

**STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS  
DIVISION OF WORKERS' COMPENSATION**

**INITIAL STATEMENT OF REASONS**

**Subject Matter of Regulations: Official Medical Fee Schedule – Air Ambulance Services**

**TITLE 8, CALIFORNIA CODE OF REGULATIONS  
SECTION 9789.70**

Section 9789.70      Ambulance Services

**BACKGROUND TO REGULATORY PROCEEDING**

In 2003, the Legislature enacted S.B. 228 (Alarcon) as part of workers' compensation reform legislation intended to reduce unnecessary medical and litigation expenses, among other things, in workers' compensation cases in California. [Stats. 2003, ch. 639] As one of its provisions, the bill substantially amended Labor Code section 5307.1, which provided for the Administrative Director to adopt a medical fee schedule for workers' compensation claims which would establish maximum reasonable fees. Commencing January 1, 2004, maximum reasonable fees for medical services other than physician services were to not to exceed 120 percent of fees prescribed in the relevant Medicare payment system. For medical services that were not covered by a Medicare payment system, the maximum reasonable fee paid would not exceed the fee specified in the Official Medical Fee Schedule (OMFS) in effect on December 31, 2003.

In 2003, the Administrative Director adopted regulation 9789.70, effective January 1, 2004, which provided that the maximum fees for ambulance services were 120% of the fee prescribed in the relevant Medicare payment system, and which provided that for services not covered by the Medicare payment system, the maximum fee was the fee specified in the 2003 OMFS.

Prior to the adoption of the OMFS, Congress had adopted the Airline Deregulation Act of 1978, which prohibited states from adopting or enforcing regulations which affected rates charged by air carriers as defined by the Act. In 2009, several air ambulance providers sued various workers' compensation payers in California, asserting that section 9789.70, as sought to be applied to them, was preempted by the federal Airline Deregulation Act of 1978. The plaintiffs have threatened to sue the Division of Workers' Compensation and Department of Industrial Relations, seeking declaratory relief that section 9789.70 is preempted by the Airline Deregulation Act, and an injunction prohibiting the Division of Workers' Compensation from enforcing this section as applied to air ambulance services.

## **NECESSITY**

The Division has determined that application of section 9789.70 to air carriers as defined in the Airline Deregulation Act may likely be preempted by the supremacy clause of the United States Constitution.

## **TECHNICAL, THEORETICAL, OR EMPIRICAL STUDIES, REPORTS, OR DOCUMENTS**

The Division relied upon the following technical, theoretical, or empirical studies, reports, decisions or similar documents in proposing the above-identified regulations:

(1) Decision of the United States Supreme Court: *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

## **SPECIFIC TECHNOLOGIES OR EQUIPMENT REQUIRED (if applicable)**

No specific technologies or equipment are required by these proposed regulations.

## **FACTS ON WHICH THE AGENCY RELIES IN SUPPORT OF ITS INITIAL DETERMINATION THAT THE REGULATIONS WILL NOT HAVE A SIGNIFICANT ADVERSE IMPACT ON BUSINESS**

The Administrative Director has determined that these proposed regulations will not have a significant adverse impact on business. The regulations may increase the cost of air ambulance services in workers' compensation claims. This will directly increase costs to any self-insured employer businesses, self-insured public agencies, and to workers' compensation insurance carriers which have claims involving air ambulance services as medical treatment costs. To the extent that insurance carriers may decide to pass on their increased costs to their insureds, it may increase costs to all insured California businesses. The regulations are expected to have a positive impact on the income of a few air ambulance providers in the state.

The extent of the impact on an affected business is dependent upon the number of workers' compensation claims involving the use of air ambulance services that the business sustains.

## **SECTION 9789.70, subdivision (c)**

### Specific Purpose of This subdivision:

The purpose of the new subdivision is to clarify that the section does not apply to services provided by air ambulance providers which are air carriers as defined by the federal

Airline Deregulation Act of 1978, as amended. The Airline Deregulation Act of 1978 predated the adoption of this section of the Official Medical Fee Schedule, and as it may have preempted regulations which would have an effect on rates charged by air carriers, section 9789.70 might never have legally applied to providers which were air carriers as defined in the Act.

Necessity:

This subdivision is necessary to allow the Division of Workers' Compensation to avoid the hazards and cost of litigation against the Division which would seek to enjoin enforcement of section 9789.70, which is alleged to conflict with the federal Airline Deregulation Act of 1978, which prohibits states from adopting or enforcing regulations which have any effect on airline rates of air carriers.

Consideration of Alternatives:

At this time, the Administrative Director has not identified any more effective nor any equally effective yet less burdensome alternative for avoiding the hazards and cost of litigation on the subject of the conflict of the section's applicability to providers which are air carriers as defined by the Airline Deregulation Act of 1978.