



NOTICE

REGARDING WORKERS' COMPENSATION FEE SCHEDULES AND AIR AMBULANCE PROVIDERS

To: Insurers Providing Workers' Compensation Coverage in West Virginia,
Third Party Administrators and Self-insured Employers

From: West Virginia Offices of the Insurance Commissioner

Date: February 7, 2019

Re: *Air Evac EMS, Inc. v. Cheatham, and W. Va. Code § 23-4-3*

On October 20, 2017, the United States District Court for the Southern District of West Virginia issued a *Memorandum Opinion and Order* in the case of *Air Evac EMS, Inc. v. Cheatham*, Civil Action No. 2:16-cv-05224. The decision found that the Airline Deregulation Act of 1978 (ADA) preempts W. Va. Code § 23-4-3, the accompanying fee schedules, and all accompanying regulations insofar as they impose regulatory obligations related to the price, route, or service of an air carrier that provides air transportation under Subpart II of Title 49, Subtitle VII, Part A of the United States Code. *See* 49 U.S.C. 41713(b). The District Court determined that this preemption clause applies to air ambulance service providers. Based upon this finding, the District Court enjoined the West Virginia Offices of the Insurance Commissioner (OIC) from enforcing the provisions of W. Va. Code § 23-4-3, the fee schedules and regulations attendant thereto, against air ambulance services providers.

The OIC appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit Court of Appeals. On December 7, 2018, the Fourth Circuit entered an *Opinion* affirming the District Court's decision to enjoin the enforcement of W. Va. Code § 23-4-3 against air ambulance service providers.

Pursuant to W. Va. Code § 23-4-3, the OIC is mandated to issue a schedule of the maximum reasonable amounts (fee schedule) to be paid to health care providers and others for rendering of treatment or services to injured employees. However, since the workers' compensation market privatized over a decade ago, payors, including the OIC, workers' compensation carriers, third-party administrators and self-insured employers have been statutorily permitted to engage in and contract for medical cost containment programs and enter into preferred provider and managed care agreements which provide for negotiated fees that deviate from the OIC fee schedule. Essentially, payors can negotiate with providers for preferred pricing or establish their own reimbursement or fee schedules according to their independent business judgment and are not bound by the OIC's promulgated fee schedule.



The OIC has not, and does not intend to, set or control the amount private insurance carriers, self-insured employers or other payors negotiate to pay to any provider, including air ambulance providers, when they are operating through preferred provider agreements, managed care plans or the like. However, this serves as **NOTICE** of the District Court's *Memorandum Opinion and Order* in the case of *Air Evac EMS, Inc. v. Cheatham*, Civil Action No. 2:16-cv-05224, as well as the Fourth Circuit's *Opinion* in *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018).

The OIC encourages all carriers, third-party administrators and self-insured employers to consult with their own legal counsel regarding the effect of the injunction as well as these opinions and orders.

The OIC, as the regulator of the insurance industry and administrator of the workers' compensation system in our state, hopes to continue to improve our workers' compensation system for the benefit of all workers, employers and other stakeholders.

For further information you may contact:

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