

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
WCC NO. H303158**

TIMOTHY JOHNSON, EMPLOYEE

CLAIMANT

**ARK. DEPT. OF CORR.,
EMPLOYER**

RESPONDENT/APPELLANT

**PUBLIC EMPLOYEE CLAIMS DIV.,
CARRIER/TPA**

RESPONDENT/APPELLANT

SURVIVAL FLIGHT, INC.,

INTERVENOR/APPELLEE

OPINION FILED MAY 1, 2025

Appeal from Medical Cost Containment Division ("MCCD") of the Arkansas Workers' Compensation Commission ("AWCC"). Submitted on the record to Chief Administrative Law Judge O. Milton Fine II on February 25, 2025.

Claimant, *pro se*, excused from participation.

Respondents/Appellants represented by Mr. Robert H. Montgomery, Attorney at Law, Little Rock, Arkansas.

Intervenor/Appellee represented by Ms. April C. Cotton, Attorney at Law, Little Rock, Arkansas.

I. BACKGROUND

This matter comes before the Commission on the record as an appeal to the undersigned from the MCCD under AWCC R. 099.30 Part III(A)(3)-(4). A telephone conference took place on November 12, 2024. The Scheduling Order entered that same day pursuant to the conference has been made part of stipulated record (see *infra*) in this case. Respondents/Appellants and Intervenor/Appellee agreed that no hearing or oral argument was necessary.

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Therefore, the order set out a briefing schedule and provided that the parties were to stipulate as to the record and issues. They did so.

Stipulations

Through their joint filing on January 22, 2025, the parties have stipulated¹ to the following:

1. On May 8, 2023, Respondent/Appellee Arkansas Department of Corrections (“ADC”) employee Timothy Johnson (“Claimant”) was thrown from a horse and suffered bodily injuries.
2. Intervenor/Appellee Survival Flight, Inc. (“Survival Flight”) was called to the scene by Newport Fire Unit 304 to provide care and transportation.
3. On the date of the injury, Survival Flight was notified of the need for its services at approximately 7:25 a.m., arrived on scene at 7:56 a.m., and transported Claimant to St. Bernard Medical Center in Jonesboro, Arkansas at 8:31 a.m.
4. Survival Flight provided medical care to Claimant, including but not limited to the stabilizing of his injured extremity, the monitoring of his vitals, and the administering of 300mcg of fentanyl in multiple intravenous doses.

¹Proposed Stipulation No. 12 reads: “This matter has been assigned to Chief Administrative Law Judge Minton O. Fine [sic].” This is unnecessary and thus will not be included.

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5. Survival Flight submitted a bill to Systemedic for \$44,130.86, of which \$21,273.00 was paid by Respondent/Appellant Public Employee Claims Division (“PECD”).
6. Survival Flight timely appealed this short pay and requested reconsideration of this decision on August 18, 2023.
7. PECD responded to the request for reconsideration and upheld its previous decision on the grounds that the charges were not reasonable.
8. MCCD performed a desk audit on August 31, 2023, finding that an additional \$22,188.17 was owed to Survival Flight and scheduled an administrative review of the dispute of partial payment to determine whether Survival Flight was also owed an eighteen percent (18%) penalty pursuant to AWCC R. 099.30 Part I(I)(7)-(8).
9. PECD responded to MCCD’s audit and letter and disputed that Rule 30 applied to Survival Flight on the grounds that Survival Flight is not a “Provider” under the rule and that its charged amount for the services provided to Claimant on May 8, 2023, was not reasonable.
10. On April 8, 2024, MCCD issued its Administrative Review Order, which included the following findings: (1) Survival Flight is a Provider under Rule 30; (2) Federal law did not preempt the authority of MCCD to set the reimbursement rates for air ambulance

companies operating in Arkansas; (3) the annual survey performed by M CCD was sufficient to determine the allowable rates for air ambulance providers; and (4) the amount ordered to be paid to Survival Flight by PECD was reasonable.

11. PECD filed a notice of appeal on May 24, 2024, in which they appealed the above findings/conclusions by M CCD.

Issues

In their January 22, 2025, filing, the parties listed Issues 2-7 *infra* as the questions to be presented to the undersigned on appeal. Survival Flight has led off its brief, however, with a preliminary argument not covered under one of those questions. But Ark. Code Ann. 11-9-705(a)(1) (Repl. 2012) provides:

In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or statutory rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner that will best ascertain the rights of the parties.

I find that this provision grants me the latitude to address this. That said, the following issues are hereby presented for determination:

1. Whether the instant appeal is timely under AWCC R. 099.30 Part III(A)(3).
2. Whether the decisions of the former administrator of M CCD, dated April 5, 2024, and May 8, 2024, properly applied the law to the facts of this case.

3. Whether the decisions of the former administrator of MCCD, dated April 5, 2024, and May 8, 2024, should be affirmed or reversed.
4. Whether AWCC has jurisdiction to settle this dispute.
5. Whether AWCC's authority in this area is preempted by federal law.
6. Whether Survival Flight is a "Provider" under AWCC R. 099.30 Part I(F)(58).
7. Whether the total amount billed by Survival Flight for transporting Claimant on May 8, 2023, is reasonable under Arkansas workers' compensation law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include documents and other matters properly before the Commission, the following Findings of Fact and Conclusions of Law are hereby made in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this matter.
2. Stipulations Nos. 1-11, *supra*, are reasonable and are hereby accepted.
3. This appeal is timely under AWCC R. 099.30 Part III(A)(3).
4. The actions taken by the former MCCD Administrator in the April 5, 2024, Administrative Review Order and May 8, 2024, Administrative

Review Reconsideration Order concerning Survival Flight's bill for air ambulance services furnished Claimant on May 8, 2023, along with PECD's responsibility for said bill, are preempted by 49 U.S.C. § 41713(b)(1).

5. The former MCCD Administrator's April 5, 2024, Administrative Review Order and May 8, 2024, Administrative Review Reconsideration Order are hereby reversed.
6. Because of Findings/Conclusions Nos. 4 and 5, *supra*, the remaining issues are moot and will not be addressed.

III. RECORD ON APPEAL

The appellate record consists of the following: the four-page Notice of Appeal filed by Respondents/Appellants on May 24, 2024, with an attachment thereto captioned "Respondent[s'] Documentary Exhibit," consisting of a one-page index and 53 numbered pages thereafter; the four-page pleading captioned "Stipulated Record and Questions Presented," filed on January 22, 2025; the 13-page brief of Respondents/Appellants filed on January 22, 2025, with six exhibits/attachments thereto totaling 79 pages; and the seven-page brief of Intervenor/Appellee filed on February 27, 2025. These documents have been blue-backed as the appellate record and, pursuant to *Sapp v. Tyson Foods, Inc.*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549, have been served on the parties in conjunction with this opinion.

IV. PROCEDURAL HISTORY

On May 8, 2023, Claimant, an employee of Respondent/Appellant ADC, was injured at work when he was thrown from a horse. The local fire department that initially treated Claimant summoned Survival Flight to the scene, which transported him by helicopter from Newport, Jackson County, Arkansas, to a hospital in Jonesboro, Craighead County, Arkansas. The services furnished by Survival Flight to Claimant consisted not only of the transportation, but medical services including the stabilizing of his injured extremity, the monitoring of his vitals, and the administering of 300mcg of fentanyl in multiple intravenous doses.

For the foregoing, Survival Flight submitted a bill for \$44,130.86. PECD instead paid \$21,273.00—which it has represented constituted three times the applicable Medicare reimbursement rate—on the recommendation of Systemedic, its bill review company. In response to this, Survival Flight on August 18, 2023, filed a timely appeal to MCCD of this short pay and requested reconsideration of this. PECD responded to the request for reconsideration by affirming its previous decision on the basis that the charges were not reasonable.

The next stage of this case began on August 31, 2023, when MCCD conducted a desk audit² in which it found that an additional \$22,188.17 was owed to Survival Flight. MCCD scheduled an administrative review of the partial

²The undersigned has not been tasked with determining whether the desk audit itself was appropriate—whether under 29 U.S.C. § 41713(b)(1) or otherwise. See *supra*. For that reason, its appropriateness will not be addressed.

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payment dispute to determine whether Respondents/Appellants should be assessed an eighteen percent (18%) penalty under AWCC R. 099.30 Part I(I)(7)-(8) for the partial payment. PECD objected to these actions by MCCD on September 28, 2023, arguing, inter alia, that MCCD's review was inappropriate because (a) under the Airline Deregulation Act ("ADA"), 49 U.S.C. § 41713(b)(1), states are preempted from regulating prices charged by an air ambulance service; and (b) Survival Flight is not a "Provider" under Rule 30; (c) the amount that Survival Flight charged was not reasonable. Rejecting these contentions, the then-Administrator of MCCD (the "former Administrator") issued an Administrative Review Order on April 5, 2024. Therein, she found that Survival Flight is a "provider" under AWCC R. 099.30 Part I(F)(58) because during his flight to Jonesboro, Claimant "received medical care from practitioners": namely, a registered nurse and a paramedic. In addition, she held "that the ADA and 49 U.S.C. § 41713 do not preempt the AWCC's authority to set the reimbursement rate for air ambulance services" Finally, the former Administrator again found that Survival Flight was entitled to an additional \$21,273.00, basing the decision on MCCD's method of determining reasonable ambulance rates by conducting annual surveys of Arkansas emergency medical services ("EMS") providers concerning their charges in the state for each Healthcare Common Procedure Coding System ("HCPCS") code (the codes billed by Survival Flight in the instant case were one unit of A0431 and 31 units of A0436—see more fully

infra) and determining the averages charged for each code. In making this final finding, the former Administrator ruled that this annual survey method was sufficient.

PECD filed a timely request for MCCD to reconsider its April 5, 2024, Administrative Review Order, arguing: (1) Survival Flight is not a “provider” under Rule 30; (2) MCCD’s authority to regulate air ambulance rates in the State of Arkansas is preempted by the ADA; and (3) the bill submitted by Intervenor/Appellee in this case was “wildly excessive,” and MCCD’s method of determining “reasonable” air ambulance rates in Arkansas—by surveying air ambulance companies—is facially unfair. In an Administrative Review Reconsideration Order entered on May 8, 2024, the former Administrator denied the request for a rehearing.

PECD filed a notice of appeal on May 24, 2024, appealing the foregoing findings/conclusions by MCCD as contained in the Administrative Review Order and Administrative Review Reconsideration Order.

V. DISCUSSION

A. Timeliness of Appeal

AWCC R. 099.30 Part III(A)(3) reads:

Any party feeling aggrieved by the rehearing order of the Administrator shall have **ten (10) days from the date of notification** to appeal the ruling to an Administrative Law Judge of the Arkansas Workers’ Compensation Commission. Notice of appeal shall be filed with the Clerk of the Arkansas Workers’ Compensation Commission.

(Emphasis added) At the outset, Survival Flight has argued that the Notice of Appeal filed by PECD was untimely. The evidence at bar shows that the Administrative Review Reconsideration Order was purportedly sent to PECD by certified mail the same day as its issuance—May 8, 2024—per the enclosure letter that accompanied it. But this was not the case; the copy of the envelope that contained the letter and order itself show that not only was the order only sent via first-class mail, but that it was not done so until May 17, 2024. Moreover, PECD stamped the envelope and enclosure letter as having been received by it on May 21, 2024. The undersigned hereby finds that PECD received both these items as well as the order itself—which bears no date stamp—on May 21, 2024. The “date of notification” referenced above was thus May 21, 2024, making the 10-day deadline for the filing of a notice of appeal May 31, 2024. Therefore, PECD’s Notice of Appeal, filed on May 24, 2024, was clearly timely.

B. Preemption

Through the ADA, enacted in 1978, Congress sought “to promote ‘efficiency, innovation, and low prices’ in the airline industry through ‘maximum reliance on competitive market forces and on actual and potential competition.’” *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 280 (2014); *Ferrell v. Air EVAC EMS, Inc.*, 900 F3d 602 (8th Cir. 2018)(quoting 49 U.S.C. §§ 40101(a)(6), 12(A)). This legislation contains a provision—found at 49 U.S.C. § 41713(b)(1)—that reads:

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

Per the Supreme Court, this provision was added “in order to ‘ensure that the States would not undo federal deregulation with regulation of their own.’” *Ginsberg*, 572 U.S. at 280 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

The evidence shows that Survival Flight is an air ambulance provider. As such, it is an “air carrier” under 49 U.S.C. § 40102(a)(2). In *Ferrell, supra*, the Eighth Circuit Court of Appeals was called upon to determine if a passenger’s putative class action against an air ambulance provider, originally filed in Arkansas state court before being removed to federal court, involved claims that were preempted by the ADA provision in question. The plaintiff/appellant took issue with the fact that that Air EVAC EMS, Inc. (“Air EVAC”), the air ambulance provider, billed him \$30,083.26 for a 41-mile transport by helicopter from one hospital to another. His health insurer only paid \$1,000.00 of the bill, leaving him owing the balance thereof. Three causes of action were raised: (1) a declaratory judgment that any contract between Air EVAC and class members was unenforceable because it lacked an essential price term; (2) damages under the Arkansas Deceptive Trade Practices Act, Ark. Code Ann. §§ 4-88-101 et. seq., for hiding or not disclosing the price for the flight until after it was completed; and (3)

a declaratory judgement that Air EVAC could not seek restitution against class member because it had “unclean hands.” The federal district court found that all three of these claims were preempted under the ADA, holding that not only were they “related to a price, route, or service of an air carrier that may provide air transportation” (the language in the preemption provision), but they were “in the heartland of price.” *Ferrell*, 900 F.3d at 606. The Eighth Circuit affirmed the holding of the district court, finding all three causes of action to be preempted.³ *Id.*

In so doing, the appellate court in *Ferrell* found that while all three claims were preempted, the one that was most obviously so was (2) above, which deals with the Arkansas Deceptive Trade Practices Act. The court wrote that “[t]his claim seeks to impose a state statutory price disclosure obligation beyond the scope of any agreement Air EVAC had with Ferrell. It obviously relates to Air EVAC’s price and service.” *Ferrell*, 900 F.3d at 606. In the matter at hand, MCCD was regulating the price that Survival Flight, an air carrier, may charge—and that PECD must pay—for a particular air ambulance service. Nothing, frankly, could be more “in the heartland of price” than that. It is thus clear that MCCD was preempted from the actions it took in the April 5, 2024, Administrative

³Other circuits have reached similar results. See, e.g., *Air EVAC EMS, Inc., v. Sullivan*, 8 F.4th 346 (5th Cir. 2021); *Scarlett v. Air Methods Corp.*, 922 F.3d 1053 (10th Cir. 2019); *Air EVAC EMS, Inc., v. Cheatham*, 910 F.3d 751 (4th Cir. 2018); *Bailey v. Rocky Mtn. Holdings LLC*, 889 F.3d 1259 (11th Cir. 2018).

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Review Order and May 8, 2024, Administrative Review Reconsideration Order, purportedly under the authority of AWCC R. 099.30.

In making this holding, the undersigned notes that MCCD employed the following analyses in rejecting the preemption argument by PECD:

The Administrator also finds that the ADA and 49 U.S.C. § 41719 do not preempt the AWCC's authority to set the reimbursement rate for air ambulance services and the provider is due reimbursement of a reasonable amount as determined by the AWCC. Congress enacted the ADA with the intention that it would regulate the services and airfares of airlines that provided scheduled passenger flights. Such services include boarding, seating, and ticketing. The ADA includes a pre-emption provision, codified at 49 U.S.C. § 41713, that says "a State . . . may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier

Even if an air ambulance falls under the definition of "air carrier," the regulation of reimbursement rates by the AWCC for the services of an air ambulance is "too tenuous, remote, or peripheral" to the original intent of the ADA for it to have a preemptive effect. See *Morales*. It is clear that the ADA's preemption provision was not intended to apply to air ambulance services. The air ambulance market is unlike any other in that air medical patients have no control over the choice of transport mode or provider and little influence on air ambulance markets.

In *Ferrell, supra*, a similar argument was raised before the Eighth Circuit:

Acknowledging that common law fraud and statutory consumer protection claims were preempted in *Morales* and *Wolens* [*American Airlines v. Wolens*, 513 U.S. 219 (1995)], Ferrell argues that these decisions should not apply to the unique air-ambulance market. He asserts that, because air-ambulance providers do not face meaningful price competition and patients often do not control whether to be transported by an air ambulance, applying the ADA to these fraud claims would entrench an anti-competitive market, not further the ADA's purpose of promoting efficiency and competition. But where a federal statute contains an express

preemption provision, we “focus on the plain wording of the clause, which necessarily contains the best evidence of Congress’ preemptive intent.” *Puerto Rico v. Frankline Cal. Tax-Free Tr.*, 136 S.Ct. 1938, 1946, 195 L.Ed. 2d 298 (2016) (quotation omitted). Here, the ADA preempts state law “related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” 49 U.S.C. § 41713(b)(1). An air-ambulance operator such as Air EVAC is an “air carrier.” See 49 U.S.C. § 40102(a)(2); *Watson [v. Air Methods Corp.]*, 870 F.3d [812, 814]; *Schneberger v. Air EVAC EMS, Inc.*, No. Civ-16-843-R, 2017 U.S. Dist. LEXIS 36701, 2017 WL 1026012, at *2 & n.3 (W.D. Okla. Mar. 15, 2017) (collecting authorities).

“[W]hen the statute’s language is plain, our inquiry into preemption both begins and ends with the language of the statute itself.” *EagleMed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017). We may not refuse to apply ADA preemption merely because we do not believe it would be sound public policy to enforce the statute Congress enacted.

In *Morales, supra*, cited by the former Administrator above in overruling the preemption argument, the Supreme Court wrote:

In concluding that the NAAG [National Association of Attorneys General] fare advertising guidelines are pre-empted, we do not, as Texas contends, set out on a road that leads to pre-emption of state laws against gambling and prostitution as applied to airlines. Nor need we address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly “relate to” rates; the connection would obviously be far more tenuous. To adapt to this case our language in *Shaw [v. Delta Airlines]*, 463 U.S. 85 (1983), “some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner” to have pre-emptive effect. 463 U.S. at 100, n.21. In this case, as in *Shaw*, “the present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.”

Similarly, the present matter “plainly does not present a borderline question.” This is not something “tenuous, remote, or peripheral” to the fares

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charged by an air ambulance provider—an air carrier providing air transportation, per the ADA preemption provision—like the examples given above by the *Morales* Court. The former Administrator explained in detail the actions that were being taken by MCCD here:

The AWCC Medical Fee Schedule contains no maximum allowances for ambulance services. Unlisted medical services for injured Arkansas workers are to be reimbursed reasonable amounts as determined by the AWCC. Thus, the dispute in this case centers on determining the reasonable amount of reimbursement for the provider's ambulance services provided to the claimant on May 8, 2023.

MCCD determines the reasonableness of its allowable ambulance rates by conducting annual surveys of Arkansas EMS providers and basing its allowable rates on the average charges in the state for each respective HCPCS code. These surveys are conducted on both air and ground ambulance providers and the allowable rates are segregated by air or ground.

The survey conducted by MCCD shows that the average rate for A0431 in May 2023 was \$35,169.69 per unit. AWCC Rule 099.30 provides that when an AWCC allowable fee is greater than the amount actually billed, the service shall be reimbursed at the lesser of the two amounts. In this case, HCPCS A0431 was billed at a rate of \$34,500.00, which is lower than the allowable rate. The Administrator finds the rate of \$34,500.00 is the reasonable reimbursement amount for A0431 in this case. Survey results also show that the average charge for A0436 in May 2023 was \$289.07 per mile. Therefore, the Administrator finds this rate is the reasonable reimbursement amount for A0436 in this case.

MCCD determined what could be billed for HCPCS codes A0431 (“Ambulance service, conventional air services, transport, one way (rotary wing)”) and A0436 (“Rotary wing air mileage, per statute mile”) and the amounts for which PECD was responsible. To repeat, this is “in the heartland of price” under *Ferrell*,

supra. The actions taken here by the former Administrator in the Administrative Review Order and Administrative Review Reconsideration Order on these matters constitute the “undo[ing of] federal deregulation with regulation of their own” that the Supreme Court in *Morales* and *Ginsberg*, *supra*, warned was impermissible under the ADA’s preemption provision. For the foregoing reasons, the undersigned is compelled to reverse these two orders.

C. Remaining Issues

Because of the above finding regarding preemption, the remaining issues are moot⁴ and will not be addressed.

VI. CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law set forth above, the Administrator’s April 5, 2024, Administrative Review Order and May 8, 2024, Administrative Review Reconsideration Order are hereby reversed.

IT IS SO ORDERED.

O. MILTON FINE II
Chief Administrative Law Judge

⁴In *Ferrell*, *supra*, the Eighth Circuit explained what option(s) might remain for an aggrieved party in a transaction such as the one at bar to get their grievance(s) redressed, including perhaps an action for breach of contract. 900 F.3d at 608-10. However, such cause(s) of action are outside the scope of this appellate review and, consequently, will not be addressed herein.