

## [From Out of the Blue Comes a Proposed Exemption for Air Ambulance Companies to Avoid California Workers' Compensation Official Medical Fee Schedule](#)

Posted on March 11, 2010 by [Larry Golub](#)

This week, the Administrative Director of the Division of Workers' Compensation of the California Department of Industrial Relations ("DWC") [proposed a regulation](#), California Code of Regulations, title 8, Section 9789.70(c), that would completely exempt air ambulance companies from the Official Medical Fee Schedule ("OMFS") that applies to all other providers who furnish medical services under the California workers' compensation system.

The DWC's purported impetus for this abrupt action was "to avoid the hazards and cost of litigation against the Division," as stated in the DWC's [Initial Statement of Reasons](#). That Statement further advised that the DWC based its proposed regulation on the contention that the OMFS may likely be preempted by the Airline Deregulation Act of 1978, which it says "prohibits states from adopting or enforcing regulations which have any effect on airline rates of air carriers."

This issue of preemption by the Federal Aviation Act of 1958, as amended by the Airline Deregulation Act of 1978 ("FAA/ADA"), was asserted in a lawsuit filed last year by California Shock Trauma Air Rescue ("CALSTAR"), an air ambulance company rendering services primarily in California. That action, filed in federal court in Sacramento against more than 75 workers' compensation insurers and self-insured employers, is entitled *California Shock Trauma Air Rescue v. State Compensation Insurance Fund, et al.* [This blog reported on that case on July 30, 2009](#), after the federal district court dismissed the case, finding that the federal court lacked subject matter jurisdiction over CALSTAR's claims.

CALSTAR then appealed the action to the Ninth Circuit Court of Appeals, where the case is now fully briefed and awaiting oral argument.

Apparently not satisfied with the court's decision in its federal court action, CALSTAR threatened to sue the DWC unless it did something to offer relief to CALSTAR and other air ambulance companies. In an article posted on [workcompcentral.com](#), the president and chief executive officer of CALSTAR stated that, after having the federal trial court dismiss his company's action, "we went back to the DWC and said, 'We've been instructed to sue you,' is what brought this action on their part." It is clear that the threat of a lawsuit prompted the DWC to issue the proposed regulation and completely exempt CALSTAR and other air ambulance companies from the ambit of the OMFS.

The defendants in the pending federal court action contend that the FAA/ADA does not preempt the OMFS as it applies to the medical services that air ambulance companies provide in California, and indeed exempting such companies from the scope of the OMFS on preemption ground is anathema to the legislative goals and purposes of the FAA/ADA. Larry Golub and Sandra Weishart of Barger & Wolen LLP represent a number of the defendants in the litigation.

The DWC will be holding [a full-day hearing](#) on the proposed regulation in Oakland on Tuesday, April 13, 2010, to receive statements and argument from all interested persons.