California Workers' Compensation Institute
1111 Broadway Suite 2350, Oakland, CA 94607 • Tel: (510) 251-9470 • Fax: (510) 251-9485

April 13, 2010

VIA E-MAIL: dwcrules@hq.dir.ca.gov

Ms. Maureen Gray
Regulations Coordinator
Division of Workers' Compensation
Post Office Box 420603
San Francisco, CA 94142

RE: Official Medical Fee Schedule – Air Ambulance Services
Article 5.3 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 9789.70

Dear Ms. Gray:

This written testimony regarding the administrative director's (AD) proposed exemption of air ambulance services from the Ambulance section of the Official Medical Fee Schedule is presented on behalf of the members of the California Workers' Compensation Institute. The Institute's membership includes insurers writing 87% of California's workers' compensation premium, and self-insured employers with $30 billion of annual payroll (20% of the state's total annual self-insured payroll).

Recommendation

The Institute recommends that the proposed regulation be withdrawn because the AD has neither the administrative nor constitutional authority to exempt certain providers from the ambulance fee schedule.

Discussion

The Administrative Director has No Authority to Determine Constitutionality

While the administrative director (AD) cites the federal case of Morales v. Trans World Airlines to support her decision to exempt air ambulance, Morales is a federal pre-emption case that falls squarely within the Airline Deregulation Act. The more informative opinion with regard to air ambulance services is that of the Magistrate Judge who dismissed the CalStar class actions. The judge determined that CalStar was in the wrong court at the wrong time with the wrong parties and directed the

plaintiff back to the state to redress its claims. The Division's rationale that the "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" is premature and inconsequential.

The essential issue raised by CalStar is whether the federal Supremacy Clause comes to bear on the state's ability to enforce its medical fee schedule against air ambulance providers. That would require the DWC to determine whether section 5307.1 is constitutional – something that it is constitutionality prohibited from doing.

Section 3.5 of Article III of the California Constitution provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In Greener v. WCAB (1993) 25 Cal.Rptr.2d 539, 6 Cal.4th 1028, the California Supreme Court made it clear that the grant of plenary power to establish a complete workers' compensation system found in California Constitution, Article XIV, section 4 would allow the determination of constitutionality by the WCAB or the DWC if the Legislature included that authority in the workers' compensation act. But the Legislature did not include that authority.

The court in Greener found that the Legislature did not exempt the appeals board from the provisions prohibiting an administrative agency from determining the constitutional validity of statutes. Greener held that until an appellate court considers and determines a constitutional challenge to a statute, the WCAB must continue to enforce those statutes. The same reasoning applies to the DWC.

As suggested by the federal Magistrate Judge, CalStar is, again, in the wrong forum with the wrong parties. Under Article III, section 3.5, the proposed regulation, if implemented, would be invalidated by the courts.

Administrative Authority

The proposed revision of Section 9789.70 will make the ambulance section of the Official Medical Fee Schedule (OMFS) inapplicable to "any air ambulance provider" defined as an "air carrier" under the federal statute. When the Legislature enacted SB 228 in 2003, it included revisions to Labor Code section 5307.1, which authorized the AD to create a medical fee schedule that would establish maximum reasonable fees for all providers. The AD adopted regulation 9789.70, which set the maximum fees for ambulance services at 120% of the relevant Medicare payment system, as authorized by the statute.

There is nothing in section 5307.1 that empowers the AD to determine which medical providers are subject to the schedule and which are exempt, so the AD has no administrative authority to adopt such a regulation.

Government Code section 11342.2 provides:

> Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

In Boehm & Associates (1999) 64 CCC 1350, the District Court of Appeal invalidated a regulation that permitted the employer to avoid interest payments until claim was adjudicated. The court noted:

> "… that the Legislature possesses the plenary constitutional authority to create and enforce a workers' compensation system (Cal. Const., art. XIV, § 4); therefore, any decision of the appeals board or regulation promulgated by the Director of the Division of Workers' Compensation in contradiction to the Workers' Compensation Act is invalid. (See *Coca-Cola Co. v. State Bd. of Equalization* (1945) 25 Cal.2d 918, 922 [administrative regulations may not contravene terms of statutes under which they are adopted].)"

The Supreme Court noted in State Compensation Insurance Fund v. WCAB (Sandhagen) (2006) 71 Cal Comp Cases 1541 that an expression of the need for a rule, no matter how compelling, cannot fill a gap in legal authority.

Cost of Exemption

In the Initial Statement of Reasons, the AD states:

> 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 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.

The AD has provided no evidence that removing the cost control mechanism of the fee schedule "will not have a significant adverse impact on business". The state's WCIS database should have adequate data to, at least, estimate the potential economic impact of removing the control of the fee schedule. Without a fee schedule to rely upon, claims administrators – insurers, employers, municipalities, and other public entities – will be expected to pay the usual and customary fees for air ambulance services.

A cursory review of these Emergency Air Transport charges contained in the ICIS database indicates that the financial impact on all payers will be significant. For accident year 2000 claims with dates of service from 2004 through mid-2009 the total amount billed just for the basic air transport fee (plus air mileage) is $17,354,843. The average cost is $13,698 per incident. The average total amount paid is $6,814,377, or an average of $5,378 per incident. These figures **do not** include itemized fees for medical supplies or other associated miscellaneous charges – only the basic fees and mileage.

In absence of a fee schedule to control these costs, these payers would have seen a 154.7% increase in the fees for these services. ICIS represents roughly 60% of the total system. If another 40% is added to these estimates, the potential cost of air ambulance services over a similar period without a fee schedule would be in excess of $20 million.

Application of the Proposed Regulation

The AD has declared that the ambulance section of the OMFS "may likely" be pre-empted by the federal statute and has proposed to exclude air ambulance services from the fee schedule but has provided no timeframe that this exclusion is intended to cover. If the Division concedes, with no adjudication by the appropriate court, that air ambulance services are not covered by the OMFS, then the workers' compensation system will be litigating these liens from 2004 through 2010. The financial impact of eliminating the control mechanism will increase medical care costs markedly and the ensuing litigation over the appropriate fee will add more expense that the Legislature intended to avoid with the imposition of section 5307.1.

Thank you for considering these comments. Please contact me if clarification or other assistance is needed.

Sincerely,

Michael McClain
CWCI General Counsel

MMc/pm

cc: John Duncan, DIR Director
Carrie Nevans, DWC Acting Administrative Director
CWCI Legal Committee
CWCI Claims Committee
CWCI Medical Care Committee
CWCI Regular Members
CWCI Associate Members