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## August 2015 Workers' Compensation Law Update

### Is The Sky The Limit? Not When It Comes to Air Ambulance Reimbursement !

There is no limit on how much an air ambulance provider (or any other health care provider, for that matter) can charge for its services or how often it can raise its charges. For example, one of the largest air ambulance providers in Texas, PHI Air Medical, increased its base rate from \$11,492.00 in 2010 to \$26,177.00 in 2014, a 128% increase. At the same time, it increased its mileage rate from \$150.00 per mile to \$290.00 per mile, an increase of 93%.

However, the lack of any restrictions on a provider's billed charges is only a problem when it is held that the provider is entitled to reimbursement of its billed charges. Since January 2014, the Division has been doing just that, issuing medical fee dispute decisions holding that its medical fee guideline does not cover air ambulance services and ordering payment of the air ambulance providers' billed charges on the grounds that they are "fair and reasonable."

Many of the Division's decisions have been appealed to the State Office of Administrative Hearings (SOAH) where they have been assigned to Administrative Law Judge Craig Bennett. Judge Bennett consolidated a group of early cases between PHI Air Medical and eight insurance carriers. These lead cases will determine the legal issues for the remainder of the air ambulance cases pending at SOAH. James Loughlin with the Firm represents seven of the eight carriers.

Judge Bennett issued a preliminary order on August 5, 2015 announcing his decision that "the proper reimbursement rate for the air ambulance services in issue is 149% of Medicare." This is a great victory for the carriers because Judge Bennett has rejected the Division's position that PHI's billed charges are fair and reasonable, he has concluded that reimbursement should be Medicare-based, i.e., a percentage of the Medicare rate, and he has picked a percentage which is not much higher in dollar terms than 125% of Medicare.

The carriers paid PHI at 125% of the Medicare rate based on their understanding that the Division's fee guideline applies to ambulance services. The difference between the 125% paid by the carriers and the 149% determined by Judge Bennett to be fair and reasonable is less than 13% of the amount

sought by PHI which was based on its claim that it is entitled to reimbursement of its billed charges.

Judge Bennett's decision and order which will explain his reasoning in detail is expected by the second week of September. PHI's counsel has already indicated that PHI intends to appeal Judge Bennett's decision to district court. Judge Bennett previously rejected PHI's argument that the federal Airline Deregulation Act preempts Texas' workers' compensation laws governing reimbursement to health care providers from being applied to it. This issue has national implications for PHI.

The carriers will likely cross-appeal Judge Bennett's decision on the grounds that the fee guideline applies and 125% is more than fair and reasonable. The carriers presented compelling, un rebutted evidence at hearing that 125% is more than fair and reasonable. The sticking point on appeal may boil down to the legal issue of whether the statutory standards for fair and reasonable reimbursement, if properly interpreted, guarantee health care providers a profit.

Judge Bennett's decision will hopefully encourage the Division to move quickly to adopt a fee guideline for ambulance services. Air ambulance fee disputes will continue to pile up at the Division until it does so. Judge Bennett's decision will hopefully also cause the Division to reconsider its approach to these disputes of ordering payment of the air ambulance providers' billed charges.

### **Hard to Keep DDs: Designated Doctor Numbers Trending Down**

The number of doctors on the Division's Designated Doctor List dropped in the past year from 1008 in July of 2014 to only 699 in July of 2015. Of the 699 still on the list, 250 of those doctors are medical doctors, 37 are osteopaths and 332 are chiropractors. The number of medical doctors on the list has dropped by half and the number of chiropractors is down by 129.

One explanation for the drop may be the "new" examination to test designated doctors' competency to evaluate MMI and impairment rating, which was implemented on 5/1/13. As that test would not have been required of doctors on the list on 5/1/13 until the date their credentials expired (every 2 years) many of the doctors on the list were not required to take the test until 5/1/15.

According to many of the doctors, increased regulation and certification requirements without a corresponding increase in the reimbursement rate paid for designated doctor examinations are largely responsible for the drop in the number of doctors willing to perform designated doctor evaluations.

Hopefully the new requirements will result in a smaller number of more qualified doctors. The

down side continues to be a drop in the number of qualified doctors willing to travel west of I-35 to perform those examinations.

### **DWC Contemplating Amendments to Death and Burial Benefits Rules**

On 8/26/15, the Division closed the informal comment period on possible amendments death and burial benefits rules. The proposed amendments allow eligible spouses of first responders to remain eligible for death benefits after remarriage and to increase the maximum amount of reimbursement for burial benefits payable in all workers' compensation death cases from \$6,000 to \$10,000. The changes would apply to injuries occurring on or after 9/1/15. Formal comments will be requested once the rules are proposed and published in the Texas Register.

### **Food for Thought - Is an Uber Driver an Independent Contractor?**

The short answer? It depends....The California Labor Commission ruled that an Uber driver who filed a claim against the company was an employee. That ruling was limited to the facts of the specific case in question, but could have ramifications for Uber drivers nationwide. On the opposite coast, a New Jersey workers' compensation judge ruled that a limousine driver in a business not unlike Uber was an independent contractor. As the nature of the workforce continues to change in the "gig" economy, many question whether worker protections fashioned for traditional full-time workers provide adequate protection for the less traditional employment relationships. In Texas, the real question is whether the company has the right to control the work performed by the individual in question. There are currently no pending Uber-related cases in Texas. Stay tuned.....

### **DWC Education Conferences Coming Up**

The Division education conferences will be held in Austin and Dallas this again this fall. The Austin conference will be September 18 at the Renaissance Austin Hotel and the Dallas conference will be October 9 at the Renaissance Dallas-Richardson Hotel. The Division offers continuing education credit for adjusters. For more see: [www.tdi.texas.gov/wc/events/edconference.html](http://www.tdi.texas.gov/wc/events/edconference.html).

### **Remember ICD-10**

We think it bears repeating that effective October 1, 2015, the Division is making the transition from ICD-9 to ICD-10. The Division has a video to help participants with this transition at: [www.tdi.texas.gov/wc/hcprovider/icd10.html](http://www.tdi.texas.gov/wc/hcprovider/icd10.html). As we mentioned in July, the Division has not provided guidance on how carriers should process bills submitted with ICD-9 codes for dates of service after 10-1-15 and has not provided any guidance to stakeholders regarding many issues that

are expected to arise. Hopefully we can update you in September. It could be quite a mess.

### **Commissioner Brannan Stirs Things Up**

Our new Commissioner made some personnel changes at DWC. Barbara Salyers is the new Chief Deputy. Her stated job duties are management and oversight of DWC operations and liaison with TDI-Hobby administration and operations. Amy Lee and the Research and Evaluation Group now report directly to Ms. Salyers. Patricia Gilbert, former Executive Deputy Commissioner for Operations retired and Joe McElrath is now the Deputy Commissioner for Business Process, a position similar to that previously held by Ms. Gilbert. Kathy McMaster will serve in a new position called Deputy Commission of Claims and Customer Services (previously Field Operations). Kristen Harmon is the new Director of External Relations. It remains to be seen what the impact of all of these changes will be, but we will continue to keep an eye on things over at the Division.