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Another Municipal Roundtable Coming Up

Next Friday, June 24, at West Pierce Fire and Rescue Station 21, located at 5000 Steilacoom Blvd SW, Tacoma, WA 98499, we will be holding another Municipal Roundtable from 0900 to 1100. The MR is a free discussion group in which we consider issues that are relevant to the fire service, and municipal corporations in general. In this MR, we will be outlining RCW 42.17A.555, the statute enforced by the Public Disclosure Commission that generally prohibits the use of public facilities to support or oppose a ballot proposition or assist a campaign for election to public office. There are some narrow exceptions to this law. See you at Station 21 on June 24!

A Pitfall of Medicaid Billing: The Downside of an "Up-Code"

A fire department, or any medical provider, may be investigated for Medicaid fraud under RCW 74.66.005, Washington's Medicaid Fraud False Claims Act ("Act"). The Act became law in 2012. The Ground Emergency Medical Transportation statute (GEMT)—for supplemental Medicaid reimbursement to eligible providers—became law in 2015. Be on the lookout: With GEMT being law, and the Act being

law, the Attorney General may have a new administrative burden, and therefore a new cause for investigations into potential Medicaid fraud.

Importantly, in Washington, there are truly "three layers" of Medicaid billing. First, the EMS provider would seek reimbursement from the Medical Assistance Administration (MAA), for "medically necessary ambulance transportation." WAC 182-546-0100.[1] Second, costs incurred in "nonemergent" Medicaid transports would hypothetically be reimbursed by the "medicaid agency" in Washington—that being Washington Apple Health. *See* 5000-6000. Finally, the EMS provider could seek supplemental reimbursement from the federal government, pursuant to GEMT.[2]

But the MAA only reimburses the EMS provider for ambulance transports when (1) there has been an ambulance *transport*—transfer of the patient from the point of pickup to the medical facility; (2) the transport is within the scope of the eligible client's *medical program* (Medicaid); (3) the transport is *medically necessary* "based on the client's condition at the time of ambulance trip and as documented in the client's record"; and (4) the transport is appropriate to the client's "*medical need*." *See* 0200.

The MAA[3] reimburses the EMS provider for ALS or BLS services based on "the level of medical services needed **and provided**" during the transport. *See* 0450. Importantly, "[A]n ALS assessment does not qualify as an ALS transport if no [zero] ALS-type *interventions* were *provided* to the client en route to the treatment facility." *Id.* (emphasis added). The MAA defines BLS as the provision of "basic medical services at the scene and/or en route" to a treatment facility. *Id.* ALS is defined as "more *complex services* at the scene and/or en route" to a treatment facility, including, but not limited to, intravenous therapy and cardiac pacing (presumably, placement and use of an EKG). *Id.*

These definitions give rise to a question: If an ALS assessment does not necessarily qualify as an ALS *intervention,* may an ALS assessment qualify as "complex services" that fall under the rubric of ALS services? We believe that the above regulations have created an ambiguity. But we also believe that the EMS provider should resolve this ambiguity in favor of *not* seeking reimbursement for ALS services from the MAA when there has

[1] Because WAC 182-546 shall appear so frequently in this article, we shall abbreviate the citation to this law by using the exact section of WAC 182-546 after each cited portion.

[2] The focus of this article shall primarily be on the first "layer," i.e. when the MAA shall reimburse the EMS provider for ALS services; we cannot address the entire scope of Medicaid billing in one article.

[3] The MAA was established pursuant to RCW 74.09.500, which "established a new program of federal-aid assistance to be known as medical assistance to be administered by the [Washington state health care] authority."

merely been an ALS assessment. Of course, if ALS service—even one ALS service—is provided, then the ambulance transport would qualify for billing at the ALS level, as per the above regulations. Of course, the actual provision of ALS services must be accurately recorded in order to secure such a reimbursement. *See* 0200. For the sake of comparison, we might also consider how the federal regulations on Medicare address the distinction between ALS and BLS.

A Medicare beneficiary's medical condition "must require both the ambulance transportation itself and the level of service *provided* in order for the billed service to be considered medically necessary." 42 C.F.R. § 410.40 (emphasis added). "An ALS assessment does not *necessarily* result in a determination that the patient requires an ALS level of service." 42 C.F.R. § 414.605 (emphasis added). Medicare Part B covers, among other things, reimbursement for BLS, ALS1 and ALS2. *See* § 410.40.

To be eligible for reimbursement at ALS1, the EMS provider must perform "at least one ALS intervention." 42 C.F.R. § 414.605. An ALS intervention "means a procedure that is, in accordance with *State* and local laws, required to be furnished by ALS personnel." *Id.* (emphasis added). Consequently, whether an ALS1 service—by the provision of at least one ALS intervention—has been performed, therefore entitling the EMS provider to ALS1 reimbursement, requires a consideration of Washington law. Thus, the definition of an ALS intervention turns on the distinctions between the scope of practice of an EMT versus a paramedic in Washington, and less on specific procedures that are defined as ALS services, like those delineated in WAC 182-546. Comparing Washington's regulations on ambulance-transportation billing, and federal regulations on Medicare, it appears than an ALS assessment alone does not qualify for Medicaid reimbursement under Washington law, and *may* qualify for Medicare reimbursement under federal law. We hope not to insert any confusion, but EMS providers should be aware of this ambiguous situation.

Safety Citations and "Unpreventable Employee Misconduct"

Under the Washington Industrial Safety and Health Act (WISHA), an employer shall provide a safe and healthful work environment. *See* RCW 49.17.060. Of course, fire departments must comply with the vertical safety standards applicable to firefighters, Washington Administrative Code (WAC) 296-305, and may be cited for not complying with this law. However, no citation may be issued by L&I[4] "if there is *unpreventable* employee misconduct that led to the violation." RCW 49.17.120 (5) (emphasis added). Of course, to claim this defense, "the employer must show the existence

[4] Of course, the Department of Labor and Industries enforces WISHA.

of: (i) A thorough *safety program*, including work rules, training, and equipment designed to prevent the violation; (ii) Adequate *communication* of these rules to employees; (iii) Steps to *discover and correct* violations of its safety rules; *and* (iv) Effective *enforcement* of its safety program as written in practice and not just in theory." *Id.* (emphasis added).[5]

Recently, in *Potelco v. L&I,* No. 73226-9-1 (2016), the Washington Court of Appeals, Division One, affirmed a ruling by the Board of Industrial Insurance Appeals, which found that an employer violated safety regulations applicable to electrical workers—and therefore WISHA—for various reasons. The employer could not successfully assert the "unpreventable employee misconduct" defense, cited above, because the Board found that the employer did not enforce its written safety program in practice. Additionally, the Board found that the employer did not take steps to discover and correct the alleged safety violations (in this case, failure to secure an area within which employees could operate without risking electric shock).

Division One affirmed the Board, and found that an employer fails to "discover and correct" safety violations when "unannounced inspections [by the employer] are infrequent and workers caught violating the rules are not consistently disciplined or penalized." Division One found that crews were forewarned—80 percent of the time—of the employer's "unannounced" safety inspections. When those employees were forewarned of the inspections, there was no way for the employer to *discover* any violations. Additionally, the employer had a written policy stating that employees may be given verbal warnings for violating safety rules, but those warnings were to be documented in writing, but the employer did not do so (consistency of discipline is key). Because those warnings were not properly documented, the employee could receive numerous verbal warnings, yet incur no progressive discipline for repeating the same violation," Division One found. Thus, the employer did not take steps to *correct* safety violations.

The takeaway from *Potelco* is that if the employer discovers that an employee has violated a safety regulation—after an unannounced safety inspection—the employer should discipline that employee, and certainly make a record of that discipline. Otherwise, future violations by that employee may be deemed "preventable." In lieu of "unpreventable employee misconduct," fire departments may be successfully cited—and sued, by injured employees—for violations of WAC 296-305 and RCW 49.17.060. See you on June 24!

[5] We emphasize the words above to simplify when the employer may assert this defense in the event of being cited by L&I, and to illustrate the narrowness of this defense (the employer must prove that all four requirements are met).