



Air Ambulance: Heads in the Clouds

By Jon A. Jablon, Esq.

Health plans, third-party administrators, brokers, consultants, and stop-loss carriers are a bit baffled by air ambulance fees. Many are outraged or appalled or disgusted as well – but it seems that the overwhelmingly common feeling is sheer confusion over how this type of billing is permissible.

In all other markets – construction, textiles, grocery, you name it – the ordinary legal doctrine is that if there is no agreed-upon price for the goods or services, the seller may only charge the reasonable, fair market value of the delivered service or item. Admittedly, in most markets, prices are agreed upon beforehand – but in the long history of business, there have been enough instances of services rendered without agreed-upon pricing that courts have seen fit to devise controls for just those occasions.

And yet...air ambulance charges are frequently between 600 and 800 percent of Medicare rates for the same flight – and sometimes far, far more. In fact, one recently crossed my desk billed at over 2,600% of Medicare rates. That's right – a whopping twenty-six times what Medicare would have paid for the same flight.

The disclaimer is that Medicare rates are not directly relevant to these flights, but instead used as a benchmark to inform what might be the fair market value, since unfortunately there isn't much else to go on. Unlike many other medical providers, though, there seems to be a trend in the air ambulance billing industry where balance-billing is the norm, and many air ambulance providers have the devil-may-care willingness to bill patients which triggers the outrage and disgust that so often has health plans paying upwards of 90% of egregious balances to protect their patients.

Add to the egregious billing the notion that many flights are not medically necessary or otherwise appropriate to begin with, and it becomes clear that we have a problem on our hands.

At Northshore International Insurance Services, Inc.'s 26th Annual Medical Excess Claims Conference regarding Air Ambulance Claim Cost Containment Strategies, Jeff Frazier – a partner at Sentinel Air Medical Alliance, a firm specializing in curbing air ambulance costs – answered quite a few questions, including the following¹:

Question: Why is air ambulance ordered for someone who does not really need the service?

Answer: About 20% of the patients using air ambulance services really need the service. In a lot of cases, patients are not transported to the nearest hospital due to overflight or relationships between the facility and the air ambulance provider.

Question: How do you determine medical necessity?

Answer: Review of transport notes or ambulance run reports primarily to determine medical necessity. Sometimes notes from the hospital are also reviewed.

Question: Why do payors cave?

Answer: Fear of the provider balance due billing the patient.

Balance-billing is a major concern of all benefit plans that pay benefits at an amount not tethered to billed charges, which is an increasing trend. If not for balance-billing, it seems likely that all plans would pay objectively reasonable rates rather than percentages of billed charges.

“Taking Patients for a Ride” Article

A recent (April 6, 2017) Consumer Reports article penned by Donna Rosato – entitled “Air Ambulances: Taking Patients for a Ride” – highlights some real-life scenarios in which air ambulance billing practices have proven to be, in a word, abusive. Aside from citing two separate sources quoting the average air ambulance flight at about \$7,000 and about \$10,000, the article notes that:

Rick Sherlock, president and CEO of the Association of Air Medical Services, a trade group, says that many air-ambulance patients are on Medicare or Medicaid, and that those programs pay \$200 to \$6,000 per transport. So, Sherlock says, air-ambulance operators must collect more from people with private insurance to make up the difference.

It should be questioned how equitable or ethical it is to jack up prices for one consumer because the provider has chosen to accept less money for another consumer. An air ambulance provider can always refuse to contract with CMS and choose to not accept Medicare or Medicaid – so to complain about not being paid enough seems a bit petulant.

Airline Deregulation Act

Further challenges are presented by the Airline Deregulation Act of 1978. Through this federal law, states are prohibited from regulating non-hospital affiliated air ambulance providers. That is, this law does not apply to the University of Whatever Health System's own proprietary air ambulance services, since those are considered to be an "extension" of emergency services as opposed to a separate air ambulance provider – but the law does apply to FlyingAirTaxiMedicalAmbulance Co., Inc., since it is independent of an emergency room and is its own "carrier."

Through the years there have been proposed changes to the federal Act to account for the disastrous effects it has on air ambulance consumers and health plans, but we're not quite there yet.

Interestingly, many air ambulance carriers have resorted to quoting the Act when attempting to justify their billing – or at least when attempting to refute reasonable settlement requests. It seems that the most prevalent argument is against any notion of fair market value; the fact that state law is preempted with respect to air ambulance billing practices is cited as the reason that fair market value is not relevant to the carrier's billing. But, although rooted in state contract law, is it reasonable to suggest that an implied contract for services is "state law," sufficient to be preempted or overridden by the federal Airline Deregulation Act?

In other words, while the federal Act may supersede state laws aimed at regulating air ambulance providers (and others), the concept of fair market value is implicit in the non-contracted nature of air ambulance services. The issue is not one of some state law attempting to regulate air ambulances;

fair market value has to do with the open market and general principles of contract rather than some particular state law.

The Airline Deregulation Act does not set a price or indicate what might be appropriate value. Instead, it dictates that individual states cannot pass laws to regulate the price of these flights. Fair market value is a general principal of contracting rather than some statutory price control, though; air ambulances are free to provide quotes up-front, but in most cases that is either not feasible or just not done. It seems that the general and basic principal of fair market value would still apply when no price is quoted or agreed-upon. The Airline Deregulation Act, after all, was passed to promote a free market economy rather than restrict it. It hardly serves to promote a free market when medical providers can gouge payors without warning.

One could even contend, somewhat ironically, that demanding surprise payment at an amount far in excess of the fair market value frustrates the very purpose of the same Airline Deregulation Act that these providers rely on to defend their charges.

Contract? What Contract?

Here's where things get even more interesting. Independent air ambulance providers tend to be universally out-of-network. There are a couple of exceptions, but in general, it is near impossible to find an air ambulance provider (unrelated to a hospital) that has contracted with a PPO network to accept discounted fees – primarily due to the belief that the Act guarantees them their full billed charges no matter what, and that there's no reason to join a network and accept discounted charges.



Regardless of that belief, another question worthy of consideration is whether the out-of-network flights can truly be considered non-contracted. Contracts are a funny thing and they come in many forms; while there is no contract to pay a certain specified rate or percentage of billed charges – indeed, a claim that would generally be considered a “contracted claim” – consider that the patient (if conscious and competent) almost always signs the provider’s “assignment of benefits” form. On that form, the patient says “if my insurance doesn’t pay you, in full, 100% of your bill, then I, the patient, agree to be responsible for the remainder.”

For some bizarre reason, courts in this country have indicated that the patient’s agreement to pay some unspecified amount supersedes any ordinary market properties. If the patient weren’t a patient but a homeowner, and a painter said “you will pay me what I bill you for this job” and the homeowner agreed, courts have always opined that while the consumer is of course responsible to compensate the painter for its service, the painter is responsible for billing only that which is reasonable – measured as the fair market value of the services. In the medical industry, though, there are very few (and largely ineffectual) statutory or common law pricing controls. Even the simplistic concept of fair market value, which is perhaps the most basic of all pricing principles, does not apply in ordinary cases. It goes without saying that this needs to be fixed.

What Can You Do?

Whoever you are – whether a health plan sponsor, third-party administrator, broker, MGU, reinsurer, or anyone else working in the self-funded industry – air ambulance charges are worrisome. If they don’t concern you...they should.

Negotiating claims can be an option, as is the case with other out-of-network medical claims, and there are also other, more novel solutions out there in the marketplace.

Just as programs have developed to assist payors in reducing dialysis billed charges, so are there companies and services that are specifically geared toward controlling air ambulance charges. Specialists in this field can provide assistance from a regulatory and financial standpoint – and ensuring proper utilization is also crucial to ensuring that payors are not gouged.

We urge payors to discuss options with a broker or consultant and ask about some of the solutions out there that have helped save health plans countless dollars of unreasonable and unnecessary air ambulance exposure. ■

About the Author

Attorney Jon Jablon joined The Phia Group’s legal team in 2013. Since then, he has distinguished himself as an expert in various topics, including stop-loss and PPO networks, focusing on dispute resolution and best practices. In 2016, Jon assumed the role of Director of The Phia Group’s Provider Relations department, which focuses on all things having to do with medical providers – including balance-billing, claims negotiation, PPO and provider disputes, general consulting, and more.

References:

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- 2 <http://www.consumerreports.org/medical-transportation/air-ambulances-taking-patients-for-a-ride>