state is preempted from controlling entry

into the field of air ambulance service does not, however, oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and the promulgation of standards for maintenance of sanitary conditions." *Id.*[3]

Recently, the U.S. District Court for the Eastern District of North Carolina also struck down a series of State laws governing air ambulances. In *Med-Trans Corp. v. Benton*, Case No. 5:07-CV-222-FL (D.N.C. September 26, 2008), the court rejected a law requiring an air ambulance to obtain a Certificate of Need ("CON") from the State's Office of Emergency Medical Services, a requirement based on the State's belief that rising health care costs and the potential unavailability of health care services in parts of the State, given market conditions, required the CON program. After the State denied the plaintiff's application for a CON, the plaintiff appealed to the court. In rejecting the CON requirement, the court stated: "The purposes underlying the CON law directly contravene the pro-competition purposes underlying the ADA.... the [State] statute constitutes a 'direct substitution of the [State's] own governmental commands for competitive market forces' in contravention of the Supreme Court's mandate in *Rowe*." *Id.* at 18 (citation omitted). The court further held that the CON law "significantly affects the rates, routes, and services of an air carrier in that it bars plaintiff from performing flights from point to point in North Carolina." *Id.* The court also rejected a provision requiring an air ambulance provider to obtain an Emergency Medical Services license from the State, and a requirement that the provider "have an EMS Peer Review Committee in place if it is to so operate as a Specialty Care Transport Program in the state." *Id.* at 20-21. Recognizing that these provisions come closer to "medical oversight" properly left to the States, the court nevertheless struck them down:

> Although the establishment of medical oversight is an important public goal in the provision of emergency health care services, it may not be obtained through unlawful means. The collective effect of the challenged regulations is to provide local government officials a mechanism whereby they may prevent an air carrier from operating at all within the state. Such a total bar to entry relates to a carrier's routes and service and violates Congress' clear mandate in

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[3] *Cf. In the Matter of the License Application of Rochester Ambulance Service*, 500 N.W.2d 495 (Minn. Ct. App. 1993) (distinguishing *Hiawatha*, court found no preemption of a State Commissioner's decision denying license to company seeking to offer ground air ambulance services -- in addition to its air ambulance services -- based on a lack of need: "In essence, Rochester Ambulance argues the state cannot prohibit any business from operating if it is run by a company that also runs an aviation business. We disagree. This case involved ground ambulance service, not air ambulance service.").

> establishing the ADA. The court is loath to disturb the carefully coordinated state and local EMS systems, and it does not do so lightly. The Supreme Court's pronouncement, however, is clear; the ADA is broadly preemptive, *Morales*, 504 U.S. at 383-84, and a state law that is "prescriptive" and "controls the primary conduct of those falling within its governance" is preempted. *Id.* at 21-22 (citing *Wolens*, 513 U.S. at 227).

The *Med-Trans* court also rejected a law requiring each air ambulance operator to provide service on a 24-hour/7-day-a-week basis: "The 24 hour requirement, like the receipt verification procedure in *Rowe*, 'would freeze into place services that carriers might prefer to discontinue in the future.'" *Id.* at 23 (citing *Rowe*, 128 S.Ct. at 995).

As in *Hiawatha*, however, the court made clear that the ADA does *not* preempt requirements that serve "primarily a patient care objective properly within the states' regulatory authority." *Id.* at 23. Thus, the court upheld a provision requiring air ambulances to synchronize voice radio communications with local EMS resources and other medically-related requirements: "Although the FAA has preemptive control of aviation safety measures, the regulations regarding EMS related equipment would not intrude on its domain. For example, the two way radio required under [North Carolina law]..., which is necessary for communication with various public safety entities in order to facilitate *patient care*, is not preempted, while the VHF aircraft frequency transceivers required by [another North Carolina law] relate primarily to *aviation safety* and would be preempted by the federal scheme." *Id.* at 26 (emphasis added). The court added other examples of acceptable State requirements: "The [State] Commission may still, for example, adopt rules specifying medically related equipment, sanitation, supply and design requirements for air ambulances, and the [State] may still inspect air ambulances for compliance with these *medically-related* regulations." *Id.* (emphasis added).[4]

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[4] The *Med-Trans* court's holding that the ADA preempted requirements for "affiliation with an EMS system" and the establishment of an EMS "peer review committee" on the grounds that collectively, the requirements amounted to a "mechanism" capable of banning entry to the market, *Med-Trans Corp. v. Benton*, Slip Op. at 21-22, seems to have been influenced by the fact that North Carolina required that local government officials -- and not medical professionals -- serve on the committee. To the extent such requirements concern legitimate *medical* standards (such as ensuring prompt transport to the medical facility appropriate to each patient's needs, or coordinating with 9-1-1 systems during emergencies), rather than broadly permit economic regulation in the process, in DOT's view (and perhaps the *Med-Trans* court's view, we posit), the ADA would not displace them.

We recognize that not every court necessarily would agree with *Med-Trans* and *Hiawatha* on the ADA's application to emergency air ambulances. In a recent case, the U.S. District Court for the District of Colorado stayed a challenge to State laws governing air ambulance operators, pending the resolution of State administrative proceedings under those laws brought against the plaintiff. Applying the Younger Abstention doctrine, the court found that it was not "facially conclusive" that ADA preempted State laws related to emergency medical air transportation service, and thus rejected the plaintiff's request to bypass the State proceedings entirely. *Eagle Air Medical Corp. v. Colorado Board of Health*, 2008 WL 3271975 (D. Colo. July 31, 2008) (appeal pending). The court did not, however, rule on the ultimate merits of the preemption claim -- leaving that for another day under the Younger Abstention doctrine -- and ruled only that preemption was not "facially conclusive." From the Department's perspective, the ADA refers to "air carriers," which includes air ambulance operators, and the law makes no exception for emergency medical transportation providers. We certainly respect the *Eagle Air* court's concern, applied at the preliminary injunction stage, over legislative intent generally; however, because the ADA makes no exception for air ambulance operators, the Department does not believe that, in the end, the legislative history need resolve some statutory ambiguity. The ADA applies to "air carriers," and that includes air ambulances.

The Texas Rules Are "Related to" Price, Route and Service

Dr. Lakey's June 4, 2008 letter to you describes subscription services as follows:

> An EMS subscription program is a concept in which an EMS provider, as defined at HSC 773.003(3) and 25 TAC 157.2(30), offers to residents of a certain geographical area a membership in its subscription program for a single annual fee, generally from approximately $50 to $100. Per this contractual arrangement, members are either not charged a fee or are charged a reduced fee for any emergency medical services and transport to a hospital that the EMS provider may give the member when requested or needed. Some EMS providers will discount their fees by accepting what the patient's insurers pay as payment in full in exchange for the advance payment of a subscription membership fee. Some may argue that the advanced payment of a subscription fee is a prepayment for that part of an air carriers' transport fare that is not covered by the patient's insurance.

The statute at HSC Section 773.111, entitled "Subscription Programs," requires the Texas Department of State Health Services (TDSHS) to "adopt rules establishing minimum standards for the creation and operation of a subscription program." The law requires the TDSHS to "adopt a rule that requires an emergency medical services provider to secure a surety bond in the amount of sums to be subscribed before soliciting subscriptions and creating and operating a subscription program." The law further states that TDSHS "may adopt rules for waiver of the surety bond," and that "the Insurance Code does not apply to a subscription program established under this section."

TDSHS promulgated such rules at TAC Part 1, Chapter 157, Subpart B. You have asked specifically about Section 157.11(l) of those regulations. That section requires that an emergency medical services [EMS] provider "who operates or intends to operate a subscription or membership program for the provision of EMS within the provider service area shall...obtain department approval prior to soliciting, advertising or collecting subscription or membership fees." The rule imposes several requirements for such approval, including written authorizations from the highest official in each political subdivision falling within the proposed service area (§ 157.11(l)(1)); the submission to State officials of the contracts used to enroll participants, the advertising used to promote the subscription service, the names, addresses, dates of enrollment, and fees paid by each subscriber, and the total amount of annual fees collected (§§ 157.11(l)(2), (3), (8), and (10)); compliance with all State and Federal rules on billing and reimbursement (§ 157.11(l)(4)); "evidence of financial responsibility" through the procurement of a surety bond "in an amount equal to the funds to be subscribed," issued by a company licensed in Texas, or through "satisfactory evidence of self insurance in an amount equal to the funds to be subscribed if the provider is a function of a governmental entity" (§ 157.11(l)(5)); non-denial of service to non-subscribers and non-current subscribers (§ 157.11(l)(6)); subscription program reviews by State officials at any time, and at least once each year (§ 157.11(l)(7)); subscription periods lasting one year or less, with only pro-rated fees charged for amounts beyond any enrollment period (§ 157.11(l)(9)); and a prohibition against service for Medicaid clients (§ 157.11(l)(11)).

Notably, Section 157.11(l), at least on its face, addresses neither the operations of an EMS provider during emergencies, nor its coordination with the State's EMS system. Rather, the provision governs a particular *economic* arrangement between EMS providers -- including air carriers -- and their customers. It bears repeating that the Department agrees with the *Hiawatha* Court, that the ADA does "not...oust the state from its traditional role in the delivery of medical services -- the regulation of staffing requirements, the qualifications of personnel, equipment requirements, and

the promulgation of standards for maintenance of sanitary conditions." *Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d at 509. As written, however, Section 157.11(l) grants State officials broad discretion in regulating air carriers' economic arrangements with customers, and thus, we believe Section 41713(b)(1) preempts the vast majority of, if not the entire, regulation. Taking the provisions separately:

- *State approval "prior to soliciting, advertising or collecting subscription or membership fees";* and *Written authorizations from the highest officials within all political subdivisions falling within the proposed service area* (§§ 157.11(l) and 157.11(l)(1)). The courts in both *Med-Trans* and *Hiawatha* rejected such barriers to market entry. As the *Med-Trans* court held, the "collective effect of the challenged regulations is to provide local government officials a mechanism whereby they may prevent an air carrier from operating at all within the State. Such a total bar to entry relates to a carrier's routes and service and violates Congress' clear mandate in establishing the ADA." *Med-Trans Corp. v. Benton*, Slip Op. at 21-22; *see also Hiawatha Aviation of Rochester v. Minnesota Department of Health*, 389 N.W.2d 507. We agree. Such barriers to market entry violate the ADA's preemption provision. We also agree with the *Med-Trans* court, however, that nothing prevents a State from ensuring that any air carrier entering the market must take the measures necessary to "facilitate patient care," *Med-Trans*, Slip Op. at 26, such as maintaining "equipment necessary for communication with public safety entities." *Id.*

- *The submission to State officials of "the contract used to enroll participants"* as a prerequisite to obtaining State approval to enter the market (§ 157.11(l)(2)); and *Program reviews by State officials at any time, and at least annually* (§ 157.11(l)(7)). Because any such contract necessarily would address the prices charged, the relevant service area (routes), and the services promised by the provider, this requirement "bears a 'reference to'" (*Morales*, 504 U.S. at 389), and thus is "related to," air carriers' prices, routes, and services. 49 U.S.C. § 41713(b)(1). That the rule only mentions the "submission" of the contract makes little difference, because the required submission apparently contemplates a State official's review of the contract, either as a prerequisite to market entry or otherwise. For similar reasons, the ADA preempts a requirement that an air carrier's subscription "program," which necessarily includes its prices, routes, and services, undergo unspecified reviews by approving State officials annually, if not more frequently. Again, however, nothing prevents the State from monitoring an EMS provider (an air

carrier or otherwise) for compliance with the State's medically-related requirements.

- *The submission to State officials of all advertising used to promote the subscription service within ten days after the beginning of any enrollment period* (§ 157.11(l)(3)). The Supreme Court in *Morales* held that States may not enforce laws governing an air carrier's advertisements, because such laws are "related to" their prices, routes, and services. *Morales*, 504 U.S. at 389. As with the contract submission requirement, moreover, we see no different result from the fact that the rule overtly mentions only submission of the advertisements. The rule would serve no purpose if the State planned to do literally nothing with the submitted advertisements, and State action against an air carrier's advertising practices would violate Section 41713(b)(1). In any event, the failure to submit the required materials -- and for that matter, the failure to comply with any of the provisions in Section 157.11(l) -- could lead to disapproval of a license to operate within Texas, resulting in another prohibited barrier to market entry.

- *"Evidence of financial responsibility"* through bonding or self-insurance (§ 157.11(l)(5)). This provision imposes a significant financial expense upon air carriers. The court in *United Parcel Service v. Flores-Galarza*, 318 F.3d 323 (1st Cir. 2003), faced this very issue, striking down a bonding requirement for shippers doing business in Puerto Rico. The court found that the expenses incurred by UPS to satisfy the bonding requirement "*necessarily* ha[d] a negative effect on UPS' prices." *Id.* at 336 (emphasis added). Here, too, the State's requirement "necessarily" affects -- and thus is "related to" -- an air carrier's prices, contrary to Section 41713(b)(1).

- *Non-denial of service to non-subscribers or non-current subscribers* (§ 157.11(l)(6)). The court in *Med-Trans* struck down a requirement, related to the availability of service, that any entity offering air ambulances make service available on a 24-hour/7-day-a-week basis: "The 24 hour requirement, like the receipt verification procedure in *Rowe*, 'would freeze into place services that carriers might prefer to discontinue in the future.'" *Med-Trans v. Benton*, Slip Op. at 23 (citing *Rowe*, 128 S.Ct. at 995). The Texas provisions also regulate the terms of service and its availability -- in this case, requiring that service be available to all persons, including paying subscribers and non-subscribers alike -- and thus are "related to" an air carrier's service, contrary to Section 41713(b)(1). Moreover, a requirement that obligates an air carrier to incur the significant expenses associated with transporting non-subscribers and non-current members would substantially

affect the prices it needs to charge to paying members. For this reason as well, the requirements are "related to" an air carrier's prices.[5]

- *Subscription periods lasting one year or less, with only pro-rated fees charged for amounts beyond any enrollment period* (§ 157.11(l)(9)). This rule directly regulates both the financial terms and service periods of an air carrier's contracts with its customers. The rule thus "bears a reference to" an air carrier's prices and services, and violates Section 41713(b)(1). *See Morales*, 504 U.S. at 389.

- *Compliance with all State and Federal rules on billing and reimbursement* (§ 157.11(l)(4)); *Submission to State officials of the names, addresses, dates of enrollment, and fees paid by each subscriber* (§ 157.11(l)(8)); and *Submission to State officials of the total annual subscription fees collected* (§ 157.11(l)(10)). Although no doubt well-intentioned, these apparent "consumer protection" provisions, unrelated to the proper administration of medical care within Texas, are inappropriate for State regulation under the ADA.[6] *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374.

The Limits of ADA Preemption

There are limits, of course, on the preemptive effect of Section 41713(b)(1), even as it relates to air ambulances. State laws and regulations aside, the ADA would not preempt a breach of contract claim against an air ambulance operator for breach of the subscription contract. As the Supreme Court stated in *Wolens*, contractual terms are "privately ordered obligations 'and thus do not amount to a State's

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[5] We recognize that during an emergency, State employees may not be able to determine whether the patient is a subscriber or non-subscriber to a licensed EMS provider with the nearest available air ambulance. Thus, to the extent the State is involved in a particular emergency and depending on the State's apparatus for emergency response, Section 157.11(6), which requires service to subscribers and non-subscribers alike, may warrant further consideration as potentially falling into the category of "medically-related" requirements. Moreover, to the extent that the State can establish that its access requirements are medically-related such requirements would be permissible.

[6] The only provision within Section 157.11(l) on which we do not comment is Section 157.11(l), prohibiting the acceptance of Medicaid clients into a subscription program. We recommend that you contact the U.S. Department of Health and Human Services (HHS) on this issue, and we have reached out to our HHS colleagues with an offer to consult on the potential effect of the ADA if they receive a request from your office.

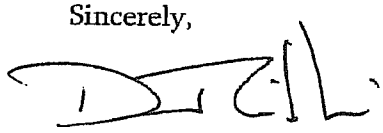
enact[ment] or enforce[ment] [of] any law, rule, regulations, standard, or other provision having the force and effect of law' within the meaning of [the ADA]." *American Airlines v. Wolens*, 513 U.S. at 228-29 (citation omitted). Thus, the ADA does not prevent private enforcement of subscription contracts through civil breach of contract claims.

Moreover, we state again our agreement with the holdings in both *Hiawatha* and *Med-Trans*, that State regulations serving "primarily a patient care objective are properly within the states' regulatory authority." *Med-Trans v. Benton,* Slip Op. at 23; *Hiawatha,* 389 N.W.2d at 509. To the extent that Texas imposes "medically-related" requirements on air ambulance service providers -- as examples, rules on the adequacy of medical equipment, the qualifications of medical personnel, and the need to maintain sanitary conditions -- the ADA does not preempt them.

This point warrants further emphasis. As you may know, improving the quality of EMS nationwide is an important component of the Department's National Highway Traffic Safety Administration's (NHTSA) comprehensive approach to reducing traffic fatalities and lessening the impact of crash injuries. Through its Office of Emergency Medical Services, NHTSA seeks "to reduce death and disability by providing leadership and coordination to the EMS community in assessing, planning, developing, and promoting comprehensive evidence-based emergency medical services and 9-1-1 systems." *See* http://www.ems.gov. The Department takes this work seriously, and fully supports the critically important work of State EMS authorities in providing medical oversight of air ambulances. Thus, in no way should this letter be construed as intending any interference with the State's oversight and coordination of EMS systems.

We appreciate the opportunity to provide input for your impending opinion, and again, we appreciate your patience in awaiting this response. If you have any questions, please do not hesitate to contact the Department's Assistant General Counsel for Operations, Ron Jackson, at (202) 366-4710.

Sincerely,



D.J. Gribbin
General Counsel

APPENDIX C

U.S. Department
of Transportation

Office of the Secretary
of Transportation

Assistant Secretary
for Administration

1200 New Jersey Avenue, SE
Washington, DC 20590

SEP 18 2017

The Honorable John Michael Mulvaney
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Mulvaney:

Enclosed are two copies of the U.S. Department of Transportation's reply to the U.S. Government Accountability Office's (GAO) final report, *"Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight" GAO-17-637.* The Department developed this response in accordance with the Office of Management and Budget Circular No. A-50 Revised (Audit Followup) and 31 U.S.C. § 720.

Copies of the enclosed response have also been sent to the Chair and Vice Chair, Senate Committee on Appropriations; Chair and Ranking Member, House Committee on Appropriations; Chair and Ranking Member, Senate Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Appropriations; Chair and Ranking Member, House Subcommittee on Transportation, Housing and Urban Development, and Related Agencies, Committee on Transportation; Chair and Ranking Member, Senate Committee on Homeland Security and Governmental Affairs; and Chair and Ranking Member, House Committee on Oversight and Government Reform.

Sincerely,

Bryan Slater
Assistant Secretary for Administration

Enclosures

U.S. DEPARTMENT OF TRANSPORTATION
STATEMENT ON GOVERNMENT ACCOUNTABILITY OFFICE (GAO) REPORT

"Air Ambulance: Data Collection and Transparency Needed to Enhance DOT Oversight"
GAO-17-637

We appreciate the opportunity to follow up on our published response to GAO's report with specific actions to address GAO's recommendations.

RECOMMENDATIONS AND ACTIONS

Recommendation 1: Communicate a method to receive air ambulance-related complaints, including those regarding balance billing, such as through a dedicated web page that contains instructions on how to submit air ambulance complaints and includes information on how DOT uses the complaints.

Response: The Department concurs. All air travel consumer complaints, including those related to air ambulance operators, can be filed using our online air travel complaint form at https://www.transportation.gov/airconsumer/file-consumer-complaint. However, to ensure that consumers understand that the Department accepts air ambulance-related complaints, we have added information specifically about air ambulance operators under the "Topics" drop down on our website at https://www.transportation.gov/airconsumer. In addition, we have added a customized feature to our online air travel consumer complaint form for consumers who wish to register an air ambulance-related complaint. More specifically, we have modified the form so that once they select "air ambulance (all)", a text box appears where the complainant can provide the name of the air ambulance operator. This allows consumers to identify the specific company/air ambulance operator about which they are complaining, thereby facilitating better complaint processing and tracking by the Department, while retaining the features of the complaint form that are applicable to entities other than air ambulance operators. The Department's Office of Aviation Enforcement and Proceedings, within the Office of the General Counsel, has established an air ambulance complaint review team consisting of attorneys and transportation industry analysts to ensure that air ambulance-related complaints are properly identified, coded, tracked, and handled. On August 31, 2017, we provided GAO supporting documentation that we implemented the recommendation and requested closure.

Recommendation 2: Take steps, once complaints are collected, to make pertinent aggregated complaint information publicly available for stakeholders, such as number of complaints received by provider, monthly.

Response: The Department concurs. Under the "Topics" drop down on our website at https://www.transportation.gov/airconsumer, we intend to post monthly the names and number of complaints registered against air ambulance operators. On August 31, 2017, we provided GAO supporting documentation that we implemented the recommendation and requested closure

Recommendation 3: Assess available federal and industry data and determine what further information could assist in the evaluations of future complaints or concerns regarding unfair or deceptive practices.

Response: The Department does not concur. In determining whether a complaint alleges conduct that could constitute an unfair or deceptive practice, our analysis is fundamentally based on the unique facts of each individual case, rather than on aggregate data. Therefore, the Department does not need additional information to determine whether a complaint alleges an unfair or deceptive practice, which, if true, would be within the Department's jurisdiction. Accordingly, we do not believe an assessment of federal or industry data would yield information that would be informative to our determinations in future cases.

Recommendation 4: Consider consumer disclosure requirements for air ambulance providers, which could include information such as established prices charged, business model and entity that establishes prices, and extent of contracting with insurance.

Response: The Department concurs. The Office of Aviation Enforcement and Proceedings' air ambulance complaint review team, described above, will monitor and evaluate air ambulance complaints received by the Department to assess the issue of consumer disclosure requirements for air ambulance operators. We plan to complete this action by August 31, 2018.

APPENDIX D

IN THE OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF WYOMING)
)
COUNTY OF LARAMIE)

TAP AUG 14 2017

IN THE MATTER OF THE WORKER'S COMPENSATION CLAIMS

AIR METHODS CORP., ROCKY MOUNTAIN HOLDINGS, LLC

Health Care Provider-Claimant,

And

EAGLEMED, LLC

Health Care Provider-Claimant,

And

MED-TRANS CORP.,

Health Care Provider-Claimant,

vs.

STATE OF WYOMING ex rel. DEPARTMENT OF WORKFORCE SERVICES, WORKERS' COMPENSATION DIVISION,

Respondent.

) WC CASE NUMBERS:
) Cardran, Jr., William G. 2012-10285 C102; Taylor, Mark D. 2012-12827 C102
) Lunstra, Austin L. 2013-08914 C102; Bielefeld, Malco A. 2015-06003
) Breen, Thomas J. 2014-07271; Cervantes, Augustin 2015-09364
) Claborn, Gary C. 2014-10533; Clymer, Paul D. 2016-04219
) Cole, Jason M. 2014-12658; Colson, Brian J. 2015-05484
) Cortez, Richard 2015-11030; Crowder, Pamela F. 2015-09431
) Baker, Richard L. 2014-11464; Asay, Stevie 2015-06404
) Anderson, Ryder 2014-13088; Altman, Brandon J. 2014-07655
) Garrison, Lynn A. 2014-11783; Gallegos, Hector 2015-06105
) Ferguson, Gary D. 2014-12453; Eversull, Harold G. 2015-04130
) Eppel, Blaine A. 2014-11686; Jones, Marcia D. 2014-11475
) Jones, Caleb H. 2014-01500; Johnston, Gerald R. 2016-02207
) Jamieson, Lori A. 2015-05656; Hunzeker, Philip W. 2015-06512
) Himes, Troy E. 2015-11257; Hepker, Timothy J. 2015-09175
) Gibson, Kaylub M. 2015-06640; Gifford, William L. 2015-09986
) Myers, Eric N. 2015-09662; Murphy, Evan S. 2015-07064
) Meza, Rogelio 2015-09564; McLeland, Charles J. 2016-02850
) Marx, John A. 2014-09798; Franklin, Thomas 2015-07826
) Stoltz, Craig 2014-08870; Simmons, Matthew J. 2015-09125
) Rowlett, JC L. 2014-10281; Rosenlund, Dana W. 2015-11137
) Resser, Matthew P. 2015-10190; Perkins, James C. 2015-07946;
) Perez, Johnathan M. 2015-05318; Pack, Justen R. 2015-10526
) Ostblom, Tyler M. 2015-06977; Niswender, Jeffary S. 2007-05649
) Thompson, Kory M. 2015-04194; Thrailkill, Ryan 2015-06969
) Thwreatt, Shawn A. 2015-02792; Tipton, Brandon R. 2015-02888;
) White, John R. 2014-00913; Wood, Rodney A. 2015-05908;
) Yupari, Fredy 2015-05857; Betts, Todd L.2006-10611 C103;
) Archuleta, Berrie G. 2014-00781 C101; Gilmore, Tyler J.2015-01248 C101;
) Fink, Dexter 2015-00920 C101; Daniels, Justin L. 2014-05948 C101;
) Lyman, Jeff L. 2013-11656 C101; Cervantes, Chelsea 2014-10360 C101;
) Dalton, Stephen G. 2014-06919 C101; French, Leslie 2013-05847 C102;
) Gibson, Jay R. 2013-08056 C102; Gillespie, Brody W. 2013-07430 C102;
) Harvey, Bryce C. 2013-07431 C102; Harvey, Scott 2013-07432 C102;
) Jackson, Steven E. 2013-05498 C102; Webb, Edward A.2015-02213 C101
) Rimmer, Ronald G. 2013-08984 C102; Rush, Jonathan P. 2013-05183 C102;
) Yowell, Veronica F. 2014-05801 C101; Turner, Greg L. 2013-07786 C102;
) Wilson, Kurtis R. 2013-05032 C102; Witkowski, Scott A. 2013-07578 C102;
) Lindell, Penny 2014-07689 C101; Johnston, Kassondra S. 2015-07423 C101;
) Johnson, Kevin R. 2014-02832 C101; Heinze, Fred J. 2013-08960 C101;

) Nicholson, Joel L. 2014-04313 C101; Nelson, Timothy E. 2014-00168 C101;
) Montoya, James A. 2013-11918 C101; McCarthy, Kevin E. 2014-10838 C101;
) Manriquez, Jose M. 2014-04371 C101; Sherbrook, Arthur J.2014-09860 C101;
) Scott, Nathan J.2014-01756 C101; Pinkelman, Joey 2015-04193 C101;
) Olvera, Raymond 2014-00787 C101; and,
) Knezovich, Jessica L. 2014-07164 C101 & C102

ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SUMMARY DISPOSITION

THESE MATTERS came before the Office of Administrative Hearings (Office) upon the motions and cross motions for summary judgment. Specifically: on March 17, 2017, the State of Wyoming, Department of Workforce Services, Workers' Compensation Division (Division) filed Respondent's Motion for Summary Disposition (Division's Motion), Memorandum in Support of Respondent's Motion for Summary Disposition, and Appendix to Respondent's Motion for Summary Disposition (Division's Appendix); on April 20, 2017, Health Care Provider-Claimant Air Methods Corp./Rocky Mountain Holdings, LLC (Air Methods) filed Claimants' Air Methods and Rocky Mountain Holdings Response to Respondent's Motion for Summary Disposition (Air Methods Response) and Claimants' Air Methods Cross Motion for Summary Judgment (Air Methods Cross Motion); on April 20, 2017, Health Care Provider-Claimants EagleMed, LLC and Med-Trans Corporation (EagleMed/Med-Trans) filed Claimants EagleMed, LLC/Med-Trans Corporation's Response in Opposition to Respondent's Motion for Summary Disposition and Motion for Summary Judgment (EagleMed/Med-Trans Response and Motion); on May 22, 2017, the Division filed an Omnibus Reply Memorandum in Support of Respondent's Motion for Summary Disposition and in Opposition to Claimants' Motions for Summary Judgment (Division's Combined Reply) and an Appendix to the Division's Combined Reply; on June 12, 2017, Air Methods filed Claimants Air Methods and Rocky Mountain Holdings Reply in Support of Cross Motion for Summary Judgment (Air Methods Reply); and on June 12, 2017, EagleMed/Med-Trans

filed Claimants EagleMed, LLC and Med-Trans Corporation's Reply in Support of their Motion for Summary Judgment (EagleMed/Med-Trans Reply). After fully reviewing the motions, responses, and replies, and following a July 12, 2017 hearing on the motion and cross motions for summary judgment this Hearing Examiner finds and concludes as follows:

I. JURISDICTION AND STATEMENT OF THE CASE

Between 2012 and 2016, Air Methods and EagleMed/Med-Trans (collectively referred to as Air Ambulance Companies) provided air ambulance services to the injured workers' compensation claimants listed in the caption above (collectively referred to, as claimants). The Air Ambulance Companies submitted bills to the Division for the air ambulance services provided to the claimants. The Division issued separate warrants to pay the Air Ambulance Companies for their services provided to each of the listed claimants. The Division's warrants paid the Air Ambulance Companies based upon the Division's fee schedule which was significantly less than the amounts billed by the Air Ambulance Companies. Each of the warrants included a Provider Payment Statement, which listed the amount billed, the amount paid, the name of the claimant, and notified the Air Ambulance Company of their rights to object and to request a contested case hearing under Wyoming Statute § 27-14-601(k)(iv) (LexisNexis), if the Air Ambulance Companies disagreed with the amounts paid by the warrant.

In each of the cases listed in the caption, the Air Ambulance Companies objected to the amounts paid by the Division's warrants and requested a hearing. In general, the Air Ambulance Companies objected on the grounds that the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1) (2012) (ADA) preempted the Wyoming workers' compensation statutes and rules which regulate air ambulance fees. Each of the requests for hearing in the cases listed in the caption was referred to this Office. As this Hearing Examiner previously ruled, the Division waived any

defense based upon the Air Ambulance Companies' failure to comply with the time restrictions for a request for hearing contained in Wyoming Statute § 27-14-601(k)(iv) (LexisNexis). Therefore, this Office has jurisdiction to hear and decide these matters. Wyo. Stat. Ann. § 27-14-601(k)(iv) and (v) (LexisNexis). [Appendix A and Appendix B, Air Methods Cross Motion; Exhibit (Ex.) 10 and Exs. A – Z, EagleMed/Med-Trans Response and Motion; Referrals in Files]

II. ISSUES AND CONTENTIONS

The parties agree that there are no genuine issues of material fact. The Air Ambulance Companies submitted bills to the Division for their air ambulance services provided to the claimants based upon the Air Ambulance Companies' set rates. The Division reimbursed the Air Ambulance Companies for their air ambulance services according to the Division's fee schedule, which was adopted pursuant to Wyoming Statute § 27-14-401(e) (LexisNexis). The amount reimbursed by the Division was significantly less than the amounts billed by the Air Ambulance Companies. Upon joint motion of the parties in December 2014, this matter was stayed to allow the parties to go to the United States District Court for the District of Wyoming (US District Court) to get judicial resolution of whether the ADA preempts the Division's fee schedule for air ambulance services. In May 2016, the US District Court issued its judgment declaring the Division's fee schedule to be preempted by the ADA and enjoining the Division from enforcing Wyoming Statute § 27-14-401(e) (LexisNexis) and the fee schedule against the Air Ambulance Companies to the extent those laws regulate air ambulance rates. The stay was lifted in this matter in January 2017.

Thus, the primary issue this Hearing Examiner must determine is whether the Division's payments to the Air Ambulance Companies for the services provided to the claimants were in accordance with the applicable law. The Division contends: (1) there is no longer any legal authority for the Division to pay any ambulance fees because the US District Court held that

Wyoming Statute § 27-14-401(e) (LexisNexis) and the fee schedule are preempted; (2) this Office does not have the express or implied authority to order the Division to pay the Air Ambulance Companies; (3) the US District Court's Judgment does not apply to claims prior to the entry of the Judgment; and (4) an order from this Office that the Division must pay the fees charged by the Air Ambulance Companies violates Article 16, Section 7 of the Wyoming Constitution. The Air Ambulance Companies simply argue that the Office must apply what remains of Wyoming Statute § 27-14-401(e) (LexisNexis), after the US District Court's preemption holding, to the undisputed facts. Specifically, the Air Ambulance Companies assert Wyoming Statute § 27-14-401(e) (LexisNexis) requires the Division to allow a charge for the ambulance service if transportation by air ambulance is necessary.

III. FINDINGS OF FACT

1. The Air Ambulance Companies provided air ambulance services to the claimants between 2012 and 2016. [Ex. 10, EagleMed/Med-Trans Response and Motion; Ex. B, Air Methods Cross Motion; Division's Rule 56.1 Statements]

2. The Air Ambulance Companies billed the Division for the services provided to the claimants based upon the Air Ambulance Companies' rates. [Ex. 10, EagleMed and Med-Trans Response and Motion; Ex. B, Air Methods Cross Motion] The Division reimbursed the Air Ambulance Companies based upon the Division's fee schedule contained in the Division's rules. In all of the claimants' cases, this resulted in the Air Ambulance Companies receiving significantly less than had been charged. For example: (a) Air Methods billed the Division $40,435.65 for services provided to Ryder Anderson on December 21, 2014, and the Division reimbursed Air Methods $5,384.04 for the services it provided to Anderson [Ex. B, Air Methods Cross Motion]; (b) EagleMed billed the Division $34,178.39 for services provided to Brandon Altman on July 28,

2014, and the Division reimbursed EagleMed $5,796.09 for the services it provided to Altman [Ex. 10, Ex. B, EagleMed /Med-Trans Response and Motion]; and (c) Med-Trans billed the Division $22,067.00 for services provided to JC Rowlett on October 6, 2014, and the Division reimbursed Med-Trans $4,147.89 for the services it provided to Rowlett. [Ex. 10, Ex. R, EagleMed/Med-Trans Response and Motion]

3. The Air Ambulance Companies objected to the Division paying significantly less than the amounts charged and requested hearings in all of the claimants' cases. The Air Ambulance Companies asserted the Division's fee schedule was preempted by the ADA. [See e.g., Air Methods Cross Motion, Appendix A, p. 7; EagleMed/Med-Trans' Response and Motion, Ex. 10, Ex. B, 10, Ex. S] In January 2014, the Division referred approximately 13 of the Air Ambulances Companies' objections to this Office for contested case hearings. On December 17, 2014, this Office issued an Order Granting Stipulated Motion to Stay Administrative Action (OAH Stay Order), which stayed those referred cases pending the parties obtaining judicial resolution of the preemption issue in US District Court and remanded the referred cases back to the Division. [Ex. A, Air Methods Response]

4. On May 16, 2016, the US District Court issued its order granting the Air Ambulance Companies summary judgment against the Division (US District Court Judgment). The US District Court held and declared "the [ADA] preempts Wyoming Statute section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the . . . Division to the extent the statute and regulation set compensation that air ambulances may receive for their services." The US District Court further ordered that the Division was permanently enjoined from enforcing Wyoming Statute section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Division against Air Ambulance Companies. In addition, the US District Court noted its

declaratory and injunctive orders were prospective. [Ex. A, p. 35, Air Methods Cross Motion; Exhibit A, p. 35, Division's Appendix]

5. On May 19, 2016, the US District Court held a status conference with the Air Ambulance Companies and the Division to discuss entry of the final judgment. The US District Judge and the parties' counsels had a lengthy discussion concerning the prospective versus retroactive effect of the US District Court's Judgment. The Division's counsel in US District Court requested the District Judge to make the Judgment more clear that the Judgment did not have any retroactive effect on the Air Ambulance bills entered before the lawsuit was filed in US District Court. Counsels for the Air Ambulance Companies countered that the US District Court Judgment should apply to the cases stayed by the December 17, 2014 OAH Stay Order because this Office had not decided the stayed claims. The discussion concluded as follows:

> [EagleMed/Med-Trans' Counsel]: What we're talking about here, what it sounds like [Division's Counsel] wants to say is that these bills that are pending before OAH, with that matter being stayed pending the outcome of the constitutionality of the fee schedule -- I think [Division's Counsel] is trying to get something that will say, we don't have to pay those because it's only bills from the date of this complaint forward. And, quite frankly, I think that's wrong. I think if you can't enforce it, they can't go back to OAH and say, okay, enforce the fee schedule for all of these that are on appeal and then, starting on the date of the complaint, we'll start doing what we should have been doing a long time ago.
>
> [Air Methods' Counsel]: . . . I'll just echo that, too, Your Honor. What's going on in the appeal is that the plaintiffs are arguing an appeal that they're owed the full amount beyond the regulation, and that's what the hearing officer stayed, was that determination, pending a determination by a court, this court, as to whether or not the enforcement of those regulations are constitutional. So I do want to make sure that -- I'll just leave it at that. That's the issue, Your Honor.
>
> THE COURT: [Division's Counsel], do you agree?
>
> [Division's Counsel]: No, I don't, Your Honor. I think retrospective means anything that happened before they filed the suit is not applicable to

your ruling. It seems pretty simple to me what retroactive and prospective means and what the difference is.

THE COURT: I'm prepared to rule, at least give you my take on it.

I think the plaintiffs prevail. I think the fact that there was a stay before the agency in this matter, it seems to me that they are governed by -- should be governed by, going forward, by the ruling of this Court. Does that make sense?

[Air Methods' Counsel]: It does to me, Your Honor. Thank you.

[EagleMed/Med-Trans' Counsel]: It does. And we do agree that we can't now go back and appeal things that weren't appealed five years ago or whatever. I think those are over and done with. As the Court said, those that were stayed should be fair game.

THE COURT: That's correct. The language of the judgment I think everybody understands as prospective.

[Air Methods' Counsel]: I think this record has made it clear on behalf of my clients, Your Honor.

[EagleMed/Med-Trans' Counsel]: I agree. I think as long as it's the enforcement -- or the injunction is prospective, not that we throw in anything about bills, I think that makes it clear and consistent with what the Court ruled.

THE COURT: All right.

[Division's Counsel]: For the record, Your Honor, we object to that.

THE COURT: I understand.

[Ex. 3, Transcript p. 8, line 14 – p. 10, line 15, Air Methods Reply]

6. Following the US District Court's Judgment, the Division appealed the Judgment to the United States Tenth Circuit Court of Appeals (Tenth Circuit). The Division also requested the US District Court to stay the US District Court's injunction against the Division pending appeal. The Division argued that the effect of the US District Court's injunction was to eliminate the Division's statutory authority to pay any fees submitted by the Air Ambulance Companies.

Specifically, the Division asserted: (1) the Wyoming Legislature only authorized payment of air ambulance fees that are reasonable and based on a fee schedule and did not authorize payment of Air Ambulance fees without those limitations; and (2) Wyoming Statute § 27-14-401(e) is not severable. [Ex. 4, Air Methods Reply] On August 16, 2016, the US District Court denied the Division's motion for a stay pending appeal. The US District Court rejected the Division's arguments and held: its Judgment did not enjoin the Division from paying ***any*** air ambulance fees; the Division "cannot set air ambulance fee rates . . . [b]ecause the [Division] cannot do so, they must pay the air ambulance services whatever they charge"; and the Division had been violating the US District Court's Judgment for two months by not paying the Air Ambulance Companies for their charges. [Ex. 5, Air Methods Reply]

7. On August 16, 2016, the US District Court issued a First Amended Judgment (Amended Judgment), which held, in part, the Division is "required to compensate air ambulance entities the full amount charged for air ambulance services." [Ex. D, Air Methods Cross Motion; Ex. 1, EagleMed and Med-Trans Response and Motion]

8. This Office, on December 19, 2016, issued an order lifting the December 17, 2014 OAH Stay Order and ordered the Division to re-refer the remanded claims for contested case hearing. The Division, since the OAH Stay Order was lifted, referred all of the cases listed in the caption.

9. Because many of the case referrals did not facially establish that the Air Ambulance Companies had complied with the statutory time period for filing a request for a hearing under Wyoming Statute § 27-14-601(k)(vi) (LexisNexis), this Hearing Examiner, on March 23, 2017, issued an Order Dismissing Cases and Returning to the Division (OAH Dismissal Order), which dismissed those cases. After reconsideration, on May 12, 2017, and again on July 21, 2017, this

Hearing Examiner issued an order rescinding the OAH Dismissal Order because the Division had waived the defense of timeliness of a request for a hearing under Wyoming Statute § 27-14-601(k)(vi) (LexisNexis).

10. The total amounts the Air Ambulance Companies are seeking in unreimbursed charges for all of the claimants' cases are as follows: (a) EagleMed: $441,730.25; (b) Med-Trans: $323,268.35; and (c) Air Methods: $2,559,784.19. [See, EagleMed and Med-Trans' Response and Motion at pp. 24-15; Ex. 1, Air Methods Reply at p. 4; Division's Rule 56.1 Statements]

11. All findings of fact set forth in the following Conclusions of Law section shall be considered a finding of fact and are fully incorporated into this paragraph.

IV. CONCLUSIONS OF LAW

A. General Principles of Law

12. Regarding summary judgment, the Wyoming Supreme Court has said:

> We hold summary judgment is available in contested case hearings before the Office of Hearing Examiners [Office of Administrative Hearings]. It should be invoked when, in the language of Wyo.R.Civ.P. 56(c), "[t]here is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Neal v. Caballo Rojo, Inc., 899 P.2d 56, 62 (Wyo. 1995).

13. Wyoming Rule of Civil Procedure 56(e), also pertinent in this matter, provides:

> When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

14. When reviewing a motion for summary judgment, the Hearing Examiner must review the record from the vantage point most favorable to the non-movant and give the non-

movant the benefit of all favorable inferences in determining whether there are genuine issues of material fact. *Worker's Comp. Claim of Bodily*, 2011 WY 149, ¶¶ 12 and 16, 265 P.3d 995, 998 and 1000 (Wyo. 2011).

15. "A claimant for worker's compensation benefits has the burden of proving all the essential elements of the claim by a preponderance of the evidence, including that the claimed injury arose out of and in the course of employment." *Newman v. State, Wyo. Workers' Safety & Comp. Div.*, 2002 WY 91, ¶ 27, 49 P.3d 163, 174 (Wyo. 2002) (*quoting Clark v. State, Wyo. Workers' Safety & Comp. Div.*, 2001 WY 132, ¶ 19, 36 P.3d 1145, 1150 (Wyo. 2001)). A claimant has the burden of proving his or her symptoms were work-related injuries within the definition of Wyoming Statute § 27-14-102(a)(xi). *Id.* A claimant has the burden of establishing each and every statutory element by a preponderance of the evidence. *Thornberg v. State, Wyo. Workers' Comp. Div.*, 913 P.2d 863 (Wyo. 1996) and *Workers' Comp. Claim of Jacobs*, 924 P.2d 982 (Wyo. 1996).

> A "preponderance of the evidence" is defined as "proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence." *Scherling v. Kilgore*, 599 P.2d 1352, 1359 (Wyo. 1979).

Thornberg, 913 P.2d at 866. "Once a claimant meets that burden, then the burden shifts to the party opposing benefits to establish an exclusion from worker's compensation coverage." *Shepherd of the Valley Care Ctr. v. Fulmer*, 2012 WY 12, ¶ 20, 269 P.3d 432, 438 (Wyo. 2012).

B. Air Ambulance Reimbursement Principles of Law

16. Wyoming Statute § 27-14-401(e) provides as follows:

> (e) If transportation by ambulance is necessary, the division shall allow a reasonable charge for the ambulance service at a rate not in excess of the rate schedule established by the director under the procedure set forth for payment of medical and hospital care.

17. The Division, by rule and regulation, adopted a fee schedule for Air Ambulance reimbursement, which provides:

Section 8. Fees for Ambulance Services. Ambulance services shall be paid the lesser of the billed charge or the maximum allowable rate for the code appropriate for the documented service. The maximum allowable rates are all-inclusive. Mileage shall be reimbursed per documented loaded statute mile. See Chapter 9, Section 1 of these rules for additional guidelines.

(a) The following codes shall be recognized by the Division:

Code	Short Descriptor	Maximum Allowable
A0425	Mileage, Ground	$ 8.60 per statute mile
A0426	Advance Life Support - 1	$ 286.91
A0427	Advance Life Support - 1, Emergent	$ 454.00
A0428	Basic Life Support	$ 239.10
A0429	Basic Life Support, Emergent	$ 382.54
A0430	Air, Fixed Wing	$ 3,350.00
A0431	Air, Rotary Wing	$ 3,900.66
A0433	Advance Life Support – 2	$ 657.50
A0434	Specialty Care Transport	$ 777.93
A0435	Mileage, Air, Fixed Wing	$ 10.30 per statute mile
A0436	Mileage, Air, Rotary Wing	$ 27.47 per statute mile

Dep't of Workforce Servs., Workers' Comp. Div., ch. 9, § 8, 053.0021.9.06062011.

18. On May 19, 2016, the US District Court Judgment held and declared "the [ADA] preempts Wyoming Statute section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the . . . Division to the extent the statute and regulation set compensation that air ambulances may receive for their services." The US District Court further ordered that the Division was permanently enjoined from enforcing Wyoming Statute section 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Division against air ambulance companies. Further, the US District Court's Amended Judgment held, in part, the Division is "required to compensate air ambulance entities the full amount charged for air ambulance services." In addition, the US District Court Judge, on May 19, 2016, orally ruled "I think the fact that there was a stay before the agency in this matter, it seems to me that they are governed by -- should be governed by, going forward, by the ruling of this Court."

C. Application of Principles of Law to Undisputed Facts

19. The Division made four arguments in support of the Division's Motion. First, the Division asserted this Office lacks the authority to create a new medical benefit or guideline for the payment of air ambulance fees after the US District Court struck down Wyoming Statute § 27-14-401(e) (LexisNexis). Second, the Division asserted the Wyoming Worker's Compensation Act, Wyoming Statute §§ 27-14-101 through 27-14-806 (LexisNexis) (WC Act) no longer authorizes the payment of air ambulances for their services because the US District Court preempted the reasonableness and fee schedule language from Wyoming Statute § 27-14-401(e) (LexisNexis) and there is no authority in the WC Act for payment of limitless air ambulance charges. Third, the Division asserted an order from this Office that the Division must pay the fees charged by the Air Ambulance Companies violates Article 16, Section 7 of the Wyoming Constitution. Finally, the Division asserted the US District Court Judgment applies only to the Air Ambulance Claims filed after entry of the Judgment.

20. The Air Ambulance Companies contended this Hearing Examiner must simply apply the US District Court's ruling and order the Division to compensate the Air Ambulance Companies the full amount charged for their air ambulance services provided to the claimants. The Air Ambulance Companies asserted the US District Court held that Wyoming Statute § 27-14-401(e) (LexisNexis) is severable and all that remains of the statute as applied to air ambulances is, "If transportation by ambulance is necessary, the division shall allow a . . . charge for the ambulance service[.]" In addition, the Air Ambulance Companies argued the US District Court unambiguously rejected the Division's argument that the US District Court Judgment should not apply retroactively to the claims before this Hearing Examiner when the US District Judge stated on the record, "I think

the fact that there was a stay before the agency in this matter, it seems to me that they are governed by – should be governed by, going forward, by the ruling of this Court."

21. This Hearing Examiner agrees with the Air Ambulance Companies. Simply put, the US District Court's Judgment, Amended Judgment, and the US District Court Judge's in court statements plainly direct that this Office's decision regarding the claimants is governed by its ruling. The US District Court clearly declared that Wyoming Statute § 27-14-401(e) (LexisNexis) is severable when it ruled that the statute is preempted "***to the extent*** the statute and regulation set compensation that air ambulances may receive for their services." Because the US District Court ruled that Wyoming Statute § 27-14-401(e) (LexisNexis) is severable, the Division's first two arguments – this Office lacks authority to create a new medical benefit and there is no authority to pay any air ambulance fees because Wyoming Statute § 27-14-401(e) (LexisNexis) is completely void – are not persuasive. This Office need not create a new medical benefit because the statute, as severed, authorizes payment of air ambulance charges. In addition, the US District Court also plainly rejected the Division's prospective application argument when the US District Court Judge said in court that the stayed claims are governed by and should be governed by, going forward, the ruling of this Court. As the Division recognized by its appeal of the US District Court Judgment and Amended Judgment to the Tenth Circuit, this Office is not the proper venue to challenge a ruling of a federal court. Therefore, this Hearing Examiner is compelled to comply with the US District Court's Judgment and Amended Judgment.

22. Moreover, Wyoming Statute § 27-14-401(e) (LexisNexis) is severable. Wyoming Statute § 8-1-103(a)(viii) (LexisNexis) provides as follows:

> (a) The construction of all statutes of this state shall be by the following rules, unless that construction is plainly contrary to the intent of the legislature:

. . . .

> (viii) If any provision of any act enacted by the Wyoming legislature or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of any such act are severable;

This statutory section has been interpreted to mean that severability is the general rule and statutes should be found severable if the valid portions are sufficient in themselves to accomplish the purpose of the statute. *Jones v. State*, 2007 WY 201, ¶ 7, 173 P.3d 379, 385 (Wyo. 2007)(quoting *Rutti v. State*, 2004 WY 133, ¶¶ 11-19, 100 P.3d 394, 401-404 (Wyo. 2004)). The general purpose of Wyoming Statute § 27-14-401(e) (LexisNexis) is to allow for the payment of ambulance services provided to injured Wyoming workers under the WC Act. The remaining valid portions of Wyoming Statute § 27-14-401(e) (LexisNexis) – "If transportation by ambulance is necessary, the division shall allow a . . . charge for the ambulance service" – are sufficient to accomplish the goal of paying for ambulance services provided to injured Wyoming workers covered by the WC Act. In other words, Wyoming Statute § 27-14-401(e) (LexisNexis) as preempted by the US District Court, allows for: (a) the payment of air ambulance charges for necessary transportation of workers' compensation claimants; and (b) the payment of reasonable ground ambulance charges for the necessary transportation of workers' compensation claimants in accordance with the Division's duly adopted fee schedule.

23. In addition, the sole issue before this Hearing Examiner is whether the Division's payments to the Air Ambulance Companies for the services provided to the claimants are in accordance with law. The sole basis for the Division's actual payments to the Air Ambulance Companies is and was the language in Wyoming Statute § 27-14-401(e) (LexisNexis) allowing the Division to only pay a "reasonable charge" and no more than its duly adopted fee schedule. The US

District Court held in May 2016 the language in Wyoming Statute § 27-14-401(e) (LexisNexis) allowing the Division to only pay a "reasonable charge" and to pay no more than its duly adopted fee schedule are preempted. This Hearing Examiner cannot now apply the preempted statute and regulations to the undisputed facts in these matters.

24. Furthermore, where a law is declared unconstitutional the law has no effect and the law in the form it existed prior to the adoption of the unconstitutional law is controlling. *Allhusen v. State, Wyo., Mental Health Professions Lic. Bd.*, 898 P.2d 878, 890 (Wyo. 1995); *See also, Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)(stating that all state laws conflicting with a federal statute are void and without effect). The US District Court declared Wyoming Statute § 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Division are preempted to the extent the statute and regulation set compensation that air ambulances may receive for their services. Therefore, to the extent Wyoming Statute § 27-14-401(e) and Chapter 9, Section 8 of the Rules, Regulations and Fee Schedules of the Division set compensation that air ambulances may receive for their services, that statute and regulation had no effect, and this Hearing Examiner must apply the law and regulation without the preempted provisions.

25. Regarding the Division's argument based upon Article 16, Section 7 of the Wyoming Constitution, this Hearing Examiner and this Office do not have the authority to determine the constitutionality of a statute. *In Re Williams*, 209 WY 57, ¶18, 205 P.3d 1024, 1032 (Wyo. 2009) Therefore, this Hearing Examiner may not address the Division's argument that payment of air ambulance charges pursuant to Wyoming Statute § 27-14-401(e) (LexisNexis) as preempted and severed violates Article 16, Section 7 of the Wyoming Constitution.

V. ORDER

IT IS THEREFORE ORDERED that:

1. The Division's March 17, 2017 Motion for Summary Disposition is DENIED.

2. Air Methods' April 20, 2017 Motion for Summary Judgment and EagleMed/Med-Trans April 20, 2017 Motion for Summary Judgment are GRANTED.

3. The Air Ambulance Companies are entitled to reimbursement of the full amount of the air ambulance service charges submitted and billed to the Division in all of the consolidated claims before this Office.

4. This case is returned to the Wyoming Workers' Compensation Division.

DONE this 10th day of August, 2017.

Peter H. Froelicher, Hearing Examiner
State of Wyoming
OFFICE OF ADMINISTRATIVE HEARINGS
2020 Carey Avenue, Fifth Floor
Cheyenne, Wyoming 82002-0270
(307) 777-6660

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served by mailing the original to the Workers' Compensation Division and by mailing a true and correct copy to the parties, postage prepaid, on the 10th day of August, 2017, addressed to the following:

Workers' Compensation Division (ORIGINAL)
1510 East Pershing Boulevard
Cheyenne, Wyoming 82002

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