No. 23–ICA-135

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

AIR EVAC EMS, INC.
Petitioner-Appellant,

v.

JASON HAUGHT, IN HIS CAPACITY AS DIRECTOR OF THE PUBLIC EMPLOYEES INSURANCE AGENCY, AND MARK D. SCOTT, GEOFF S. CHRISTIAN, AMANDA D. MEADOWS, JARED ROBERTSON, DAMITA JOHNSON, JASON MYERS, MICHAEL COOK, WILLIAM MILAM, AND MICHAEL T. SMITH, IN THEIR CAPACITIES AS MEMBERS OF THE PUBLIC EMPLOYEES INSURANCE AGENCY FINANCE BOARD,
Respondents-Appellees,

REPLY OF PETITIONER-APPELLANT AIR EVAC EMS, INC.

On Appeal from the Circuit Court of Kanawha County, No. 19-AA-169
Hon. Carrie L. Webster

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I. INTRODUCTION AND SUMMARY OF REPLY

In apparent denial about the stinging rebukes from the federal courts in *Cheatham*, PEIA insists that nothing has changed and that it may continue to illegally cap Air Evac's reimbursement for the life-saving emergency services provided to state employees and their families. For the period at issue—June of 2016 to June of 2019—PEIA operated under an illegal statutory reimbursement regime. As the Fourth Circuit recognized, "[t]here was nothing subtle or indirect about" this regime, which was created "to lower payments for air ambulance services," in violation of the federal Airline Deregulation Act ("ADA"). *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 767 (4th Cir. 2018).

PEIA now offers an equally unsubtle rationale for imposing the same rate-capping regime rejected in *Cheatham*. According to PEIA, it may now invoke its own "discretion" to limit payments to air ambulance providers—to the tune of millions of dollars, which PEIA blithely suggests should be borne by the state employees themselves. This new rate-capping argument flouts black letter law, common sense, and PEIA's own statutory mission of protecting the interests of its beneficiaries. But none of these attempts to distract the Court change the underlying facts or the law.

Following *Cheatham*, the proper course of action is clear: apply West Virginia severability principles to the statutes in place from 2016 - 2019. Under these principles, two guiding features emerge. First, PEIA is obliged to pay Air Evac's billed charges, without illegal rate caps; after all, regulating air ambulance rates is the exclusive province of the U.S. Department of Transportation, not state legislatures or agencies. *Cheatham*, 910 F.3d at 764. Second, Air Evac may not "balance-bill" 2016 - 2019 beneficiaries under the prohibition then in effect.

Rightly swatting away PEIA's specious arguments regarding jurisdiction, immunity, and 1-800 numbers, the Circuit Court got to the brink of this analysis, but then erroneously stopped short. Severability is the crux of this appeal and the Circuit Court's refusal to follow West Virginia law and sever the enjoined provisions is reversible error. Had the Circuit Court done so, it would have assessed the meaning of the remaining statutory language and have been compelled to conclude that Air Evac is entitled to full reimbursement for the past air ambulance transports at issue.

This Court should carry this matter home, and, as the Circuit Court did, disabuse PEIA of the notion that it may rely on *post hoc* rationalizations and concocted arguments to avoid the outcomes of the game it played and lost—a game for which PEIA, to this day, tries to rewrite the rules after every losing hand.

II. DISCUSSION

A. *Cheatham* Yields Very Real Consequences.

PEIA soundly lost the *Cheatham* litigation and Air Evac soundly won. Though PEIA would like to believe that *Cheatham* has no actual consequences, it does. And those consequences are straightforward: PEIA cannot statutorily cap reimbursement for the disputed emergency transports while simultaneously prohibiting Air Evac from recovering the balance. *Cheatham*, 910 F.3d at 766-68.

To recap, in 2011, PEIA implemented "new laws and regulations aimed at air ambulance expenses," including fee schedules that capped the reimbursement rate for air ambulance providers at the federal Medicare Rural Rate. *Cheatham*, 910 F.3d at 758. This rate was "substantially below" Air Evac's billed charges. App. 783. Then, in 2016, the Legislature enacted a statute that further capped what air ambulance providers could receive at one of two amounts: (1) the federal

Medicare reimbursement rate, or (2) the fee or cost of the air ambulance's subscription service agreement, which was typically around $100. App. 783; *see* W. Va. Code §§ 5-16-8a(a), 5-16-8a(b) (2016); *Cheatham*, 910 F.3d at 758. These provisions of the Act and schedules were "backed up" by a ban on balance-billing, *see* W. Va. Code § 16-29D-4, which prohibited Air Evac from recovering from PEIA insureds any more than the reimbursement rate cap set by PEIA. This rate-capping scheme was imposed through threats of enforcement actions and criminal and civil penalties. *See* W. Va. Code § 5-16-12(a) (2016) (civil liability); § 5-16-12(b) (2016) (criminal liability); *Cheatham*, 2017 WL 4765966, at *3 ("The Office of the West Virginia Attorney General has warned Air Evac that the balance-billing prohibition applies to air ambulance companies.").

As the Fourth Circuit recognized,

> *West Virginia [] simply dictated a relatively low reimbursement rate and prohibited any additional recovery,*

and as a result,

> *the state face[d] no pressure to bargain up front, and no threat of patients being directly billed on the back end, thereby lowering total reimbursement costs*.

Cheatham, 910 F.3d at 758 (emphasis added). Again, "[t]here was nothing subtle or indirect about [PEIA's] approach; it was directly targeted at payment for air ambulance services." *Id*. at 767. That is what got PEIA into trouble. The *Cheatham* courts easily concluded that PEIA's "comprehensive scheme" violated the ADA: the reimbursement caps were enjoined, but the balance-billing prohibition was left in place. *Id.* at 767-69.

PEIA's scheme was the product of neither negotiation nor the behavior of a "market participant"; rather, PEIA used its "coercive power" "to achieve its goals" in capping recoupment by Air Evac. *Id*. at 768.

PEIA's attempts to evade the consequences of *Cheatham* are creative, but entirely without merit. The notion that PEIA may continue to engage in the same illegal activity by relying on a different provision in the Act (and one that it did not rely upon during the relevant period and was otherwise not at issue in *Cheatham*) is simply wrong. Resp. Br. at 24. The effect of this new position that PEIA asserts is that it can still pay the same illegally capped rates and unilaterally invalidate the statutory balance-billing prohibition—thereby shifting its cost of losing in *Cheatham* onto its insureds. PEIA is dead wrong.

First, no amount of administrative "discretion" enables PEIA to evade the command of the ADA or binding Fourth Circuit authority. Not surprisingly, PEIA cites no authority to support its novel approach. PEIA may not, via any discretion it may have, invalidate the balance-billing prohibition that was alive and well for the entire time at issue—all along, shielding its insureds from the $4 million in transport charges PEIA now seeks to thrust on to their shoulders years after those transports were made. To this end, PEIA's argument that it may retroactively deem such transports "not covered" is further belied by the fact that PEIA *did cover* and issue some payment on the disputed flights, albeit at the same illegal rate foreclosed by *Cheatham*. Resp. Br. at 4. And PEIA has already been swiftly rebuked in advancing the same type of "heads I win, tails you lose" argument when taking contradictory positions on application of the balance billing ban. *Cheatham*, 2017 WL 4765966, at *3 (U.S. District Court Judge Johnston rejecting PEIA's argument that the balance-billing prohibition was inapplicable to Air Evac where it and the West Virginia Attorney General's Office had threatened enforcement against Air Evac if it did not abide by the ban: "These threats of enforcement undermine Defendants' assertion that the balance-billing provision will not be enforced against Air Evac.").

Second, it is no answer that the Legislature passed a law in 2019 providing that, going forward, air ambulance providers were no longer subject to penalties for seeking payment of the balance of their bills from insureds. This "prospective" law (Resp. Br. at 5), effective on June 4, 2019, does not apply to this dispute, which concerns transports that *pre-dated* the law. *See* S.B. 587, W. Va. Legis. Reg. Sess. (2019), *codified at* W. Va. Code § 5-16-8a(d). PEIA's suggestion that state employees themselves should shoulder the cost of emergency services, years after the fact, is as irrelevant as it is appalling.

Third, PEIA attempts to rationalize its new argument by mischaracterizing a single line from the Fourth Circuit's opinion in *Cheatham*: "The ADA does not require a state to pay whatever an air carrier may demand." *See, e.g.* Resp. Br. at 4 (quoting *Cheatham*, 910 F.3d at 769). But as Air Evac has explained, this statement simply distinguishes between the respective roles of federal and state law. PEIA's obligation to pay air ambulance charges rests in state law; the ADA invalidates any state-law attempts to cap or regulate those payments. *See id.*[1]

Of course, the ADA does not give federal air carriers like Air Evac *carte blanche* to decree reimbursement levels, and Air Evac has never argued as much. Under the ADA, the U.S. Department of Transportation—not PEIA or the Legislature—is the sole "economic" regulator of air ambulances. *Cheatham*, 910 F.3d at 756; *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 390, 112 S. Ct. 2031, 2040, 119 L. Ed. 2d 157 (1992) ("we note that our decision does not give the airlines *carte blanche* to lie to and deceive consumers; the DOT retains the power to prohibit

[1] In making this observation, the Fourth Circuit cited *EagleMed LLC v. Cox*, 868 F.3d 893, 906 (10th Cir. 2017), which held that the ADA prohibited Wyoming from "enforcing [its] preempted rate schedule against air ambulance carriers." "[H]ow" Wyoming should administer its payment program without violating the ADA "[was] a question of state law, and any duty to pay the [air ambulance] claims remains a state [law] duty, not a federal duty." *Id.* As discussed below, it is the application of state severability principles that answers the same question here.

advertisements which in its opinion do not further competitive pricing, see 49 U.S.C.App. § 1381.").

In short, PEIA's tortured arguments cannot overcome this simple truth: PEIA lost because it was acting unlawfully. And though PEIA can correct course "moving forward" (*Cheatham* at 769), its losses—namely the statutory invalidation resulting from *Cheatham*—must be applied to the statutory scheme *as it existed* and *as relied upon by PEIA* during the period of the disputed transports. PEIA cannot now squirm free from its past contraventions of federal law. *Cobra Natural Resources, LLC v. Federal Mine Safety & Health Review Commission,* 742 F.3d 82, 101-02 (4th Cir. 2014) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.") (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515, (2009)) (internal citation omitted).

This case is confined to the limited universe of transports made during only a portion of the time that PEIA operated its illegal scheme, from June of 2016 to June of 2019. It is these transports—and *only* these transports—that form the basis for this dispute. With the unlawful provisions of this statutory scheme severed, Air Evac is due reimbursement. What PEIA has done to alter this landscape "moving forward" is itself suspect, but not relevant to this case.

B. Severability Analysis Dictates that Air Evac is Entitled to Its Billed Charges for the Disputed Period.

For the period in question, PEIA's fee schedules are preempted and enjoined, but the balance-billing prohibition is alive and well. In other words, PEIA may not rely on its restrictive fee schedules and Air Evac may not balance bill PEIA insureds for transports made during the relevant period. In turn, because the ADA does not dictate air carrier reimbursement rates, it is up to the West Virginia courts to determine what the residual of the PEIA Act dictates with the fee schedules severed. That is the teaching of *Cheatham* and other authorities addressing the same

issue: state law severability principles reveal what remains of the severed Act and What PEIA must pay.[2] *See Cheatham*, 910 F.3d at 769; *EagleMed LLC v. Cox*, 868 F.3d 893, 906 (10th Cir. 2017). Again, the Circuit Court erred in concluding that severability was unnecessary because the ADA itself does not mandate payment of Air Evac's full charges. App. 838. This is backwards. When part of a statute is invalidated, the court must perform a severability analysis to determine whether the remaining parts of the statutory scheme can continue operating without the invalid provisions. *State v. Heston*, 137 W. Va. 375, 403, 71 S.E.2d 481, 496 (1952). Thus, it is rather the PEIA Act, subject to the ADA and West Virginia severability law, that creates PEIA's duty to pay.

"[S]tate law governs the severability of a state statute." *Envt'l Tech. Council v. Sierra Club*, 98 F.3d 774, 788 n.21 (4th Cir. 1996). Applying West Virginia severability, the result is that the fee schedules (W. Va. Code § 5-16-8a(a)) are stricken, and the statute authorizing those fee schedules (W. Va. Code § 5-16-5(c)(1)) can be minimally severed to comport with *Cheatham*:

> "All [annual and long-range] financial plans required by this section shall establish . . . [~~m]aximum levels of~~ reimbursement which the [PEIA] makes to categories of health care providers."

Accordingly, "establish[ing]" full reimbursement is the only fair reading of what is left of the Act for the simple reason that PEIA has no restrictive fee schedules to rely upon in light of *Cheatham*.

PEIA all but ignores that this was the precise result in *EagleMed*, where the federal courts held that portions of the Wyoming workers' compensation system violated the ADA by applying statutory and other limits to air ambulance reimbursement payments. *EagleMed*, 868 F.3d at 897-905. The effect of ADA preemption was a question of Wyoming state law. *Id.* at 906. The

[2] During the relevant period, Air Evac conducted 115 air ambulance transports of PEIA members, at a total cost of $4,773,034. App. 84. After PEIA's payments at the Medicare Rule Rate for each, Air Evac was left with $4,018,046 in unpaid transports. *Id.*

Wyoming Supreme Court therefore applied state severability principles to hold that once the invalid language was severed from the Wyoming workers' compensation statute, the remaining statutory language required "payment in full" of the air-ambulance providers' charges by the Division of Workers' Compensation. *Air Methods/Rocky Mountain Holdings v. Dep't of Workforce Servs., Workers' Comp. Div.*, 432 P.3d 476, 485 (Wyo. 2018). The same analysis applies here and compels the same result.

PEIA attempts to discredit *EagleMed* by returning to its familiar *post hoc* rationalizations that, despite the full and hard rebuke in *Cheatham*, it may shift to alternative justifications for restricting reimbursement in the very manner prohibited by the federal courts. *See* Resp. Br. at 31 – 32 (PEIA suggesting that generalized "discretion" afforded by W. Va. Code § 5-16-3(c) absolves it of any consequences stemming from *Cheatham*). This is disingenuous at best. PEIA played its hand and lost. It cannot now sift through the deck to compose an alternative set of laws to justify the same actions already forbidden. *See Cheatham*, 2017 WL 4765966 at *3 (U.S. District Court Judge Johnson rejecting this very type of flip flopping by PEIA with respect to application of the balance billing prohibition).

PEIA is flat wrong to assert that "[s]everability is typically at issue where the invalidity of one provision of Code may cause an entire legislative act to fall." Resp. Br. at 9. PEIA gets it backwards. Severability analysis is applied narrowly to maintain the balance of an act, where possible. Syl. pt. 6, *Heston*, 137 W. Va. 375, 71 S.E.2d 481; see also *Louk v. Cormier*, 218 W. Va. 81, 97, 622 S.E.2d 788, 804 (2005) (severability is possible unless "the valid and the invalid provisions of a statute are so connected and interdependent . . . as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other"). This is particularly true where, as here, the statute at issue contains a severability provision. W.

Va. Code § 5-27-1 ("[I]f any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or invalid, such unconstitutionally or invalidly shall not affect other provisions or applications of the chapter, and to this end the provisions of this chapter are declared to be severable.").

As Air Evac has explained, revisions can easily be made to the Act to strike the "invalid provisions" while maintaining the general purpose of the Act as intended by the Legislature: to create a health insurance program that pays for medical care provided to West Virginia public employees and their dependents. This is a far better fit than PEIA's suggestion to warp the health insurance program and retroactively burden its insureds with millions of dollars in unpaid emergency transport charges after program administrators lost a multi-year court battle.[3]

C. The Circuit Court Correctly Rejected PEIA's *Post Hoc* Rationalizations and Jurisdictional Arguments.

Though not the subject of this appeal, PEIA interjects and repeats a host of arguments it makes in its own appeal (23-ICA-127) to distract from the simple severability analysis necessary to conclude this dispute. Though Air Evac questions if such arguments are at all appropriate for briefing in this appeal, it will briefly reply.

Air Evac is not required to sort out this dispute by calling a 1-800 number and PEIA's contested case rules are the appropriate avenue for administrative relief. The idea that questions regarding the scope of federal preemption and West Virginia severability law should be resolved over a 1-800 hotline or submitted to a round table of physicians for a final decision, with no

[3] And to the extent PEIA wants to maintain that its "fisc" is more important than thrusting millions of dollars onto the shoulders of its most vulnerable insureds, this is hardly the place to do it. As noted, PEIA's then-Director Ted Cheatham, testified that air ambulance reimbursements constitute less than 0.003% of PEIA's overall budget for medical expenditures. App. 138, 399. There is no sound argument from PEIA that its financial duties under the Act supersede the interests of its insureds not being retroactively saddled with debt PEIA assured them it they would not owe. W. Va. Code § 16-29D-4. This is just another ploy by PEIA to avoid the consequences of its loss, no matter who those consequences may shift to under its cavalier position.

possibility for judicial review, is comical. Resp. Br. at 20 - 22. Yet this is what PEIA continually suggests is the appropriate procedure. It, of course, is wrong.

The proper path, which was taken by Air Evac, was the application of PEIA's own contested case rules. As presented multiple times to PEIA, only two facts matter here: (1) the Legislature expressly left PEIA's contested-case hearing rules in effect and in force until PEIA repeals them, and (2) PEIA has never repealed them. PEIA has no answer to Air Evac's argument on this score.

PEIA takes an alternative approach, arguing that Air Evac's dispute does not qualify as a "contested case" because "no constitutional right, statute, or agency rule requires PEIA to determine the amount it owes Air Evac . . .." Resp. Br. at 18. Lost in PEIA's analysis is the fact that *Cheatham* applied *constitutional* grounds—the Supremacy Clause of the United States Constitution—to invalidate the *statutory* grounds on which PEIA illegally restricted reimbursement to Air Evac for its *non-discretionary* emergency transport of its insureds. Air Evac has already been vindicated, in part, on its constitutional right to not be subject to the "coercive power" relied upon by PEIA in administrating its illegal reimbursement scheme. *Cheatham*, 910 F.3d at 768. To have any meaning, the effect of *Cheatham* must be determined via application of state severability principles. Without any credible doubt, *Cheatham* represents a "constitutional command" to PEIA (Syl. Pt. 2, *State ex rel. W. Virginia Bd. of Educ. v. Perry*, 189 W. Va. 662, 663, 434 S.E.2d 22, 23 (1993)), and squarely triggers PEIA's contested case rules, which "apply to every person, partnership, association, corporation, public corporation or governmental agency affected by any rules, regulations or statutes" enforced by PEIA. W. Va. Code St. R. § 151-3-2.1.

An exception to sovereign immunity is not necessary where sovereign immunity is not applicable in the first place. Try as they might, PEIA's continued use of terms like "suit," "sued," and "damages" does not alter the fact that this is neither a *lawsuit* nor a raid on the State Treasury for unappropriated "damages." Resp. Br. at 10 - 12. As an initial matter, an agency proceeding—and the continuation of one on appeal—is not a lawsuit. *See Rice v. Underwood*, 205 W. Va. 274, 280, 517 S.E.2d 751, 757 (1998) ("the deciding of contested cases by a board or regulatory body is a recognized administrative function and does not transform the administrative agency into a court.") (citing *State v. Huber*, 129 W.Va. 198, 217, 40 S.E.2d 11, 22 (1946)); *Thornton v. Commissioner of the Dept. of Labor*, 190 Mont. 442, 445 (Mont. 1980) ("An administrative hearing is not a suit at law").

Further, this is far from a garden variety slip and-fall case, where a plaintiff may attempt to sue the State directly for damages. Rather, as exhaustively briefed, this is a unique scenario resulting from a preemption finding by the federal courts striking down an illegal statutory scheme that PEIA astonishingly continues to employ to this very day. Air Evac, in light of *Cheatham*, seeks proper and lawful payment of funds the Legislature has appropriated to pay healthcare providers. Sovereign immunity poses no bar whatsoever to APA review in these circumstances. As PEIA's own contested case rules dictate, when an agency fails to pay for services rendered in accordance with a statutory obligation to do so, a service provider has administrative and judicial recourse to see that it is made whole.

Because PEIA refuses to except the consequences of its actions and continues to flout the mandate of *Cheatham*, this administrative proceeding is properly before this Court.

III. CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court's decision that Air Evac is not entitled to full payment for air ambulance transports from June 9, 2016, to June 4,

2019, and, after engaging severability analysis, remand with instructions to order PEIA to fully reimburse Air Evac for these charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that on this 21st day of August, 2023, that I electronically fled the foregoing ***Reply of Petitioner-Appellant Air Evac EMS, Inc.*** using the File & ServeXpress system which sent a Notice of Electronic Filing to, and constitutes service on, counsel of record.

/s/ Carte P. Goodwin
Carte P. Goodwin

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