IN THE SUPREME COURT, STATE OF WYOMING

AIR METHODS/ROCKY MOUNTAIN, HOLDINGS, LLC.,	)	
Appellant (Appellee/Petitioner),	)	
v.	)	No. S-18-0068
STATE OF WYOMING, ex rel., DEPARTMENT OF WORKFORCE SERVICES, WORKERS' COMPENSATION DIVISION,	)	
Appellee (Appellant/Respondent).	)	
STATE OF WYOMING, ex rel., DEPARTMENT OF WORKFORCE SERVICES, WORKERS' COMPENSATION DIVISION,	)	
Appellant (Appellant/Petitioner),	)	
v.	)	S-18-0074
AIR METHODS/ROCKY MOUNTAIN HOLDINGS, LLC.; EAGLEMED; and MED-TRANS CORP.,	)	
Appellees (Appellees/Respondents).	)	

APPELLANT'S BRIEF in S-18-0074

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STATEMENT OF JURISDICTION

On February 8, 2018, the District Court for the First Judicial District certified this appeal to the Wyoming Supreme Court. (D. Ct. R. at 706). This Court accepted certification of this appeal on March 27, 2018. Therefore, this Court has jurisdiction over this appeal under article 5, § 2 of the Wyoming Constitution.

STATEMENT OF THE ISSUES

I. The United States District Court for the District of Wyoming preempted Wyoming Statute § 27-14-401(e), and its corresponding fee schedule, based on its conclusion that the fee schedule, and the "balance billing" prohibition in Wyoming Statute § 27-14-501(a), together establish mandatory maximum reimbursement rates for air ambulance services. Did the United States District Court properly interpret State law?

II. The OAH Order under review is based on two general conclusions: (1) that OAH was compelled to follow the rulings of the United States District Court that preempted Wyoming Statute § 27-14-401(e), and its corresponding fee schedule, and directed the Division to pay the disputed claims in full; and (2) that it is permissible under Wyoming law to sever the Legislature's direction to pay for air ambulance services from the limitations of the fee schedule.

A. Under Wyoming law, severance of the invalid portions of a statute is not permissible if contrary to legislative intent. Since 1945, the direction to pay for ambulance services has always been subject to the limitation of reasonableness as reflected in a fee schedule. Did the hearing examiner err in failing to conclude that severance of the fee schedule was inconsistent with legislative intent?

B. Under Wyoming law, severance of the invalid portions of a statute is not permissible if the remaining portions cannot be given effect. After severance of its invalid portions, Wyoming Statute § 27-14-401(e) directs only that "a . . . charge" be allowed for air ambulance services. Did the hearing examiner err in failing to conclude that, following severance, the remaining portions of the statute were too vague to be given force or effect?

C. Under Wyoming law, severance of the invalid portions of a statute is not permissible if the remaining portions cannot be given effect. Neither a court nor an administrative body has the authority to add language to a statute in order to preserve the statute's meaning or purpose. By requiring the Division to pay Appellees' full billed charges, the hearing examiner

added words to Section 401(e). Is this severance contrary to law?

III. Under Wyoming Statute § 27-14-602(c), the Office of Administrative Hearings has exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable under the Worker's Compensation Act. Did the hearing examiner exceed his authority when it required the Division to pay for air ambulance services in amounts that exceed what is payable under the Act?

IV. The Wyoming Constitution prohibits payment of money from the treasury unless the claimant has filed a certified claim with the officer or officers whose duty it may be to audit the same. The Worker's Compensation Act does not authorize Division officials to allow claims to the extent they exceed what is payable under the Act. Does this Court lack jurisdiction over the claims at issue due to Appellees' failure to comply with Wyoming Statute § 9-1-404?

STATEMENT OF THE CASE

I. Nature of the Case

Although this case's litigation history—multiple decisions by the U.S. District Court for Wyoming and a reversal by the Tenth Circuit—could create the impression that this Court has been dragged into a litigation quagmire, the underlying issue of Wyoming law is both simple and dispositive. The Wyoming Workers Compensation laws provide that, when an injured worker must be transported by ambulance, the Workers Compensation Division "shall allow a reasonable charge by the ambulance service at a rate not in excess of the rate schedule established by the director . . .." Wyo. Stat. Ann. § 27-14-401(e). The simple question is whether—if the Director cannot create a fee schedule for air ambulances because one would violate federal law—the Wyoming Legislature intends that the Workers Compensation Fund pay any amount an ambulance service wishes to charge.

Before the litigation began, the Director had created a fee schedule, and when air transportation services were called for a patient, the Air Ambulance Companies were reimbursed either (1) the billed charge or (2) the maximum allowable base rates and mileage rates provided in the fee schedule, whichever amount was lower. Beginning in 2014, some Air Ambulance Companies refused to accept the Division's payments as full and final settlement of their air transportation claims, and they sued in federal court for a declaratory judgment that the Wyoming fee schedule was preempted by the federal Airline Deregulation Act. The Court of Appeals for the Tenth Circuit determined that the

fee schedule is preempted by federal law but that "[t]he proper rate of payment for air ambulance services must be determined by the State of Wyoming."

A hearing examiner at the Office of Administrative Hearings then considered the question regarding the proper rate of payment. The Air Ambulance Companies argued that they were entitled to payment of the full billed charges because the fee schedule violated federal law. The hearing examiner determined that he was bound by the federal preemption of a portion of the text of Wyoming Statute § 27-14-401(e) and portions of the corresponding fee schedule that specifically applied to the base rates and mileage rates for air ambulance services. The hearing examiner then applied principles of state law and concluded that the remaining language of Wyoming Statute § 27-14-401(e) requires the Division to pay any amount billed by the Air Ambulance Companies.

The Workers' Compensation Division argues on appeal that the hearing examiner incorrectly applied the law of severance to find that the portions of Wyoming Statute § 27-14-401(e) that remain valid after federal preemption require the Division to pay the full billed charges submitted by the Air Ambulance Companies. The Division contends that instead, the federal preemption of those portions is of such fundamental significance that the entire statute should be declared null and void and of no further force or effect.

To resolve these questions, the Court will need to apply Wyoming Statute § 8-1-103 and its precedent regarding severance to determine if there are any applications of the act which can be given effect without the invalid provisions.

II. Course of Proceedings and Disposition Below

In December 2014, fifteen air ambulance claims had been referred to the Office of Administrative Hearings for disposition. (Admin. R. at 35). In the same month, the hearing examiner granted the parties' stipulated motion for a stay of administrative action pending judicial resolution of whether the Airline Deregulation Act preempts the portions of the fee schedule that pertain to air ambulances. (Admin R. at 35-6).

In early 2015, the Air Ambulance Companies filed a complaint for declaratory relief in the United States District Court for the District of Wyoming. *Eaglemed v. Wyoming ex rel. Department of Workforce Services, Workers' Compensation Division, et al.,* 227 F. Supp. 3d 1255, 1262 (D. Wyo. 2016). The Air Ambulance Companies sought a declaration that the Airline Deregulation Act preempts Wyoming Statute § 27-14-401(e) and its corresponding fee schedule as they pertain to air ambulance services.

This appeal concerns four of the codes in the fee schedule that are specifically applicable to air ambulance services:

Code	**Short Descriptor**	**Maximum Allowable**
A0430	Air, Fixed Wing	$3,350.00
A0431	Air, Rotary Wing	$3,900.66
A0435	Mileage, Air, Fixed Wing	$10.30 per statute mile
A0436	Mileage, Air, Rotary Wing	$27.47 per statute mile

Rules Wyo. Dep't Workforce Servs, Workers' Comp. Div., Ch. 9, § 8.[1]

The course of the federal litigation is summarized in the Division's Motion to Stay Enforcement of Administrative Order filed on April 24, 2018. As noted there, the federal litigation is not yet concluded.

The initial proceedings in the federal district court ended in August 2016 upon the entry of its First Amended Judgment (Admin. R. at 86-8). The First Amended Judgment re-affirmed the federal district court's prior ruling that portions of Wyoming Statute § 27-14-401(e), and its corresponding fee schedule, were preempted by the ADA. For the first time, the First Amended Judgment required the Division "to compensate air ambulance] entities the full amount charged for air ambulance services. (Admin. R. at 87). Then, in October 2016, even though the Department had appealed the action to the Tenth Circuit Court of Appeals, the Air Ambulance Companies moved OAH to lift the stay that had been imposed in December 2014.[2] (Admin R. at 1-4). OAH lifted the stay in December 2016. (Admin. R. at 129-30).

In January 2017, OAH issued a general scheduling order that included a deadline for dispositive motions. (Admin. R. at 209-14). On March 17, 2017, the Division filed its

[1] Chapter 9, section 8 has been amended under emergency rules filed on March 14, 2018 in the office of the Secretary of State. The emergency rules do not affect the issues of this appeal.

[2] The Air Ambulance Companies renewed their motion to lift the OAH stay on October 20, 2015. (Admin. R. at 29-105).

dispositive motion which urged OAH, as a matter of law, to deny the claims in dispute to the extent the claims sought payment in any amount in excess of the fee schedule. (Admin. R. at 240-54).[3]

The Division presented three arguments: (1) that OAH does not have the authority to create a special reimbursement rate for air ambulances services that is not provided for in the Worker's Compensation Act; (2) that the Division has no authority to make any payment for air ambulance services in the wake of federal preemption of the fee schedule; and (3) that to the extent the Air Ambulance Companies, after partial payment by the Division under the fee schedule, seek payment in amounts beyond what has been authorized by the Legislature, their claims should have been presented to the State Auditor as provided in article 16, § 7 of the Wyoming Constitution and Wyoming Statute § 9-1-404.

With specific regard to its third argument, the Division pointed out that the nature of each claim changes when the claim is partially paid under the fee schedule. To the extent the claim is paid in accordance with the maximum amount available under the fee schedule, there is nothing further for the Division or for OAH to do. *See* Wyo. Stat. Ann. § 27-14-602(c). Neither the Division, nor OAH, has the authority to certify the payment of a claim to the state auditor to the extent the claim exceeds the amount payable under

[3] The Division's motion prompted a change in the initial scheduling order. The parties were directed to file responses, replies and cross [dispositive] motions under the procedures and timelines of OAH rules. (Admin R. at 407-8).

the Worker's Compensation Act. *See* Wyo. Stat. Ann. § 27-14-611. To the extent the claim exceeds the maximum available under the fee schedule, the claim becomes a general monetary claim against the state treasury.

The Division presented its argument regarding the potential application of Wyoming Statute § 9-1-404 to demonstrate that Wyoming Statute § 27-14-401(e) and its corresponding fee schedule cannot, by definition, establish a mandatory maximum reimbursement rate for air ambulance services when the Air Ambulance Companies have been provided with a statutory procedure through which they can solicit legislative appropriations to pay their usual and customary charges.

In their pleadings before OAH, the Air Ambulance Companies argued that: the alleged underpayment of their claims began in 2014 (Admin. R. at 427, 825, 1105); that the fee schedule is the only basis for the alleged underpayments (Admin. R. at 431, 825, 830, 1247); that the fee schedule violates the ADA insofar as it applies to air ambulance services (Admin. R. at 427, 834, 849, 1105, 1247); that the fee schedule has been preempted (Admin. R. at 430, 825, 830, 831, 836); and that Division officials have been enjoined from enforcing its provisions (Admin. R. at 431, 831). The Air Ambulance Companies relied heavily on the ruling of the federal district court that required the Division to pay their claims in the full billed amount. (Admin. R. at 1105, 1108).

The Air Ambulance Companies argued that the Division already has legislative inherent authority to pay the excess amounts of the claims in dispute. (Admin. R. at 826, 832, 1105). To support this argument, they pointed to the Division's own rules and regulations that permit payment for medical services, not covered by an existing fee

schedule, on an *ad hoc* basis. (Admin. R. at 827, 842). They also pointed to the Division's authority to contract for medical bill review programs, medical case management, and utilization review services. (Admin. R. at 842, 1116). With regard to questions regarding the Division's authority, Eaglemed and Med-Trans also contended that the Division had the "power to promulgate new fee schedules without the input of the Wyoming Legislature." (Admin. R. at 842).

With the completion of briefing, OAH heard oral argument and issued its decision on August 10, 2017. The OAH Order is not objectionable except with respect to its Conclusions of Law and final disposition. Paragraph 21 of the Conclusions of Law reads as follows:

> This Hearing Examiner agrees with the Air Ambulance Companies. Simply put, the US District Court's Judgment, Amended Judgment and the US District 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) . . . 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) . . . 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) . . . 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 Judge 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 [the federal] Court. As the Division recognized by its appeal of the US District Court Judgment and Amended Judgement 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. [4]

(D. Ct. R. at 29)(emphasis in the original).

The United States Court of Appeals for the Tenth Circuit issued its decision on August 22, 2017, twelve days after hearing examiner issued his order. *Eaglemed, LLC v. Cox,* 868 F.3d 893 (10th Cir. 2017). The Tenth Circuit reversed the full payment remedy imposed by the district court's First Amended Judgment and rejected the notion that preemption requires full payment of air ambulance charges (or creates a statutory right to such payment). *Eaglemed, LLC v. Cox,* 868 F.3d at 905-07 and n.3. The Tenth Circuit held as follows:

> [The court turns] then to Defendants' challenge to the breadth of the injunctive relief ordered. The district court concluded that, because the Airline Deregulation Act preempted the State's attempt to establish fixed maximum reimbursement rates for air-ambulance carriers, then the Workers' Compensation Division was necessarily required to pay in full any amount charged to the Division by an air-ambulance provider that transported a covered injured worker. The district court's amended judgment accordingly required Defendants to reimburse all air-ambulance claims in full at whatever rate Plaintiffs chose to charge them. [The court agrees] with Defendants that the district court abused its discretion in so holding.

Id. at 905. (App. Ex. 4).

The Tenth Circuit noted that "Plaintiffs [the Air Ambulance Companies] have not identified a single provision in the Airline Deregulation Act or any other federal statute

[4] OAH's reliance on the federal district court's First Amended Judgment which ordered the Division to pay full billed charges is also reflected in paragraph's 7, 18, 23, and 24 of the OAH Order. (D. Ct. R. at 24, 27, 30-1).

which would require [the State] to make any payment of air-ambulance claims whatsoever, much less payment at whatever rates Plaintiffs choose to charge them." *Id.* at 906. (App. Ex 4).

III. Statement of Facts

The Air Ambulance Companies are air carriers that hold Federal Aviation Administration operating certificates authorizing them to provide air ambulance services. The companies are also licensed under state law. (Admin R. at 427-8, 430, 825, 829, 846, 850, 1247).

The Air Ambulance Companies do not self-dispatch. They are required to respond to requests made by first responders and other third party professionals without regard to the payment status of their patients/passengers. (Admin R. at 829).

Usual and customary charges for air ambulance services are based on market forces. The ADA itself makes it clear that a "usual and customary" charge is one set by an air ambulance provider in accordance with market forces. Air ambulance providers, not the State, establish their own charges for air ambulance services. (Admin. R. at 138-39, 837-38, 846-8, 1296, 1302). The determination of a "usual and customary" charge does not "entail the application of any 'reasonable' standard such as comparison to market rates generally, or consideration of third-party contractual, prompt pay or hardship discounts; or any other substantive standard through which the State may set or discount the usual and customary prices for an air carrier's services." (Id. at 138-9).

The Air Ambulance Companies, like other air carriers, are subject to regulation by the United States Department of Transportation with respect to unfair or deceptive practices or unfair methods of competition that harm consumers. (Admin. R. at 1256).[5]

Air ambulance services are expensive. Forcing the Division to pay full billed charges helps to subsidize the costs of air ambulance services for non-paying patients. (Admin R. at 829).

There are no disputes of fact as to the receipt and processing of claims for air ambulance services. The claims in dispute are documented by injury reports, claim forms, Provider Payment Statements, (*See, e.g.*, Admin. R. at 1366), objections and requests for hearing filed by the Air Ambulance Companies (*See, e.g.* Admin. R. at 1367) and Division letters referring the contested claims to OAH. (*See, e.g.* Admin. R. at 1362). The Provider Payment Statements provide specific details regarding the base rates and mileage rates being charged by the Air Ambulance Companies. The Provider Payment Statements also provide details regarding reimbursement for medical and nursing services provided during air transports. These services are separately reimbursed to air ambulance entities under procedure codes in the fee schedule that are not in dispute here.

Suffice it to say that all of the claims exceeded the base rate and loaded mileage rates set forth in the fee schedule. Respondent Air Methods increased its average charges

[5] It is not clear from the examples provided by the Air Ambulance Companies whether the Department of Transportation regulates prices that are set by providers in response to market forces in the absence of deceptive, misleading, or anticompetitive conduct.

from $17,262 in 2009 to more than $40,000 between 2009 and 2014, while its profits surged. *Eaglemed, LLC* 868 F.3d at 903. The cost of an average air ambulance flight is $9,000 to $10,000. (Admin. R. at 1213). The award in this case represents a 300-400% mark-up on that average cost.[6] As a result of severance of Wyoming Statute § 27-14-401(e), the Division has been ordered to pay the collective sum of $3,324,782.79, on top of the $613,508.95 the Air Ambulance Companies have already received under the fee schedule. (Admin. R. at 847-8, 1261-2, 1353).

Except for excess payments made during the time that the federal court's full payment judgment was in effect, the Division has not thus far made any payments to the Air Ambulance Companies that exceed the fee schedule.

In its August, 2017 decision, the Tenth Circuit made the following observations regarding the air ambulance industry:

> [T]he market for air-ambulance services is severely distorted based on the unique circumstances surrounding these services. Unlike the typical commercial airline flights that were the focus of the Airline Deregulation Act, air-ambulance flights generally are not chosen by their passengers, are not paid in advance at an agreed-to rate, and do not have prices that are determined in a free market of individual consumer choice. As a general rule, air-ambulance services are not requested or arranged by either the individuals who will receive the services or by the insurance companies, governmental entities, or individuals who will ultimately pay for them. Rather, air ambulances are called by medical professionals and emergency

[6] Eaglemed claims average $40,532.76 per trip ($526,952.83/13). (Admin. R. at 847). Med-Trans claims average $35,998.54 per trip ($431,982.51/12). (Admin R. at 848). The claims of Air Methods/Rocky Mountain Holdings average $42,776.75 per trip ($2,994,372.78/70). (Admin. R. at 1261-62).

> first-responders who will neither receive nor pay for their services. Their prices are determined only after the service has already been rendered—in cases paid through Medicare or Medicaid, at prices established by government rate schedules, and in cases paid through private insurance, usually at a price negotiated between the air ambulance and the insurer. *See* United States Government Accountability Office, Air Ambulance: Effects of Industry Changes on Services are Unclear, GAO Report to Congressional Requesters at 6-7 (Sept. 2010). And, as for the significant proportion of individuals who are uninsured or whose insurance will not cover any or a portion of such claims, these individuals may be billed an extremely high amount that they would not have agreed to if they had been both aware of the potential price and capable of making an informed decision as to their medical transport at the time the air-ambulance service was arranged. *See Schneberger v. Air Evac EMS, Inc.*, 2017 U.S. Dist. LEXIS 36701, 2017 WL 1026012, at *4-5 (W.D. Okla. 2017); *see also* M. Kit Delgado et al., Cost-Effectiveness of Helicopter versus ground Emergency Medical Services for Trauma Scene Transport in the United States, 62(4) *Ann. Emerg. Med.* 351, 352 (Oct. 2013) (included in Appendix G to amicus brief) ("Furthermore, a systematic review has shown that more than half of the patients flown [in air ambulances] have minor or non-life-threatening injuries that would likely have similar outcomes if transported by ground.").
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> Due to the Airline Deregulation Act's broad preemption provision, states have been unable to "prevent air ambulance service providers . . . from imposing exorbitant fees on patients who wrongly assume their insurance will cover the charges and are not in a position to discover otherwise" or engaging in other unscrupulous pricing behaviors that would not be sustainable in a true free market but are easily perpetuated in the warped market of air-ambulance services. *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp. 3d 930, 942 (D.N.D. 2016).

Eaglemed, LLC 868 F.3d at 902-03.

A. Standard of Review

Rule 12.09(a) of the Wyoming Rules of Appellate Procedure and Wyoming Statute § 16-3-114(c) govern this Court's review. This Court reviews each case as though it came directly from the agency and gives no deference to the district court decision.

Watkins v. State ex rel. Wyo. Med. Comm'n, 2011 WY 49, ¶ 16, 250 P.3d 1082, 1086 (Wyo. 2011). "As always, [the Court reviews] an agency's conclusions of law *de novo*, and [it] will affirm an agency's legal conclusion only if it is in accordance with the law." *State ex rel. Wyo. Dep't of Workforce Servs., Workers' Comp. Div. v. Beazer*, 2016 WY 111, ¶ 13, 384 P.3d 267, 271 (Wyo. 2016) (citing *Dale v. S & S Builders, LLC*, 2008 WY 84, ¶ 26, 188 P.3d 554, 561-62 (Wyo. 2008)) (internal quotation marks omitted). A grant of summary judgment is a legal conclusion that the Court reviews *de novo* "using the same standards employed by the administrative agency." *DeLoge v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 2011 WY 154, ¶ 5, 264 P.3d 28, 30 (Wyo. 2011) (citations omitted). Wyoming Rule of Civil Procedure 56(c) governs the review of administrative agency action granting summary judgment in workers' compensation cases. *Beazer*, at ¶ 13, 384 P.3d at 271 (citing *Chavez v. Mem'l Hosp. of Sweetwater Cnty.*, 2006 WY 82, ¶ 6, 138 P.3d 185, 188 (Wyo. 2006)).

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Wyo. R. Civ. P. 56(c). The Court views the record "from the vantage point most favorable to the party who opposed the motion, and this Court will give that party the benefit of all favorable inferences that may fairly be drawn from the record." *Beazer*, at ¶ 13, 384 P.3d at 271 (citations omitted).

"A worker's compensation claimant has the burden of proving each of the essential elements of his claim by a preponderance of the evidence." *Johnson v. State ex*

rel. Wyo. Workers' Safety & Comp. Div., 2014 WY 33, ¶ 21, 321 P.3d 318, 323 (Wyo. 2014) (citations omitted); *See Thornberg v. State ex rel. Wyo. Workers' Comp. Div. (In re Thornberg),* 913 P.2d 863, 866 (Wyo. 1996) (citing *Scherling v. Kilgore*, 599 P.2d 1352, 1359 (Wyo. 1979)) ("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.") (internal quotations omitted). A claimant also has the burden of "following procedures and rules contained within the Wyoming Worker's Compensation Act in order establish entitlement to worker's compensation benefits." *State ex rel. Wyo. Workers' Safety & Comp. Div. v. Parrish*, 2004 WY 144, ¶29, 100 P.3d 1244, 1254 (Wyo. 2004).

After the passage of the 1994 amendment to Wyoming Statute § 27-14-101 abolishing liberal construction, "workers' compensation statutes can no longer be interpreted in favor of coverage but will be interpreted in a way that gives effect to the legislative intent and preserves the historic compromise between workers and employers." *Brierley v. State ex rel. Wyo. Workers' Safety & Comp. Div.* 2002 WY 121, ¶ 13, 52 P.3d 564, 569 (Wyo. 2002). Moreover, when a statute is unambiguous and not silent as to the issue presented it "must be interpreted in accordance with its plain language to effectuate legislative intent." *Id.* (citing *Moller v. State ex rel. Wyo. Workers' Safety & Comp. Div.*, 12 P.3d 702, 706 (Wyo. 2000). When the intent of the Legislature is clear, the "Courts will not usurp the power of the Legislature by deciding what should have been said." *Weyerhaeuser Co. v. Walters*, 707 P.2d 733, 738-39 (Wyo. 1985) (Rose, J. dissenting) (internal citations omitted). "A basic tenant of statutory construction is that

omission of words from a statute is considered to be an intentional act by the legislature, and this court will not read words into a statute when the legislature has chosen not to include them." *Merrill v. Jansma*, 2004 WY 26, ¶ 29, 86 P.3d 270, 285 (Wyo. 2004). In other words, the Court "will not insert language into the statutes that the legislature omitted." *Id.* (citing *Mathewson v. City of Cheyenne*, 2003 WY 10, ¶ 9, 61 P.3d 1229, 1233 (Wyo. 2003).

Finally, because Wyoming Statute § 27-14-803(a)(viii) expresses a preference for separability of statutes, the Division bears the burden to show that Wyoming Statute § 27-14-401(e) is indivisible. *Bell v. Gray*, 377 P.2d 924, 926 (Wyo. 1963).

ARGUMENT

I. The federal court's preemption analysis may be based on an incorrect or impermissible reading of state law.

The federal courts have preempted Wyoming Statute § 27-14-401(e), and its corresponding fee schedule, based on the relationship between these provisions and the sixth sentence in Wyoming Statute § 27-14-501(a) that is thought to prohibit medical care providers and hospitals from directly billing injured workers for any portion of their charges.[7] The federal district court eventually concluded that the fee schedule adopted under section 401(e), together with the balance billing prohibition in section 501(a), have

[7] By itself, Wyoming Statute § 27-14-401(e) and its fee schedule merely set the amount that the Division will pay for air ambulance services. The sixth sentence in Wyoming Statute § 27-14-501(a) has been referred to in the federal litigation and in proceedings before OAH as the "balance billing" prohibition.

the combined effect of setting mandatory maximum reimbursement rates for air ambulance entities in violation of the Airline Deregulation Act, 49 U.S.C. § 41713(b)(1). *Eaglemed,* 227 F. Supp. 3d 1255, 1273 (2016).

On appeal, the Tenth Circuit discussed the interplay between Wyoming Statutes §§ 27-14-401(e) and the balance billing prohibition in 27-14-501(a). The court stated as follows:

> *** Section 27-14-501(a) might be read in the future to prevent air-ambulance companies from seeking reimbursement from the workers themselves, thus preventing the companies from receiving payment from their passengers as well as from the State. However, if this were to happen, then it would be Section 27-14-501(a) that would be illegally regulating air-ambulance rates by preventing any recovery from air-ambulance passengers, and the proper remedy would seem to be the preemption of this statute, not the forced payment of air-ambulance claims from state coffers.

Eaglemed, LLC, 868 F.3d at 906 n.3.

Thus, the Tenth Circuit has re-opened the question whether the balance billing prohibition should be preempted rather than the fee schedule. And the federal district court has now made it clear that the "core issue" is the amount the Division is obligated to pay under state law for air ambulance services. In this regard, the Wyoming courts have not yet had an opportunity to construe the provisions of Wyoming Statute § 27-14-501(a) as a matter of state law. For the following reasons, there are significant questions regarding whether the balance billing prohibition applies to ambulance companies.

First, the federal district court determined that the Air Ambulance Companies are not hospitals or "health care providers" as defined in the Worker's Compensation Act.

> Section 27-14-601 uses the terms "medical and hospital care" and "health care provider." The question is whether the air ambulance services are

defined as a "health care provider" that is providing "medical and hospital care" under the Workers' Compensation Act. "Medical and hospital care" is defined as follows.

> [W]hen provided by a health care provider means any reasonable and necessary first aid, medical, surgical or hospital service, medical and surgical supplies, apparatus, essential and adequate artificial replacement, body aid during impairment, disability or treatment of an employee pursuant to this act including the repair or replacement of any preexisting artificial replacement, hearing aid, prescription eyeglass lens, eyeglass frame, contact lens or dentures if the device is damaged or destroyed in an accident and any other health services or products authorized by rules and regulations of the division. "Medical and hospital care" does not include any personal item, automobile or the remodeling of an automobile or other physical structure, public or private health club, weight loss center or aid, experimental medical or surgical procedure, item of furniture or vitamin and food supplement except as provided under rule and regulation of the division and paragraph (a)(i) of this section for impairments or disabilities requiring the use of wheelchairs[.]

Wyo. Stat. Ann. § 27-14-102(a)(xii) (emphasis added). The term "health care provider" is defined as "doctor of medicine, chiropractic or osteopathy, dentist, optometrist, podiatrist, psychologist or advanced practitioner of nursing, acting within the scope of his license, licensed to practice in this state or in good standing in his home state[.]" Wyo. Stat. Ann. § 27-14-102(a)(x). Under the ordinary usages of both of these terms, air ambulances provide medical and hospital care and would appear to be health care providers. But, under the specific statutory definition, the air ambulances do not fit either of these definitions.

The Court can discern from other markers in the Workers' Compensation Act that ambulance services are not considered "medical and hospital care" or "health care providers." Section 27-14-401 indicates this clearly. The term "medical and hospital care" is used throughout the first four subsections of this statutory section. See Wyo. Stat. Ann. § 27-14-401(a)—(d). Subsection (e) of the statute, the very next subsection, governs the consideration of ambulance service charges.

> 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.

> Wyo. Stat. Ann. § 27-14-401(e). This subsection uses the term "medical and hospital care," but not to describe ambulance services. It uses "medical and hospital care" as a comparison for how the Division should set fee schedules for ambulances, indicating that they are two different items. In addition, the title of this statute section starts "Medical, hospital and ambulance expenses...," separating ambulance expenses from medical and hospital expenses. Ambulance services are not "medical and hospital care" under the statute. Therefore, Section 27-14-601, the section allowing providers to bill injured workers, does not apply to air ambulances.

EagleMed, 227 F. Supp. 3d 1274-75.

This analysis is reasonable except that the conclusion that Wyoming Statute § 27-14-601(a) does not apply to air ambulances does not necessarily mean that Wyoming Statute § 27-14-501(a) does apply to them. Nevertheless, the federal district court reached the conclusion that air ambulance entities are subject to the balance billing prohibition without careful analysis of the text of Wyoming Statute § 27-14-501(a) and without consideration of prior Wyoming precedent:

> There are a myriad of circumstances that might lead to the denial of a claim for reimbursement. For various reasons, an injured person may not have been covered under the Act. The treatment furnished may not have been covered or was not necessary or reasonable. The injury may not have occurred on the job or the employer might not be qualified. No record has been provided that indicates that the defendants have treated payment of a lesser sum under the rate schedule as a denial of plaintiffs' claim for air ambulance services. No such record exists, because in the Division's opinion, payment of the reduced price under the fee schedule represented full payment under state law.
>
> The statutory ban on balance billing the injured worker in Section 27-14-501 applies to the plaintiffs' air ambulance services. Under the current statutory and regulatory scheme, the air ambulance entities are limited in the amount of compensation they may receive for their services by the Division's fee schedule as implemented by the defendants.

EagleMed, at 1275.

This reasoning of the federal district court is not helpful. The fact that an air transport may have been provided under circumstances in which the patient is not covered by the Worker's Compensation Act does not assist with the issue of whether, when the Act does apply, the air ambulance company is subject to Wyoming Statute § 27-14-501(a). As a basic starting point, it is important to recognize that air ambulance entities are not mentioned in the text of Wyoming Statute § 27-14-501(a) or § 27-14-601(b).

Of the nine sentences (in bold type below) that compose Section 501(a), eight of them pertain only to medical care providers and hospitals. For the reasons stated below, the sixth sentence in section 501(a)—which contains the balance billing prohibition—should not be read as having any application to ground or air ambulances. The nine sentences in Section 501(a) are parsed as follows:

First Sentence. "Within thirty (30) days after accepting the case of an injured employee and within thirty (30) days after each examination or treatment, a health care provider or a hospital shall file without charge a written medical report with the division." This sentence does not apply to air ambulance companies. The federal district court has already determined that the term "health care provider" as defined in the Worker's Compensation Act does not include air ambulances companies and that air ambulance companies do not provide hospital care. *EagleMed,* at 1275.

Second Sentence: "Upon request, the division shall provide a copy of the report to the employer or employee." This sentence does not apply to air ambulance

companies because it simply provides that the medical report required by the first sentence of section 501(a) shall be provided to the employer or employee upon request.

Third Sentence: "The division shall notify the employer and the employee that they shall be provided a copy of the report upon request." This sentence does not apply to air ambulance companies because it does nothing more than require the Division to notify the employer and the employee that they have the right to request a copy of the medical report required by the first sentence of section 501(a).

Fourth Sentence "The report shall state the nature of the injury, the diagnosis, prognosis and prescribed treatment." This sentence does not apply to air ambulance companies because it specifies the content of the medical report that is required to be to be provided by health care provider or hospital under the first sentence.

Fifth Sentence "Any health care provider or hospital failing or refusing to file the report or transmit copies within the time prescribed by this subsection or presenting a claim for services not reasonably justified or which was not required as a result of the work related injury shall forfeit any remuneration or award under this act for services rendered or facilities furnished the employee." This sentence by its terms does not apply to air ambulance companies. It serves the purpose of making sure that health care providers and hospitals submit claims promptly and prohibits them from submitting fraudulent claims.

Sixth Sentence "Fees or portions of fees for injury related services or products rendered shall not be billed to or collected from the injured employee." This sentence was added to Wyoming Statute § 27-14-501(a) in 1986. (1986 Wyo. Sp.

Sess. Laws, 3, 31 (ch. 3, § 3)). [8] This sentence has not changed even though Section 501(a) has been amended and re-enacted on three occasions. (1989 Wyo. Sess. Laws, 654, 657-59 (Ch. 264, § 2)); 1996 Wyo. Sess. Laws, 260,262-63 (ch. 82, § 1); 1998 Wyo. Sess. Laws, 835-36 (ch. 117, § 1). There is nothing in the text of this sentence to indicate that it applies to air ambulance companies. In fact, this sentence refers to "fees or portions of fees" while Wyoming Statute § 27-14-401(e) refers to "a charge" which also distinguishes ambulance charges from the reference to fees for medical and hospital care in section 401(b). The sixth sentence of section 501(a) does not identify who is prohibited from direct billing for that is not its purpose. The purpose of this sentence is to make it clear that all fees for injury related services and products are subject to the direct billing prohibition. In other words, neither a health care provider nor a hospital may attempt to exempt an injury related service or product from the direct billing prohibition in order to bill the injured employee directly. In addition, this sentence has no logical connection to air transportation charges under the fee schedule. The Air Ambulance Companies are billing the Division under specific HCPCS codes that define base rates and mileage rates for actual flying. Each code is unitary and indivisible. It would be impossible to simultaneously bill the Division for loaded mileage charges and at the same time bill the injured worker for flying services related to but somehow unrelated to loaded mileage transportation.

[8] The text of the law enacted in the 1986 Special Session are found in the 1987 volume of the Session Laws.

Seventh Sentence: "Any tests to be administered or other services proposed to be rendered by a health care provider which are clearly not germane to the injury shall be disclosed to the injured employee, if possible, and the employee shall be advised that the cost of the tests or services will be the responsibility of the employee if he consents to the tests or services." This sentence does not apply to air ambulance companies. It pertains to the specific situation in which a health care provider or hospital is treating a work related injury and provides other health care services that are not "germane." Health care services provided by air ambulance entities are paid for under separate codes in the fee schedule.

Eighth Sentence: "Any other necessary and reasonable test or report including initial and necessary follow-up testing for blood borne pathogens, which may be required by division policy or requested by the division, employer or employee may be paid in accordance with a fee schedule adopted by the division." This sentence does not apply to air ambulance companies. No one asks air ambulance companies to do follow up testing or reporting.

Ninth Sentence: "The division shall by rule and regulation institute an appropriate policy for testing for blood borne pathogens after possible occupational exposure and for immediate prophylactic treatment if medically indicated, and shall inform hospitals and primary health care providers of this policy." Again, by its own terms, this sentence does not apply to air ambulance companies.

There is no connection between Wyoming Statute § 27-14-401(e) and § 27-14-501(a). The reference in Section 401(e) to "the rate schedule established by the director

under the **procedure** set forth for payment of medical and hospital care" should be read as having two limited effects: (1) the reference to "procedure" does nothing more than require ambulance service providers to timely file claims under Wyoming Statute § 27-14-501(d) and (2) the reference to "procedure" incorporates the rule making powers of the Division Director "to provide fee schedules for all medical and hospital care" under Wyoming Statute § 27-14-802(a). Claims filed by ambulance providers are then reviewed by the Division under Wyoming Statute § 27-14-601.

The issue to be determined here is whether the reference to "procedure" in Wyoming Statute § 27-14-401(e) merely imposes a requirement to file a claim or whether the reference automatically incorporates substantive limitations, such as the balance billing prohibition, that are specifically applicable to health care providers and hospitals.

There are three reasons why the reference to "procedure" in Wyoming Statute § 27- 14-401(e) does not incorporate substantive limitations of section 501(a).

First, as noted above the sixth sentence of section 501(a) does not identify who is prohibited from direct billing injured workers, and since the statute as a whole pertains only to health care providers and hospitals, the doctrine of *noscitur a sociis* (it is known by its associates) leads to the conclusion that section 501(a), including the direct billing prohibition, applies only to health care providers and hospitals. *Radalj v. Union Savs. & Loan Ass'n*, 59 Wyo. 140, 176-77, 138 P.2d 984, 996 (Wyo. 1943).

Second, legislative history supports the conclusion that the balance billing limitations of Wyoming Statute § 27-14-501(a) do not apply to air-ambulance carriers. The portion of section 501(a) stating that "fees or portions of fees for injury related

services or products rendered shall not be billed to or collected from the injured employee" was added to the statute in 1986. 1986 Wyo. Sp. Sess. Laws at 31). This was eight years after the 1978 passage of the ADA. "[The Court presumes] that the legislature has acted in a thoughtful and rational manner with full knowledge of existing law and as a part of an overall and uniform system of jurisprudence." *State ex re. Dep't. of Workforce Servs., v. Workers' Comp. Div. v. Hall* (*In re Hall*), 2018 WY 35, ¶ 16, --- P.3d, --- (Wyo. 2018) (citation omitted). If section 501(a) were to be read to prevent air-ambulance companies from receiving payment from their passengers as well as from the State, it "would be illegally regulating air-ambulance rates by preventing any recovery from air-ambulance passengers." *Eaglemed, LLC,* 868 F.3d 906, n.3 (10th Cir. 2017). It must be presumed that the Legislature did not intend that section 501(a) would cause other provisions of the Worker's Compensation Act to come into violation of federal law under the ADA, and it must therefore be presumed that the Legislature did not intend that the balance billing prohibitions in § 501(a) would apply to air ambulance services.

Finally, the Wyoming Supreme Court has already held that Section 501(a) "plainly applies to health care providers." *Moller v. State ex rel. Wyo. Worker's Safety & Comp. Division,* 12 P.3d 702, 706 (Wyo. 2000).

If the Wyoming Supreme Court declares, as a matter of state law, that the sixth sentence of Wyoming Statute § 27-14-501(a) does not apply to ambulance companies, there would be no further basis for federal preemption of the fee schedule provided for in Wyoming Statute § 27-14-401(e). Ambulance companies, including ground ambulance

providers, would be free to collect payments from the Division under the fee schedule and to bill excess charges to the injured workers themselves.

II. The hearing examiner erred in relying on the ruling of the United States District Court that compelled the Division to pay the disputed claims in full. He also erred in severing the portions of Wyoming Statute § 27-14-401(e) and the fee schedule that pertain to air ambulance entities. Wyoming Statute § 27-14-401(e) is indivisible and should have been declared null and void insofar as it applies to air ambulance entities.

The Air Ambulance Companies claimed in the proceedings below, that OAH was required to comply with the First Amended Judgment issued by the federal district court that directed Division officials to pay their claims in full. (Admin. R. at 427, 430, 832-34).

In oral argument on the parties' dispositive motions, counsel for Eaglemed/Med-Trans stated that his clients were not asking OAH to sever Wyoming Statute § 27-14-401(e) because the federal district court had already done so. (Transcript of Proceedings, July 12, 2017, at 30-2). The hearing examiner ultimately agreed with this argument as noted in Paragraph 21 of the Conclusions of Law of his August 10, 2017 Order:

> This Hearing Examiner agrees with the Air Ambulance Companies. Simply put, the US District Court's Judgment, Amended Judgment and the US District 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) . . . 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) . . . 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) . . . 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 Judge 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 [the federal] Court. As the Division recognized by its appeal of the US District Court Judgment and Amended Judgement 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. [9]

(D. Ct. R. at 29)(emphasis in the original).

The United States Court of Appeals for the Tenth Circuit issued its decision on August 22, 2017, twelve days after the hearing examiner issued his order. We now know that the hearing examiner's reliance on the rulings of the federal district court may have been misplaced. The Tenth Circuit reversed the full payment judgment and rejected the notion that preemption requires full payment of air ambulance charges (or creates a statutory right to such payment). *Eaglemed, LLC,* 868 F.3d at 905-07 and n. 3 The Tenth Circuit held as follows:

> [The court turns] then to Defendants' challenge to the breadth of the injunctive relief ordered. The district court concluded that, because the Airline Deregulation Act preempted the State's attempt to establish fixed maximum reimbursement rates for air-ambulance carriers, then the Workers' Compensation Division was necessarily required to pay in full any amount charged to the Division by an air-ambulance provider that transported a covered injured worker. The district court's amended judgment accordingly required Defendants to reimburse all air-ambulance claims in full at whatever rate Plaintiffs chose to charge them. [The court

[9] The hearing examiner's reliance on the federal district court's First Amended Judgment, which ordered the Division to pay full billed charges, is also reflected in ¶¶ 7, 18 23, and 24 of the OAH Order. (D. Ct. R. at 24, 27, 30-1).

> agrees] with Defendants that the district court abused its discretion in so holding.

Id. at 905. (Appendix to Division's Motion for Stay of Enforcement, Ex. 4).

The Tenth Circuit noted that "Plaintiffs [the Air Ambulance Companies] have not identified a single provision in the Airline Deregulation Act or any other federal statute which would require [the State] to make any payment of air-ambulance claims whatsoever, much less payment at whatever rates Plaintiffs choose to charge them." *Id.* at 906. (App. Ex 4).

The Tenth Circuit ruling undermines the validity of paragraph 21 of the Conclusions of Law stated in the OAH Order. The Tenth Circuit reversed the full payment order upon which the hearing officer based paragraph 21. *Eaglemed, LLC,* 868 F.3d at 905-07. The Tenth Circuit ruled, contrary to paragraph 21, that preemption does not mandate full payment of air ambulance charges. *Id.* at 905, 906 n.3.

With this guidance from the Tenth Circuit, the federal district court noted in an order issued April 12, 2018, that: "the core issue in this case, how much can (or must) the state pay air ambulance services under workers compensation laws, has not yet been determined." [Doc. No. 15-CV-26J, ECF No. 112 at 5]. (Appendix to Division's Motion for Stay of Enforcement, Ex. 6). The federal district court also stated that "[t]he proper rate of payment for air ambulance services must be determined by the State of Wyoming." (*Id.* at 7).

Before proceeding to the law of severance, the following discussion is necessary to ensure that this appeal addresses all possible bases for the OAH Order. Paragraph 23 of

the Conclusions of Law does nothing more than re-state prior conclusions that OAH cannot apply a fee schedule that has been preempted under federal law. (D. Ct. R. at 30-31). Paragraph 24 of the OAH Order states the general principle that when a law is declared unconstitutional, the "law in the form it existed prior to the adoption of the unconstitutional law is controlling." (citing cases). (D. Ct. R. at 31). However, OAH did not investigate the legislative history of Wyoming Statute § 27-14-401(e). There is no indication that OAH was attempting to apply some prior version of Wyoming Statute § 27-14-401(e). Taken as a whole, paragraph 24 of the OAH Order does nothing more than re-state the severance analysis in paragraph 22 quoted above.

The principal battleground between the parties arises from the law of severance. The Air Ambulance Companies argued below that severability of a statute is preferred if the remaining valid portions are sufficient to accomplish the purpose of the statute. (Admin R. at 826, 832, 835-37, 1110, 1254), and that OAH has the power to apply severability principles as part of its power to interpret the Worker's Compensation Act. (Admin. R. at 841).

The Air Ambulances Companies asserted below that severance of Wyoming Statute § 27-14-401(e) preserves legislative intent to pay for air ambulance services. (Admin R. at 826, 834, 837-38, 1110, 1113, 1115, 1246-47, 1253-54).

The Air Ambulance Companies have also pointed out that severance preserves the three principal purposes of the worker's compensation system: "ensuring that injured workers receive quality medical care quickly, protecting both employees and employers from crippling liability, and also providing an efficient means to compensate medical

providers." (Admin. R. at 1113, *See* also 838-39, 1112-15, 1255). This argument may be slightly off the mark in the context of air ambulance services because the Air Ambulance Companies do not, and cannot, challenge the fee schedule with regard to medical and nursing services provided during an air ambulance transport. Under the ADA, they can only challenge base rates and mileage rates for actual flying.

The Air Ambulance companies further argued that even after the application of severance principles, the word "reasonable" could be retained in Wyoming Statute §27-14-401(e) so long as it is understood that the word reasonable "must be construed to mean the provider's usual billed rate as set in accordance with market forces." (Admin. R. at 1304-05).

The Air Ambulance Companies argued below that severability recognizes the powers granted to the Division to pay for air ambulance services even after preemption of the fee schedule (Admin. R. at 1110) and that OAH was required by the law of severance to order the Division to pay the disputed claims in full. (Admin. R. at 826-27, 846, 1106). They also pointed out that the Wyoming Supreme Court has previously severed a statute in the Worker's Compensation Act (Admin. R. at 840, 1255).

The hearing examiner ruled in favor of the Air Ambulance Companies. Paragraph 22 of its Conclusions of Law reads as follows:

> Moreover, Wyoming Statute § 27-14-401(e) . . . is severable. Wyoming Statute
> § 8-1-103(a)(viii) . . . 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) . . . 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) . . . –'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) . . . 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.

(D.Ct. R at 29-30).

A. The hearing examiner erred in concluding that the severance of the preempted portions of Wyoming Statute § 27-14-401(e), and its corresponding fee schedule, was consistent with legislative intent.

The Worker's Compensation Act does not contain any clauses relating to separability of its provisions. In terms of state law, the OAH Order is based exclusively on Wyoming Statute § 8-1-103(a)(viii) which provides in part 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;

Wyoming Statute § 8-1-103 should not be regarded as a positive rule of law. Similar statutes are generally regarded as a statutory codification of one canon of statutory construction. "The principle of separability is sometimes enacted as general law applicable to all acts subsequently adopted in a state irrespective of whether such acts contain their own separability clauses. Courts consider these clauses to be codifications of general rules of interpretation and not binding as fixed rules of law." Volume 2, Norman J. Singer & J.D. Shambie Singer, *Sutherland on Statutes and Statutory Construction* § 44:11 (7th ed. 2009).

Wyoming Statute § 27-14-401(e) is a single indivisible provision consisting of a single sentence. It provides for payment of ambulance services not to exceed the amount allowed by a fee schedule. If the provision is invalid in its application to air ambulances because of preemption under the ADA, then the proper application of Wyoming Statute § 8-1-103(a)(viii) would be a determination that Wyoming Statute § 27-14-401(e) is null and void in its application to air ambulances but remains valid in its application to ground ambulances.

Severance is not permissible if "plainly contrary to the intent of the legislature." Wyo. Stat. Ann. § 8-1-103(a). Severing the Legislature's direction to pay for ambulance

services from the limitations of reasonableness that are embodied by a fee schedule is only permissible where consistent with legislative intent. *McFarland v. City of Cheyenne,* 42 P.2d 413, 416-17 (Wyo. 1935). Severance is consistent with legislative intent if:

> the legislature must have intended an act to be separable, and the act must be capable of separation in fact. Stated otherwise, an unconstitutional portion of a statute may be severed if: (1) absent the unconstitutional portion, a workable statutory scheme remains; (2) valid portions of the statute can be enforced independently; (3) the invalid portion is not the inducement to passage of the statute; and (4) severing the invalid portion will not do violence to the intent of the legislature. From the act itself, the court must find a manifest or apparent intent to deal with a portion of the subject matter irrespective of the validity of the remainder of the act. Where the act is such that the legislature would not have passed it without the invalid parts, the whole act is held inoperative.

Sutherland on Statutes and Statutory Construction, Vol. 2, § 44.3.

"Since no precise formula or standard exists to establish legislative intent, a rule of reasonableness is invoked. Courts decline to attribute to the legislature an intent to pass an unreasonable act. Courts also presume that a legislative body generally intends its enactments to be severable . . . To determine legislative intent, courts consider the circumstances under which the particular act was passed." (*Id*.)

The Wyoming Supreme Court has adopted these basic principles. "If, after striking out the unconstitutional [or preempted] part of the statute, the residue is intelligible, complete, and capable of execution, it will be upheld and enforced, except, of course, in cases where it is apparent that the rejected part was an inducement to the adoption of the remainder." *Hanson v. Greybull*, 183 P.2d 393, 400 (Wyo. 1947).

Wyoming Statute § 27-14-401(e) reads 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.

This section is derived from 1945 Wyo. Sess. Laws, 211, 218 (ch. 171, § 10) which first recognized ambulance services as a benefit under the Worker's Compensation Act. The original text of Wyoming Statute § 27-14-401(e) directed the court presiding over a particular claim, to "allow a reasonable charge for such ambulance services at a rate not in excess of the rate established by the State Treasurer." (*Id.*).

Wyoming Statute § 27-14-401(e) was amended again in 1986 to read as follows:

> (e) If transportation by ambulance is necessary, the clerk of court 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 for payment of medical and hospital care.

1986 Wyo. Sp. Sess. Laws at 23-24.

The current form of Wyoming Statute § 27-14-401(e) was enacted under amendments adopted in 1989. (1989 Wyo. Sess. Laws, at 656). As noted above, Section 401(e) directs the Division to "allow a reasonable charge . . . at a rate not in excess of the rate schedule established by the director."

Since 1945, the original enactment and every amendment to Wyoming Statute § 27-14-401(e) tied payment for ambulance services to a fee schedule. It seems obvious that a fee schedule would be an integral part of any statutory directive to expend public funds when the statute expressly refers to a fee schedule. The entire worker's compensation system is founded on the constitutional provision that compensation is paid for injured workers "as may be fixed by law. " Wyo. Const. art 10, § 4. In this sense, the

limitations imposed by the fee schedule have always acted as an inducement for legislative approval of ambulance services as an employee benefit.

> Let us consider another phase in testing the probable intention of the legislature, namely, importance or unimportance of the invalid part in relation to the remainder. Minor details and unimportant parts, which are severable, will not, as already stated, if unconstitutional, ordinarily render the whole act void. But if an invalid part was an inducing cause to the enactment of the law, the whole is invalid. Nor is it necessary that the invalid part should have operated as the sole inducement to the passage of the law. It will have that effect if the void part to any extent influenced the legislature in passing the statute. It is also said that 'the courts have frequently had occasion to decide that unconstitutional portions of general statutes are of sufficient importance to render the entire act unconstitutional.' In harmonizing these statements, we cannot be far wrong in stating that when an act is void as to an important part, such part will itself often be considered by the courts, at least in connection with other circumstances, as an inducing cause for the enactment of the law, thus rendering the whole act invalid.

McFarland v. City of Cheyenne, 42 P.2d 413, 418 (Wyo. 1935) (internal citations omitted).

This is not a case in which the offending language of Wyoming Statute § 27-14-401(e) and its fee schedule were added to the statute independently. *See*, *e.g., State ex rel. Spire v. Strawberries, Inc.,* 473 N.W.2d 428 (Neb. 1991) invalidating a subsection that had been added to a statute independently of its other provisions.

This is also not a case such as *Rutti v. State* in which the defendant claimed that his conviction for distributing child pornography was invalid because one of the definitions of "child pornography" in the criminal statute under which he was convicted was overbroad and facially invalid. *Rutti v. State,* 2004 WY 133, ¶¶ 10, 17, 100 P.3d 394, 401, 404 (Wyo. 2004). The defendant pointed to a decision of the United States Supreme Court that "criminalized child pornography created through the use of 'virtual' children,

i.e., images of children generated through technology that do not depict an actual child." (*Id*. at ¶ 13, 100 P.3d at 402). However, the defendant did not address the other definitions of child pornography that provided independent grounds for his conviction *Id.* Here, the direction to pay for ambulance services has always been indivisible from the limitations provided by the fee schedule. Although the hearing officer concluded that the direction to pay could be severed from the fee schedule, the opposite is not true. The fee schedule means nothing unless it operates along with the direction to pay. Therefore, these portions of the statute do not operate independently of each other as was the case in *Rutti.* That lack of independence is fatal to severance under this Court's precedent.

The legislative intent factor also cuts strongly against severability in this case. In his findings and conclusions, the hearing examiner did not address whether the Wyoming Legislature would have intended to pass a statute authorizing payment for air ambulance services without a mechanism to establish reasonable limitations where to do so would have imposed unpredictable burdens on the worker's compensation fund. But this analysis is critical in such a circumstance.

As explained by the Supreme Court of Illinois,

> The effect of eliminating the quoted qualification would be to extend the benefits to a much larger group and to greatly increase the burden on taxpayers. If the remainder were allowed to stand it would be an entirely different law, in no sense an expression of the legislative will. Where that part of an act which is unconstitutional so limits and qualifies the remaining portion that the latter, when stripped of the unconstitutional provision, is essentially different in its effect and operation from what it would be were the whole law valid, the act must be held invalid as a whole. We cannot say the legislature would have passed the act with the invalid limitation omitted, and the circuit court was correct in holding it invalid in its entirety.

Lee v. Ret. Bd. of The Policeman's Annuity & Benefit Fund of the City of Chicago, 201 N.E.2d 361, 363 (Ill. 1964). (internal citations omitted).

See also Gwinnett Cnty. Sch. Dist. v.Cox, 710 S.E.2d 773, 782 (Ga. 2011) ["A court] cannot judicially rewrite a statute when the unconstitutional part 'is so connected with the general scope of the statute that, should it be stricken out, effect cannot be given to the legislative intent.' In that circumstance, the rest of the statute must fall with the defective language." (internal citations omitted).

The issue of legislative intent is unusually complicated in this appeal because the central issue to be determined is whether the Legislature would have intended to continue its authorization to pay for air ambulance services in the face of the ADA which provides an immediate mechanism to invalidate any attempt by the State to place reasonable limits on the amounts air ambulance entities may charge. The Legislature obviously intended to pay for air ambulance services in reasonable amounts determined by a uniform fee schedule. The fact that the Legislature expressly provided for a fee schedule should give some confidence that the Legislature would be unlikely to pass a statute that would deliver a blank check to a type of service provider that is not bound by a competitive marketplace because the consumers of the service, injured workers in distress, typically lack choice. [citation to the excellent case earlier in the brief explaining the captive market for this service] But even if it is impossible to know whether the Legislature would have intended to pay for air ambulance services limited only the Air Ambulance Companies' discretion in determining usual and customary rates, the result is the same; no severance. "If a court is unable to know whether the legislature would have enacted a

particular bill without the unconstitutional provision, the court will not sever the unconstitutional provision but will strike the entire statute." *Sutherland,* Vol. 2, § 44.4.

B The hearing examiner erred in concluding that after severance of the preempted portions of Wyoming Statute 27-14-401(e), and its corresponding fee schedule, the remaining portions of the statue could be given effect.

Wyoming Statute § 27-14-401(e) as enacted reads 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.

Following severance, Wyoming Statute § 27-14-401(e) would read 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.~~

(D. Ct. R. at 30).

According to the hearing examiner, Wyoming Statute § 27-14-401(e) directs the division to "allow a charge for the ambulance service." (Dist. Ct. R. at 30). But, the question remains–what charge is the division obligated to allow? Since the fee schedule has been preempted, does the Division have the authority to pay any amount charged for air ambulance services? Even though the fee schedule has been preempted, does the Division have the authority to pay at least what the fee schedule would have otherwise allowed? The fee schedule amount fits within the broad reach of the portions of Wyoming Statute § 27-14-401(e) that remain after severance allowing "a charge for the air ambulance service." Does the Division have discretion to determine the amount to be paid based on some criteria other than the fee schedule? The hearing officer answered all of these questions by **adding language** to Wyoming Statute § 27-14-401(e) under which

the Division would have to pay whatever the air ambuilance companies bill This he could not do under Wyoming law.

Severance is not permissible when the remaining portions of a statute become incomplete, unenforceable or ambiguous. *See Rutti v. State*, 2004 WY 133, ¶ 16, 100 P.3d 394, 403 (Wyo. 2004) ("Generally, however, Wyo. Stat. Ann. § 8-1-103(a)(viii) (LexisNexis 2003) provides for the severability of statutory provisions that are determined to be invalid **if the valid portions are sufficient in themselves to accomplish the purpose of the statute.**") (emphasis added); *McFarland v. City of Cheyenne*, 42 P.2d 413, 416 (Wyo. 1935) ("No provision, however unobjectionable in itself, can stand, unless it appears that, standing alone, the provision can be given legal effect . . . .").

For example, the United States District Court for the Central District of California applying California law observed that:

> [i]nvalid provisions are functionally severable if the remaining provisions can stand on their own, unaided by the invalid provisions, are capable of separate enforcement, can be given effect, or can operate entirely independently of the invalid provisions. The remaining provisions must neither be rendered vague by the absence of the invalid provisions nor inextricably connected to them by policy considerations.

League of United Latin Am. Citizens v. Wilson, 997 F. Supp. 1244, 1259 (Cal. C. 1997) (internal citations and quotation marks omitted). In that case, the implementation and definition provisions of an immigration statute were federally preempted and therefore removed from the statute. *Id.* at 1260. The remaining provisions required state officials to determine whether "the person is an alien in the United States in violation of federal

law." *Id.* The United States District Court held that the remaining provisions were also invalid because they "do not indicate which federal law supplies the definition of 'an alien in the United States in violation of federal law'. . . . [and] sections 5(c) and 6(c) do not state how or by whom the definition should be applied and the determination made." *Id.* According to the District Court, the remaining provisions were "hopelessly vague" and unenforceable after the invalid provisions were removed. *Id.*; *See also Mont. Immigrant Justice Alliance v. Bullock*, 371 P.3d 430, 443-44 (Mont. 2016) (holding that a reporting provision in an otherwise federally preempted immigration statute was too vague to be enforceable because there was no clear definition of "illegal alien" available after severance).

In Wyoming, the Supreme Court defines "ambiguous" or "vague" as language that is "uncertain and subject to varying interpretations." *Dep't of Revenue & Taxation v. Pacificorp*, 872 P.2d 1163, 1166 (Wyo. 1994). Following preemption of the invalid portions of Wyoming Statute §27-14-401(e) and its corresponding fee schedule, the remaining portions of section 401(e) are likewise uncertain and subject to varying interpretations.

C. After severance of the preempted portions of Wyoming Statute 27-14-401(e), and its corresponding fee schedule, the hearing examiner erred in adding language to the statute to reach the conclusion that the Division is obligated, under state law, to pay Appellees' full billed charges.

The statute as revised by the hearing examiner now reads 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~~ "reimbursement of the full amount of the air ambulance services charges submitted and billed to the Division . . ."

(Dist. Ct. R. at 32).

There is an obvious disconnect between the inherently ambiguous command to "allow a charge" and the new obligation created by the hearing officer that the division must pay "the full amount of the air ambulance services charges submitted and billed to the division."

By adding language to Section 401(e) to reach the conclusion that the Division must pay full-billed charges, the hearing examiner OAH pointed up an important technical problem in the law of severance. *Sutherland on Statutes and Statutory Construction* identifies three different types of cases in which the law of severance may be applied:

> The problem arises in three types of situations: (1) part, but not all, of the act is invalid as to all applications: (2) the entire act is invalid to part, but not all, possible applications; and (3) part, but not all, of the act is invalid to part, but not all, possible applications.

Sutherland Vol. 2, § 44.2.

This case falls within the second category described above. Section 401(e) and its fee schedule are valid in their application to ground ambulances and invalid only in their application to air ambulance companies. "Courts object to enforcement of a statute under the application of the doctrine of separability where invalidity is an improper application. For to limit the act to its valid applications requires reading into it words not inserted by the legislature." *Sutherland* Vol. 2, § 44:15 (citing *Ballard v. Mississippi Cotton Oil Co*., 34 So. 533, 554 (Miss. 1902)). In *Ballard,* the court observed:

> But wherever a court, in order to uphold the provisions of a statute as constitutional, has to interpolate in such statute provisions not put there by the legislature, in order, by such interpolation, to make the provision which the legislature did put there constitutional, this is no case of severance in any proper legal sense; nor is it in any legal or logical sense a proper limitation of the provisions which are in a statute by judicial construction. Such action by a court is nothing less than judicial legislation pure and simple.

Ballard at 554.

This is precisely what the hearing examiner did in this case. In the wake of preemption of the portions of Section 401(e) and the fee schedule that impose limitations, the hearing examiner was left with language that directs only that the Division "shall allow a charge." To breathe some life and meaning into this snippet, he had to add language to provide a textual basis for its order for payment of the full billed charges in dispute.

The OAH Order is invalid to the extent it relies on the assumption that "a charge" would necessarily mean the full-billed charge. The hearing examiner's attempt to amend Wyoming Statute § 27-14-401(e) is indefensible. *Am. Bankers Ass'n v. Lockyer*, 239 F.Supp. 2d 1000, 1021 (E.D. Calif., 2002)("This court cannot . . . in the exercise of its power to interpret, rewrite the statute.")(citing *Blair v. Pitchess*, 5 Cal. 3d 258, 96 Cal. Rptr. 42, 486 P.2d 1242 (Cal. 1971); *Whole Woman's Health v. Hellerstedt*, --- U.S. ---, 136 S.Ct. 2319 (2016)("A severability clause is not grounds for a court to 'devise a judicial remedy that . . . entails quintessentially legislative work.'")(internal citation omitted).

By severing Wyoming Statute § 27-14-401(e), the hearing examiner violated legislative intent that payment for ambulance services would be limited to uniform reasonable charges set forth in a fee schedule. By revising Wyoming Statute § 27-14-401(e), the hearing examiner violated the separation of powers doctrine enshrined in article 2, § 1 of the Wyoming Constitution.

III. The hearing examiner exceeded his authority when he required the Division to pay for air ambulance services in amounts that exceed what is payable under the Act.

Aside from executing the severance, the hearing examiner lacked jurisdiction to order the Division to pay any amount that exceeds the limitations of the Act or the Division's rules and regulations. Under Wyoming Statute § 27-14-602(c), OAH has "exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable **under this act**." (emphasis added). It does not have the authority to award benefits to any injured worker, provider or other claimant in amounts that exceed the limitations of the Worker's Compensation Act and the Division's rules and regulations. Under Wyoming Statute § 27-14-602(c), "[a] hearing examiner has exclusive jurisdiction to make the final administrative determination of the validity and amount of compensation payable under this act [the Wyoming Worker's Compensation Act]." In accordance with subsection 602(c), the task before the hearing examiner was to determine the validity and amount of compensation payable to the Air Ambulance Companies **under the Act**. Neither the preemption nor the invalid injunction expanded the hearing examiner's authority to award compensation outside the bounds of the Act.

Even though section 27-14-401(e) does not require full payment of air ambulance charges, the hearing examiner required full payment to the Air Ambulance Companies in this case. (*See* OAH Order at 17, D. Ct. R. at 32). He did not have authority to impose such a requirement. As the Tenth Circuit ruled, it is "for the state officials to determine, as a matter of state law, how Wyoming can and should administer its workers'

compensation program within the limitations set by federal law." *Eaglemed, LLC,* 868 F.3d at 907. (Exhibit 4 to Appendix to Division's Motion for Stay of Enforcement).

Under the Wyoming Administrative Procedure Act, the hearing examiner may not issue findings or conclusions that are "[i]n excess of statutory jurisdiction, authority or limitations or lacking statutory right." Wyo. Stat. Ann. § 16-3-114(c)(ii)(C). Any decision by the hearing examiner that "falls outside the confines of the statutory guidelines articulated by the Legislature is contrary to law and cannot stand." *Tri Cnty. Tel. Ass'n, Inc. v. Wyo. Pub. Serv. Comm'n*, 910 P.2d 1359, 1361 (Wyo. 1996) (internal quotation and citation omitted). This is because "[f]undamental policy decisions should be made by members of the legislature, elected for that purpose; these standards insure that policy is set by the legislature, and not delegated to agencies." *Newport Int'l Univ., Inc. v. State Dep't of Educ.,* 2008 WY 72, ¶ 28, 186 P.3d 382, 389 (Wyo. 2008).

In this case, the policy choice is embedded in the Wyoming Constitution. In that regard, article 10, § 4 of the Constitution provides as follows:

> As to all extrahazardous employments the **legislature** shall **provide by law** for the accumulation and maintenance of a fund or funds out of which shall be paid compensation as may be **fixed by law** . . . Monies in the fund shall be expended **only** for compensation authorized by this section, for administration and management of the Worker's Compensation Act, debt service related to the fund and for workplace safety programs conducted by the state as authorized by law.

Wyo. Const. art. 10, § 4 (emphasis added).

In accordance with the Constitution, "worker's compensation is a statutory responsibility and any change or addition to the law is a function of the legislature and not the courts." *Johner v. Wyo. State Treasurer ex rel. Worker's Comp. Div. (In re*

Johner), 643 P.2d 932, 934 (Wyo. 1982); *accord State Treasurer v. Sikora (In re Sikora),* 112 P.2d 557, 563 (Wyo. 1941). "[The courts] cannot usurp the power of the legislative branch in deciding what should have been said." *Johner,* 643 P.2d at 934.

The hearing examiner cannot do so either. The Wyoming Constitution entrusts the Legislature with policy decisions regarding the medical, hospital or ambulance services that are treated as employee benefits in the workers' compensation system. The Legislature included as a potential benefit a reasonable charge for ambulance services conforming to a fee schedule. Wyo. Stat. Ann. § 27-14-401(e). The Legislature chose not to grant the Air Ambulance Companies a statutory right to payment of whatever amount they may choose to bill. Nor does the Division have the power to simply adopt a new fee schedule as argued by Eaglemed and Med-Trans. (Admin. R. at 842). Wyoming Statute § 27-14-401(e) enables the Director to adopt a fee schedule for the express purpose of placing reasonable limitations on the amount that may be charged by air ambulance entities. The only fee schedule that would be acceptable to the Air Ambulance Companies—payment of their usual and customary charges—would be inconsistent with Section 401(e) because the Director would be delegating his rule-making authority to air ambulance entities.

IV. The Wyoming Constitution prohibits payment of money from the treasury unless the claimant has filed a certified claim with the officer or officers whose duty it may be to audit the same.

The Division suggested in its pleadings before OAH that Wyoming Statute §§ 9-1-404 through -407 apply to the payment of the portions of the claims that exceed the fee schedule. In response, the Air Ambulance Companies argued that, upon severance of

Wyoming Statute § 27-14-401(e), the statutory procedures in Wyoming Statute §§ 9-1-404 through -407 become inapplicable, duplicative and unnecessary (Admin. R. at 1116-7). Eaglemed and Med-Trans also claimed below that the Division's argument was based on the false assumption that the Legislature has only allocated a set amount of money for worker's compensation claims. They point out that premiums are collected for the purpose of ensuring that the system is actuarially sound and so long as the system is being operated on a sound actuarial basis, there is no need for specific appropriations from the Legislature to pay for the excess portions of the Air Ambulance Companies' claims (Admin. R. at 835, 840, 843-5). Air Methods and Rocky Mountain Holdings took a similar tack. (Admin. R. at 1113, 1116-17).

However, premiums are taxes. Wyoming is one of three states that operates a state monopolistic worker's compensation system. Compulsory worker's compensation premiums paid by covered employers are regarded as excise taxes. *See Yoder v. Ohio Bureau of Workers' Comp. (In re Suburban Motor Freight)*, 998 F.2d 338, 340 (6th Cir. 1993); *N.D. Workers Comp. Bureau v. Voightman*, 239 B.R. 380, 384 (8th Cir.1999). Division officials, like other officers of state government, are permitted to expend tax revenues only as provided by law. In addition, the logical extension of the Air Ambulance Companies' argument is that the Division may ignore limits imposed by the Legislature as it sees fit. According to Eaglemed and Med-Trans, unanticipated claims and expenses are simply paid from reserves. (Admin R. at 845).

To the extent air ambulance claims exceed the fee schedule, the Air Ambulance Companies are seeking a recovery from the state treasury itself. Article 16, § 7 of the

Wyoming Constitution provides in part that "[n]o money shall be paid out of the treasury except upon appropriation by law . . . and no . . . claims . . . against the state . . . shall be audited, allowed or paid until a full itemized statement in writing . . . shall be filed with the **officer or officers** whose duty it may be to audit the same." (emphasis added). While officials of the Division have the duty to audit claims that are payable under the Act, they have no duty to audit or allow claims that exceed fee schedules that have been duly adopted under the law. The OAH order at issue may be infirm to the extent it purports to require the State Auditor to issue warrants for payment of any amount other than "payment in accordance with this act." See Wyo. Stat. Ann. § 27-14-611.

More than a year ago, the Division directed the Air Ambulance Companies' attention to the requirement that the excess portions of their claims be presented to the State Auditor under Wyoming Statute § 9-1-404. (Agency R., at 250-3). There is no indication in the record they have done so.

This is not a situation in which the filing of a claim is subject to the Wyoming Governmental Claims Act, Wyoming Statutes §§ 1-39-101 through -120, because the claims in dispute do not arise in tort or contract. Nor is this a situation in which the Legislature has specifically authorized private parties to assert monetary claims against the State or other governmental entities such as a the case for inverse condemnation. *See* Wyo. Stat. Ann. § 1-26-516. To the extent the claims exceed the fee schedule, they are claims against the state treasury beyond the limits of the Worker's Compensation Act and should have been presented to the State Auditor, as a matter of state law. (Admin. R. at 251).

The claims at issue are claims against the State. *Routh v. State ex rel. Wyo. Workers' Comp. Div.,* 952 P.2d 1108, 1115 (Wyo. 1998) ("There is no question that the Division is an agency of the State of Wyoming.") In that regard, article 16, section 7 of the Wyoming Constitution provides, in part, as follows:

> No money shall be paid out of the state treasury **except upon appropriation by law** and on warrant drawn by the proper officer, and no bills, claims, accounts or demands against the state . . . shall be audited, allowed or paid until a full itemized statement in writing, certified to under penalty of perjury, shall be filed with the officer or officers whose duty it may be to audit the same.

Wyo. Const. art. 16 § 7 (emphasis added).

"'Claims and demands' ought probably be understood as referring to and covering only claims and demands for money, or for the payment of money--a claim or demand that is to be satisfied according to its terms by the payment of money . . ." *Houtz v. Bd. of Cnty. Comm'rs of Uinta Cnty.,* 11 Wyo. 152, 170-71, 70 P. 840, 842-43 (1902). By that standard, the Air Ambulance Companies' demands for additional payment plainly qualify as "claims and demands" subject to article 16, section 7. *Id.* (holding that a claim for reimbursement of a fine paid under an illegal order imposed by a Justice of the Peace was subject to article 16, section 7, and the statute then in effect relating to claims against county governments).

A continuing appropriation can satisfy article 16, section 7. *See State ex rel. Henderson v. Burdick,* 4 Wyo. 272, 288-290, 33 P. 125, 131 (Wyo. 1893) (holding that a statute, adopted by the Legislature, as directed by the Constitution, fixing the salary to be paid to a state officer, which remained in effect following the budget period in which it

was adopted, constitutes a continuing appropriation for the purpose and no further compliance with article 16, section 7 is necessary).

The Worker's Compensation Act constitutes a continuing appropriation, but only for the payment of benefits provided thereunder subject to all limitations and provisions of the Act. From its inception, the Wyoming workers' compensation system has been subject to the limitations of the Act and administrative rules and regulations. As noted above, this point is made clear by article 10, section 4(c) of the Wyoming Constitution, which provides in part that ". . . [a]s to all extrahazardous employments the legislature shall provide by law for the accumulation and maintenance of a fund or funds out of which shall be paid compensation **as may be fixed by law**." (emphasis added). The payment of workers' compensation benefits cannot be unmoored from the limitations of the Wyoming Constitution, the Act and the Division's rules and regulations.

The Air Ambulance Companies seek payment of workers' compensation benefits in amounts that exceed the limits of the Act and the Division's rules and regulations. There is no authorization or appropriation, continuing or otherwise, that provides for the payment of claims that exceed the limitations established by law. A legislative appropriation is therefore required under article 16, § 7 of the Constitution.

Further, the provisions of Wyoming Statutes §§ 9-1-409 and 27-14-701 make it clear that workers' compensation benefits are paid from the workers' compensation account that is in the hands of the Wyoming State Treasurer. In the absence of constitutional or legislative authority to pay the claims at issue in this proceeding, the question is whether there is some other claims procedure that pertains to claims such as

these – unadorned claims for payment of money from the state treasury that are not based on tort, contract, or statute.[10]

The answer may lie in Wyoming Statutes § 9-1-404, which provides as follows:

> Except as provided by W.S. 1-39-101 through 1-39-120 [the governmental claims act], persons having claims against the state shall document the claim and submit it to the state auditor within one (1) year after the claim accrues, to be audited, settled and acted upon.

The claims at issue were presented to the Division in accordance with Wyoming Statutes § 27-14-501(d). Thus, it appears that the claims were, at least in the first instance, filed with the officers of the Division whose duty it was to audit the claims. Following the Division's audit, the claims were paid to the full extent permitted by the air ambulance fee schedule. Following payment of the claims in accordance with the fee schedule, the Division's officials had no further duties or authority. The payment of the excess portions of these claims, if any, must depend on a higher authority.

[10] Subject to the limitations of the Wyoming Governmental Claims Act, the State may be sued on tort and contract theories. Other statutes permit suits against the State, such as in the case of inverse condemnation. Wyo. Stat. Ann. § 1-26-516. In the absence of a statute authorizing suit, the State enjoys sovereign immunity. Under article 1, section 8 of the Wyoming Constitution, ". . . [s]uits may be brought against the state in such manner and in such courts as the legislature may by law direct." This provision also serves as a limitation on the powers of OAH to grant the relief sought by the Air Ambulance Companies in these proceedings. *Id.*

There is a mechanism by which the Air Ambulance Companies may pursue relief from that higher authority, the Legislature.[11] The Air Ambulance Companies can seek an appropriation as might be possible through compliance with article 16, § 7 and Wyoming Statutes § 9–1–404.[12] *See Campbell Cnty. Sch. Dist. v. Catchpole,* 6 P.3d 1275, 1281 (Wyo. 2000).

In any event, only the Legislature can grant the relief the Air Ambulance Companies seek. Only the Legislature can change the law and, in addition, appropriate the funds to pay the Air Ambulance Companies from the Worker's Compensation Account or general state revenue. In that regard, Wyoming Statutes § 9-1-407 provides, in pertinent part, as follows:

> (b) Except as provided [in the governmental claims act], when the law recognizes a claim for money against the state and no appropriation or authorization is made by law to pay the claim, upon demand, the auditor shall audit and adjust the claim and give the claimant a certificate of the amount of the claim.
>
> (c) The auditor shall report claims under this section to the speaker of the house and the president of the senate. The auditor shall pay the claim if an appropriation is made for that purpose.

[11] The Division reserves all defenses with respect to such a proceeding.

[12] The Division reserves all defenses regarding whether the Air Ambulance Companies have complied with article 16, section 7 of the Constitution and Wyoming Statute § 9-1-404 and any other requirements that might constitute conditions precedent.

There is no appropriation or authorization for payment outside the fee schedule. A separate appropriation under Wyoming Statutes § 9-1-407 is required. This Court cannot order the Legislature to make such an appropriation.

To the extent the Air Ambulance Companies have not filed claims with the State Auditor, they may be untimely under Wyoming Statute § 9-1-404. In an analogous situation, the Wyoming Supreme Court concluded that a claim filed in the offices of the former Wyoming Highway Department substantially complied with the requirements of article 16, § 7 of the Wyoming Constitution and with Wyoming Statute § 9-1-407 where the claim was filed in accordance with the Department's published claims procedure. *Rissler & McMurry Co. v. Wyo. Highway Dep't*, 582 P.2d 583, 587 (Wyo. 1978). Here also, the Air Ambulance Companies filed their claims with the Division. However, the "substantial compliance" doctrine announced in *Rissler* breaks down where the Air Ambulance Companies have already received all that is payable under the Worker's Compensation Act. Division officials may certify claims to the auditor for payment only to the extent the claims seek payment "in accordance with this [Worker's Compensation] act." Wyo. Stat. Ann. §27-14-611. To the extent the Air Ambulance Companies seek payment in excess of that provided in the Act and the Division's fee schedule, they ignore Wyoming Statute § 9-1-404 at their risk.

CONCLUSION

The Division recognizes that the law of severance presents this Court with a potentially unpalatable choice. Because of the effect of the Airline Deregulation Act on state law, this Court may have to decide whether the Office of Administrative Hearings

improperly severed Wyoming Statute § 27-14-401(e). Depending on the outcome, the Division may be without authority to make any payment to the Air Ambulance Companies for their services for injured workers.

Before ruling on severance, the Division invites this Court to address the central issue of this appeal—whether Wyoming Statute § 27-14-501(a) applies to ambulance service providers. This interpretation of state law is of critical importance because the Tenth Circuit has suggested that if Section 501(a) were to be read as preventing

> air-ambulance companies from seeking reimbursement from the passengers themselves, thus preventing the companies from receiving payment from their passengers as well as from the State . . . then it would be Section 27-14-501(a) that would be illegally regulating air-ambulance rates by preventing any recovery from air-ambulance passengers, and the proper remedy would seem to be the preemption of this statute, not the forced payment of air-ambulance claims from state coffers.

Eaglemed, LLC, 868 F.3d at 906 n.3.

If this Court determines that Wyoming Statute § 27-14-501(a) does not apply to ambulance providers, then these providers would be permitted to bill injured workers for charges in excess of the amount that would be paid under the fee schedule. The excess charges would, in many instances, be paid through general health insurance or specific air ambulance insurance coverage that is now available. Wyoming Statute § 27-14-401(e) and its corresponding fee schedule would no longer set mandatory maximum reimbursement rates and there would be no further basis for preemption of the statute or the fee schedule. The Division would then be permitted to pay the Air Ambulance Companies the amount allowed by law and the issuance of severance would become moot.

However, if it becomes necessary to address Wyoming's law of severance, the Division urges this Court to find that Wyoming Statute § 27-14-401(e) is an indivisible provision, that the direction to pay for air ambulance services cannot be given effect in the absence of the limitations imposed by the fee schedule, and that the Office of Administrative Hearings erred in adding language to the statute to reach its full payment remedy. In the wake of federal preemption, Wyoming Statute § 27-14-401(e) and its fee schedule should be declared null and void.

DATED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

I, hereby certify that the foregoing Brief of Appellant does not contain any information which may be redacted for privacy reasons, is an exact copy of the written document filed with this Court, has been scanned and is free from viruses, and was served electronically through the Wyoming Supreme Court's C-Track Electronic Filing System, and by depositing a copy of the same in the United States mail, postage prepaid, postage prepaid, this 11th day of May, 2018, addressed as follows:

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