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FISCAL IMPACT REPORT

SPONSOR Leavell ORIGINAL DATE 1/30/15
 LAST UPDATED _____ HB _____

SHORT TITLE Workers' Comp Air Ambulance Fee Schedule SB 51

ANALYST Klundt

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		TBD	TBD			Worker's Compensation Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Workers' Compensation Administration (WCA)
 Public Regulation Commission (PRC)
 Department of Health (DOH)
 Human Services Department (HSD)

Responses Not Received From

General Services Department (GSD)
 State Personnel Office (SPO)
 Medical Board (MB)
 Nursing Board (NB)
 Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

Senate bill 51 requires the Workers' Compensation Administration Director to set a maximum billable charge for air ambulance transportation of injured workers in New Mexico and allows for utilization review on claims involving air ambulance transport. Currently, the Workers' Compensation Administration has no set fee for transporting injured workers by plane or helicopter – the fees are negotiated between the air ambulance provider and the insurer carrier.

FISCAL IMPLICATIONS

Workers' Compensation Administration (WCA) states there was no fiscal impact to the agency identified; however there is a significant impact to the workers' compensation system. The agency has received numerous reports from payors that air ambulance companies may be over billing for services.

As reported by the Workers' Compensation Administration, New Mexico Mutual, an insurer, tracks air transport and reports an average bill from one company of \$44,055 thousand in 2014. This is an increase from \$15,623 since 2007, or 182 percent. The average cost for air transport for all companies in 2014 is \$22 thousand according to the WCA. Two-thirds of all claims submitted are facility to facility transportation. The remaining one-third of transports are site to facility transports.

The WCA also stated the medical necessity for air ambulance services in a non-emergent situation as opposed to regular, less expensive, ambulance transport remains an issue. In the past seven years, costs have nearly tripled for air ambulance transportation. The WCA has held hearings to determine the reasonableness and necessity of air ambulance transports and providers have argued federal statute, the Airline Deregulation Act [49 U.S.C. § 471(13)(b)(1)], which prohibits state imposition of fees on air ambulance companies, leading to bills that are exceedingly high, in the tens of thousands of dollars.

WCA analysis also indicated that high medical costs already have a significant impact on the workers' compensation system. The agency reports that at one time medical costs were 40 percent of the overall cost of an average workers' compensation claim. Currently, medical costs make up approximately 60 percent of the costs to the workers' compensation system. The agency states that the more expensive workers' compensation claims become, the higher insurance premiums become overall, making it less affordable for employers doing business in the State of New Mexico.

CONFLICT

The WCA believes if this bill passes, it will likely be challenged in state or federal courts by air ambulance companies, who have stated they believe the Airline Regulation Act preempts any state laws.

The proposed legislation may be preempted by federal law, the Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b)(1). The ADA provides that "a State [or] political subdivision of a State...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..." The United States Supreme Court noted that Congress enacted the ADA after "determining that maximum reliance on competitive market forces' would best further 'efficiency, innovation, and low prices' as well as 'variety [and] quality...of air transportation services.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (finding that advertising requirements adopted by National Association of Attorneys General to regulate airline advertising were guidelines "relating to" the rates, routes, or services of air carrier such that they were expressly preempted by language of Airline Deregulation Act).

Several states (Arizona, Colorado, and Texas) have recognized federal preemption and the

resulting inability to enforce a fee schedule against air ambulance services. California included fee caps of air ambulance services in its workers' compensation fee schedule for several years, without challenge. However, in 2013, the California Workers' Compensation Appeals Board determined that California's fee schedule was preempted by the Air Deregulation Act.

California courts have found that the state's workers' compensation fee schedule is preempted by federal law only where the air ambulance carrier can prove that it is an "air carrier that may provide air transportation" under the Airline Deregulation Act and that it is authorized to provide interstate air transportation. The proposed statute adopts the California approach to the issue.

According to the WCA rising air ambulance fees may be attributable to the rates the carrier is being reimbursed for Medicare and Medicaid claims, and carriers may be subsidizing losses by increasing billing for another segment of the market (the workers' compensation system).

Notwithstanding the *Morales* decision, it is important to note that regulation of workers' compensation systems is an important state police power. In a contest between the preemption provision in the ADA, which the carriers are arguably abusing, and New Mexico's strong interest in controlling and managing costs in its workers' compensation system, the WCA believes it is possible that the proposed legislation could withstand legal challenges.

TECHNICAL ISSUES

Page 3, Line 15: Section 1 (O) sentence refers to the public health division of the department of health. As changes to internal subdivisions of the department of health would make this sentence irrelevant, the sentence should simply refer to the department of health.

Page 3, Line 21: Section 1 (Q) (a) sentence states "does **not** provide proof to the director that it operates as an interstate air carrier under a certificate of authority from the United States federal aviation administration (FAA)." All air ambulance services must be certified under the FAA to operate. The word "not" should be removed.

The definition of air ambulance provider in section Q may need to be clarified so that all parties are clear who falls under the jurisdiction of the WCA. Also, it is unclear whether section Q(2) refers to the state or federal department of health. Determining the methodology to develop a fee for air ambulance services also presents a technical challenge according to the WCA.

In current statute, Section 52-4-1 NMSA 1978 provides a definition of a "health care provider" for Chapter 52, and Paragraph O in that Section includes certified nurse midwives in that definition provided that they are licensed by the board of nursing and "registered with the behavioral health services division of the Human Services Department." However, HSD and BHSD play no role in registration of certified nurse midwives, and that clause has no effect. The bill would make the proper corrected reference on page 3 line 15 to "registered with the Public Health Division of the Department of Health." As potential changes to internal subdivisions of the department of health would make this sentence irrelevant, the sentence could more flexibly refer to being "registered with the Department of Health."