WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ADAN LOMELI, ***Applicant***

vs.

GRIMMER FARMS; ZENITH INSURANCE COMPANY, ***Defendants***

RAUL MORALES, ***Applicant***

vs.

PLANTERS HAY, INC.; ZENITH INSURANCE COMPANY, ***Defendants***

REACH AIR MEDICAL SERVICES, LLC et al., ***Lien Claimants.***

Adjudication Numbers: SAU10596185 ADJ10596185
Sacramento District Office
ADJ11927201
San Diego District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Lien claimant, Reach Air Medical Services LLC ("Reach"), seeks reconsideration and removal of the Findings and Order of August 24, 2023 in ADJ11927201. Therein the workers' compensation administrative law judge ("WCJ") found, in pertinent part, that on February 8, 2019, applicant Raul Morales, while employed as a Forklift Driver by Planters Hay, Inc., insured by defendant Zenith Insurance Company ("Zenith"), sustained industrial injury to his left lower extremity, that the parties resolved applicant's case-in-chief by Compromise and Release approved March 20, 2023, that Reach provided air ambulance services reasonably required to cure or relieve applicant from the effects of his industrial injury, that Reach "was shown to have been authorized to provide interstate transportation by air as a common carrier at all pertinent times," that Labor Code section 4600 was not shown to be preempted by the Airline Deregulation Act of 1978, that the Workers' Compensation Appeals Board ("WCAB") was shown to have jurisdiction over disputes regarding the value of air ambulance services incurred in this case pursuant to section

4600, and that the appropriate venue for resolution of disputes regarding the value of air ambulance services incurred pursuant to section 4600 before December 27, 2021 was shown to be the WCAB.

Reach contends that the Airline Deregulation Act of 1978 ("ADA") preempts the state policy-based "reasonableness" standard of section 4600 to reduce air ambulance market-based reimbursement, and that the Appeals Board should sever the allegedly preempted portion of section 4600 to retain jurisdiction and to award payment to air ambulance providers based on their market-based charges.

Zenith filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

As a preliminary matter, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, we treat the WCJ's finding that Labor Code section 4600 is not preempted by the ADA as a "final" decision on the threshold issue of jurisdiction. Accordingly, we address Reach's petition for removal and reconsideration as a petition for reconsideration taken against a "final order."

Turning to the merits of Reach's contentions upon reconsideration, we have considered the allegations of Reach's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent indicated in the attachment to this opinion, we will deny Reach's Petition for Reconsideration.

As further discussed below, and consistent with the WCJ's Findings and Order and Opinion on Decision of August 24, 2023, we conclude that where an air ambulance carrier files a lien seeking WCAB enforcement of its right to reimbursement, the Airline Deregulation Act of 1978 does not preempt Labor Code sections 4600(a) and 4603(b), pursuant to which the WCAB may require the parties to present evidence on the market value of the air ambulance carrier's services and determine the market price within the range of evidence that has been presented by the parties.[1]

We acknowledge the Appeals Board's statement in *Enriquez v. Couto Dairy* (2013) (78 Cal.Comp.Cases 323, 331) [en banc], responding to an allegation made by Zenith therein, that "in the absence of AD Rule 9789.70, Labor Code section 4600 would [according to Zenith] limit [the air ambulance's] lien claim to a "reasonable" amount, so section 4600 is preempted in the same way the rule is preempted. We reject the contention because there is no legal authority for the proposition that section 4600 is preempted by federal law." Although we remain persuaded that pertinent legal authority does not mandate preemption of section 4600 by the ADA, we treat the above statement as non-binding dicta. This is because the statement was unnecessary to *Enriquez's* holding that the ADA preempts the Official Medical Fee Schedule for air ambulance services found in the 2009 version of Administrative Director Rule 9789.70. (See *Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168.)

FURTHER DISCUSSION IN SUPPORT OF THE WCJ'S DECISION

I. THE LANDSCAPE OF ADA PREEMPTION

In *Enriquez, supra,* the Board discussed the broad reach of ADA preemption and the limits of that reach. On one hand, a state law that "relate[s] to a price, route, or service of an air carrier" (49 U.S.C. 9 41713(b)(1)) is preempted even if the law is not specifically designed to affect such prices, routes, or services, or the effect is only indirect; the preemption provision displaces all state

[1] Upon reconsideration, the Appeals Board is not limited to consideration of the issues defined by the parties. (See *Ramirez v. Workers' Comp. Appeals Bd.* (2017) 10 Cal.App.5th 205, 221 [82 Cal.Comp.Cases 327, 336], citing *Tate v. Industrial Accident Comm.* (1953) 120 Cal.App.2d 657, 663.)

laws "relating to" a price, route, or service of an air carrier, even state laws that are consistent with the ADA. On the other hand, the scope of the phrase "relating to" is not unlimited; only state laws having a "significant effect" on prices are preempted, while those having a "too tenuous, remote, or peripheral" impact are not. The Board surveyed federal case law and then stated: "If state civil negligence claims against airlines for unsafe seating are not too tenuous, remote, or peripheral to fall within the "relating to" provisions of 49 U.S.C. 9 41713(b)(1), then we have no doubt that state laws directly regulating costs for air ambulance services are also preempted." (78 Cal.Comp.Cases at 329-330.)

We continue to recognize that the scope of ADA preemption is broad. In *Northwest, Inc. v. Ginsberg* (2014) 572 U.S. 273, 188 L.Ed.2d 538, 546, 134 S.Ct. 1422, 1428 ("*Ginsberg"*) the U.S. Supreme Court expanded upon its holdings in *Morales v. Trans World Airlines, Inc.,* 504 U. S. 374, 378, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) ("*Morales*") and *American Airlines, Inc. v. Wolens,* 513 U. S. 219, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) ("*Wolens")*, finding that state common law claims may be preempted by the ADA. The Court concluded that the ADA preempted a frequent flyer's claim against Northwest (now Delta) for violating Minnesota's implied covenant of good faith and fair dealing. The Court reiterated that a state law claim "relates to" "rates, routes, or services" and is preempted by the ADA if it has "a connection with, or reference to, airline" prices, routes, or services. The Court found: (1) the phrase "other provision having the force and effect of law" within the ADA's preemption provision (49 U.S.C. § 41713(b)(1) - preempting state "law[s], regulation[s], or other provision[s] having the force and effect of law") includes common-law claims; and (2) a state-law claim for breach of the implied covenant of good faith and fair dealing is pre-empted "if it seeks to enlarge the contractual obligations that the parties voluntarily adopt." (*Ginsberg*, 572 U.S. at 276, 134 S. Ct. at 1426.)

In the ten years that have passed since the Board's decision in *Enriquez*, however, a number of federal appellate opinions have directly addressed the issue of ADA preemption of state workers' compensation laws. Yet we are not persuaded that those opinions require a finding that Labor Code section 4600(a) is preempted by the ADA in this case.[2]

[2] At the same time, we acknowledge that Article III, section 3.5(c) of the California Constitution does not preclude the Board from determining that a state law is unconstitutional if the determination is based on an extensive body of federal or state case law. (*Navarro v. A&A Farming* (2002) 67 Cal.Comp.Cases 145 (Appeals Board en banc) [finding federal preemption of state statute based on extensive body of federal and state case law].)

In *Air Evac Ems v. Sullivan* (5th Cir. 2021) 8 F.4th 346 ("*Sullivan*"), the Fifth Circuit Court of Appeal found certain provisions of the Texas Labor Code preempted by the ADA because they regulated the prices that insurers must pay to providers for various medical services utilized by their beneficiaries, including air transport services. The Fifth Circuit Court of Appeal stated: "Two of our sister circuits have unanimously held that the ADA preempts price controls on air ambulance services set by state workers' compensation regulations. See *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751 (4th Cir. 2018); *EagleMed LLC v. Cox*, 868 F.3d 893 (10th Cir. 2017). We agree." (*Sullivan, supra,* 8 F.4th at 350.)

Similarly, in *Guardian Flight LLC v. Godfread* (8th Cir. 2021) 991 F.3d 916, 921 the Eighth Circuit Court of Appeal explained:

> […] The payment provision [of the North Dakota statute in question] effectively caps certain air ambulance prices, however, by mandating the acceptance by an out-of-network provider of the insurer's payment and prohibiting the provider from billing the insured for any remaining balance. The insurer must reimburse out-of-network providers at a rate "equal to the average of the insurer's in-network rates for air ambulance providers," N.D. Cent. Code § 26.1-47-09(1), with the air ambulance service provider being required to accept that rate. Similarly, the subscription provision prohibits air ambulance providers from entering into price-establishing subscription agreements with consumers. These two provisions are clearly "related to" and "hav[e] a connection with" the price that air ambulance providers charge for their services. See *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 767 (4th Cir. 2018) (holding that state statutes establishing state-paid maximum amounts to air ambulance providers and limiting the providers' ability to seek recovery from anyone else "clearly have a connection to air ambulance prices"). We thus conclude that the ADA preempts both the payment provision and the subscription provision. See id. at 769-70; *Bailey v. Rocky Mountain Holdings*, LLC, 889 F.3d 1259, 1272 (11th Cir. 2018) (holding that the ADA preempts the enforcement of a state statute prohibiting an air ambulance provider's balance billing); *EagleMed LLC v. Cox*, 868 F.3d 893, 902-04 (10th Cir. 2017) (holding that the ADA preempted a state statute that "expressly establish[ed] a mandatory fixed maximum rate that [would] be paid by the State for air-ambulance services provided to injured workers covered by the Worker's Compensation Act").[3]

[3] But see *Ferrell v. Air EVAC EMS, Inc.* (8th Cir. 2018) 900 F.3d 602, 610, wherein the Eighth Circuit opined: "Absent further federal legislation, it seems obvious that a state or federal court asked to determine these contract and restitution issues [as between "balance-billed" consumers and air ambulance carriers] will necessarily look to governing principles of state law. This is not contrary to the marketplace principles adopted in the ADA. It is the way disputes between private contracting parties are decided in a deregulated marketplace. Thus, [our] determination that [consumers'] class action declaratory judgment claims are preempted as pleaded does not leave air-ambulance patients without potential, unpreempted judicial remedies under *Wolens* and *Ginsberg*."

Turning to California decisional law of relevance here, in *People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772 ("*Pac Anchor*") our Supreme Court considered whether the Attorney General's unfair competition action against a trucking company,[4] for misclassification of drivers as independent contractors and other violations of state labor and unemployment insurance law, "related to [the trucking company's] price, route, or service" (49 U.S.C. § 14501 (c)(1)) and so was preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). Similar to the Airline Deregulation Act's express preemption provision, the FAAAA provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier…with respect to the transportation of property." (49 U.S.C. § 14501 (c)(1).) The Court noted that the U.S. Supreme Court had "rejected the notion" that under the broad preemption provision of the federal employee retirement income security act ("ERISA"), Congress intended to preempt "basic regulation of employment conditions," even though such regulation "will invariably affect the cost and price of services." Relying upon this view of Congressional intent, the Court held the FAAAA did not "facially preempt" the Attorney General's unfair competition action; nor was the action preempted "as applied." The action did not relate to motor carrier prices, routes, or services when enforced through California's unfair competition laws because they regulate employer practices in all fields and require motor carriers to comply with labor laws that apply to the classification of their employees. Similarly, state wage orders on wages, hours, and working conditions in the transportation industry do not refer to prices, routes or services. If minimum wage and employer recordkeeping requirements have an effect on the trucking company's prices, routes or services, the effect is indirect and so the requirements fall outside the scope of the U.S. Supreme Court's test in *Morales.* Though the unfair competition action may have some indirect effect on prices or services, the effect is " 'too tenuous, remote, [and] peripheral … to have pre-emptive effect.' " (*Pac Anchor*, 59 Cal.4th at 786, quoting *Morales* at 504 U.S. at p. 390.)

Similarly, in *Valencia v. SCIS Air Security Corp.* (2015) 241 Cal.App.4th 377 ("*Valencia*"), the Court of Appeal found no preemption of an employee's claims that her employer, who provided security services for airlines' in-flight catering operations, violated California meal and rest break and wage laws. (Lab. Code, §§ 226.7, 512(a) & 1194.) The Court stated that the

[4] Bus. & Prof. Code, §§ 17200 et seq.

case law relevant to preemption "provide[s] a spectrum with [*Ginsberg*] on one end (preemption) and [*Pac Anchor*] and [*Dilts*][5] on the other (no preemption)." (*Valencia,* 241 Cal.App.4th at 384.) The Court described the spectrum this way:

> Laws are more likely to be preempted when they operate at the point where carriers provide services to customers at specific prices, such as the frequent flyer program in [*Ginsberg*] (*Dilts,* at p. 646.) On the other end of the spectrum, generally applicable background regulations that are several steps removed from prices, routes, or services are not, such as the labor laws in *Harris* and *Dilts*. (*Ibid*.) This is true even if compliance with state laws will raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment. (*Ibid*.) Despite the potential cost increase, the carrier is still the decision maker as to the price, route, and service, that it offers its customers. (*Id*. at p. 647.)
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> (*Valencia,* 241 Cal.App.4th at 384-385, internal quotations omitted.)

In *People ex rel. Harris v. Delta Air Lines, Inc.* (2016) 247 Cal.App.4th 884 ("*Harris*"), the Court of Appeal reached the opposite conclusion. The Court reviewed *Ginsberg, Wolens, Morales* and *Pac Anchor*, and found the Attorney General's unfair competition action against Delta expressly preempted. The Attorney General claimed that the airline's "Fly Delta" mobile application violated privacy requirements mandated by California's Online Privacy Protection Act of 2003 ("OPPA").[6] The mobile application could be used to check-in online for an airplane flight, view reservations for air travel, rebook cancelled or missed flights, pay for checked baggage, track checked baggage, and access a user's frequent flyer account. Therefore, the unfair competition action "relate[d] to" the airline's services, and the Attorney General's allegations had a "connection with, or reference to" Delta's services. Further, because the OPPA would require Delta to meet state standards regarding privacy policy requirements instead of market forces that determined the airline's selection and design of its mobile application, the effect of the OPPA

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[5] In *Dilts v. Penske Logistics, LLC* (9th Cir. 2014) 769 F.3d 637, 640, the Ninth Circuit found no preemption of a lawsuit brought by several employee drivers against a trucking company for failure to provide meal and rest breaks to its drivers, in violation of California labor and employment laws. The court held that the state laws apply to all industries and therefore any effect on the trucking company's "price[], route[], or service[]" is too remote. (*Id.* at pp. 647, 649.) Further, the court rejected the trucking company's argument that complying with state law would drive up their cost of business and thus force it to raise prices and affect routes or services, because any such effect is too remote. (*Id.* at p. 648.) Finally, the court noted that Congress did not intend for trucking companies to evade state meal and rest break laws when it enacted the ADA. (769 F.3d at pp. 647, 649.)

[6] Bus. & Prof. Code, §§ 22575–22579.

would not be "tenuous, remote or peripheral" under the U.S. Supreme Court's test in *Morales*. (*Harris, supra,* 247 Cal.App.4th at 903-904.)

The same result obtained in *Grupp v. DHL Express* (*USA*), *Inc.* (2015) 240 Cal.App.4th 420 ("*Grupp*"), where the Court found both ADA preemption and FAAA preemption of an action brought by two claimants under California's False Claims Act. (Gov. Code, §§ 12650 et seq.) The claimants alleged that the delivery company DHL overcharged and fraudulently billed the state for delivery services. The Court found that the claimants' allegation that DHL overcharged for the services it actually provided, demonstrated that the claims necessarily related to or were connected to the delivery company's prices and services. There also was a connection to DHL's routes because the claimants suggested that when an air delivery fee was paid, the delivery company was obligated to use air routes instead of ground routes, or some combination. The Court stated:

> It cannot be said that the impact of the…claims is too tenuous for preemption. Simply put, claims under the State Act would cause DHL to alter prices, routes and services, i.e., it could no longer impose challenged surcharges and use ground routes for air packages. This direct impact would be significant, which is unacceptable. (*Wolens, supra,* 513 U.S. at p. 224; *Morales, supra,* 504 U.S. at pp. 390–391.) Inferably, there are times when DHL or other delivery companies charge for air delivery but find it more economical or practical to deliver by ground. If delivery companies are constrained by the State Act and are required to opt for more expensive routes, or more time-consuming routes, they will become more expensive and therefore less competitive, which Congress sought to avoid.
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> (*Grupp,* 240 Cal.App.4th at 428.)

II. ADA PREEMPTION IN THIS CASE

Under Labor Code section 4600(a), the employer's liability for medical treatment includes liability for medical treatment transportation expense.[7] (*Avalon Bay Foods v. Workers' Comp. Appeals Bd.* (*Moore*) (1998) 18 Cal. 4th 1165, 1175 [63 Cal.Comp.Cases 902, 909].) Here, Reach

[7] Section 4600(a) states in full: "Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer. In the case of his or her neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

seeks to enforce the employer's liability for medical treatment transportation expense by invoking the WCAB's jurisdiction to enforce a lien filed pursuant to Labor Code section 4903(b).[8]

However, the employer's liability is limited to treatment expense that is "*reasonably* required to cure or relieve" the effects of the industrial injury.[9] In fact, the WCAB is without jurisdiction to allow a lien against compensation in satisfaction of a debt not authorized by statute. (See *Rowland v. Workers' Comp. Appeals Bd.* (1977) 66 Cal.App.3d 448 [42 Cal.Comp.Cases 88] [WCAB without jurisdiction to allow insurance company's lien per section 4903(c) for sums paid under disability policy].)

Thus, to the extent Reach seeks reimbursement of medical treatment transportation expense without regard to its reasonableness, California workers' compensation law places Reach in a paradoxical situation. If section 4600(a) is without a "reasonableness" standard due to preemption, the WCAB is without jurisdiction to allow Reach's lien because preemption renders the debt unreasonable under section 4600 and unauthorized by section 4903.

However, the Court of Appeal's "spectrum" approach in *Valencia, supra,* offers a way out of this dilemma. We recall that at one end of the spectrum, a state law is more likely to be preempted when it has the effect of forcing air carriers to provide services to customers at specific prices. At the other end, generally applicable background laws that are several steps removed from prices, routes, or services are not preempted, even if compliance with the law will raise an air carrier's overall cost of doing business.

Under this "spectrum" approach, if sections 4600 and 4903 are construed as generally applicable background laws, several steps removed from prices, routes, or services, they are not preempted. In the context of air ambulance liens, we are persuaded that merely requiring the parties to present evidence on the market value of the air ambulance carrier's services, and then determining the market price within the range of evidence that has been presented by the parties, will avoid preemption by the ADA. This interpretation of sections 4600 and 4903 makes them more akin to generally applicable background laws, several steps removed from prices, routes, or

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[8] Section 4903 states in relevant part: "The appeals board may determine, and allow as liens against any sum to be paid as compensation, any amount determined as hereinafter set forth in subdivisions (a) through (i). […] The liens that may be allowed hereunder are as follows: […] (b) The reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Section 4600) […] ."

[9] See *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 166 [48 Cal.Comp.Cases 566, 570; *Nash v. Workers' Comp. Appeals Bd.* (1994) 24 Cal.App.4th 1793, 1811 [59 Cal.Comp.Cases 324, 338].

services, thereby avoiding preemption and aligning this case with the various strands of federal and state case law. This approach also is consistent with U.S. Supreme Court jurisprudence, in that it coincides with the ADA's purpose of ensuring that marketplace competition, not state regulation, determines air carrier prices. This approach also avoids *Ginsberg's* prohibition against 'enlarging contractual obligations that the parties voluntarily adopt.'

By participating in California's workers' compensation system, Reach and Zenith have submitted themselves to this State's statutory scheme, pursuant to which Zenith is required to pay for medical treatment transportation services provided by Reach, though the exact market value is undetermined when the services are first provided. Under our interpretation of sections 4600 and 4903, both Reach and Zenith will present evidence of the market value of Reach's services, and the WCAB may determine the market price within the range of evidence that has been presented by the parties, without running afoul of ADA preemption. This approach does not violate the Tenth Circuit Court of Appeal's decision in *Cox*, because the Court allowed that even where Wyoming's schedule for payment of air ambulance providers was preempted, Wyoming, as payor from its workers' compensation fund, was not required to pay whatever amount the air ambulance carrier chose to bill. (See *Cox, supra,* 868 F.3d at 906: ("[Air ambulance providers] have not identified a single provision in the Airline Deregulation Act or any other federal statute which would require [the Wyoming workers' compensation fund] to make any payment of air-ambulance claims whatsoever, much less payment at whatever rates [the providers] choose to charge them.")

Finally, in connection with Reach's contention that the Board has authority to sever the "reasonableness" language of section 4600(a) and to enforce the remainder of the statute – in effect requiring the Board to allow reimbursement of whatever amount Reach chooses to charge – we conclude that because there is no preemption of the statute as construed herein, it is unnecessary to sever the "reasonableness" language of section 4600(a).

For the foregoing reasons,

IT IS ORDERED, that the Petition for Reconsideration filed by Reach Air Medical Services LLC is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 17, 2023

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

REACH AIR MEDICAL
ADAN LOMELI
CHERNOW, PINE AND WILLIAMS
FELDESMAN, TUCKER, LEIFER, FIDELL, LLP
JOSHUA FUCHS
ZENITH INSURANCE
STOCKWELL HARRIS
GILSON DAUB
TRISTAR
MEADOWBROOK INSURANCE
YORK
WAI CONNOR (2)
ALLAN SENKOW

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

LEWIS BRISBOIS
TESTAN LAW
AMERICAN CLAIMS
STRATMAN WILLIAMS ABREGO
COLEMAN CHAVEZ
HEALTHCARE RESOURCE GROUP
LUNA LEVERING
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JTL/*ara*

REPORT AND RECOMMENDATION ON PETITION FOR RCONSIDERATION/REMOVAL

[…]

INTRODUCTION

Trial in the Special Adjudication Unit proceedings of the above-captioned cases was held on July 27, 2023, and the matter was submitted for decision at that time to Workers' Compensation Judge Christopher M. Brown. A Findings of Fact, Order; Opinion on Decision was issued on August 24, 2023. Lien Claimants filed a timely, sufficiently served and verified (amended filing) Petition for Reconsideration or Removal on September 18, 2023.

The Petition states the legal basis for the filing is Labor Code Sections 5903(a) and (c) and alternatively asserts Removal would be proper as the decision will result in irreparable harm. Specifically, Petitioner asserts that the Finding that Labor Code Section 4600 was not shown to be preempted by the Airline Deregulation Act of 1978 (FOF 13) is improper and should be reversed.

DISCUSSION

PETITIONER'S BASIS FOR RECONSIDERATION PURSUANT TO LABOR CODE § 5903(a) MAY BE CORRECT BASED ON ARTICLE III SECTION 3.5 OF THE CALIFORNIA CONSTITUTION

The basis for Petitioner asserting a Labor Code § 5903(a) argument is unclear. The Board has jurisdiction over controversies between an employer and employee and shall resolve the disputes upon request of either party.[1] The parties clearly submitted the issue of preemption of Labor Code Section 4600 by the Airline Deregulation Act of 1978 to the WCJ for decision. (MOH Page 4) Title 8 CCR § 10330 states:

> In any case that has been regularly assigned to a workers' compensation judge, the workers' compensation judge shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in Labor Code section 3715. Orders, findings and decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted. (Title 8, CCR§ 10330)

[…]

[1] Labor Code §4604 Jurisdiction of the appeals board to settle disputes: Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5.

THE FINDING THAT LABOR CODE SECTION 4600 IS NOT PREEMPTED BY THE AIRLINE DEREGULATION ACT OF 1978 IS BASED ON THE EN BANC DECISION ISSUED IN L*UIS ENRIQUEZ (DEC'D) V. COUTO DAIRY, ZENITH INS. CO (2013) (ENRIQUEZ)*

The issue of preemption of Labor Code Section 4600 by the Airline Deregulation Act of 1978 was addressed in *Luis Enriquez (Dec'd) v. Couto Dairy, Zenith Insurance Company* (2013) 78 Cal. Comp. Cases 323 (WCAB en banc).[2] The *Enriquez* case focused on the issue of preemption of Regulation 9789.70 by the Air Line Deregulation Act of 1978. Preemption of Labor Code Section 4600 by the Airline Deregulation Act of 1978 was asserted by the defendant in that case, which is also the defendant in this case. As discussed in the Opinion on Decision the board rejected that contention in the en banc decision. (OOD 8-24-2023 Pages 5 - 10) The undersigned recognizes that ten years have passed since the decision was issued in *Enriquez* and multiple decisions from Federal Courts and other State Courts have been issued as identified in the Pre-Trial Points and Authorities filed by the parties in this case. These cases, including *Northwest, Inc. v. Ginsberg* (2014) 134 S.Ct. 1422 (*Ginsberg*), [are alleged by Reach to] provide legal authority for the proposition that Labor Code Section 4600 is preempted by the Air Line Deregulation Act of 1978. […]

EXSITING EN BANC DECISIONS ESTABLISH THE PROCESS FOR DETERMING WHAT LIEN CLAIMANT SHOULD BE PAID IF LIEN CLAIMANT FAILS TO ESTABLISH PREEMTION OF LABOR CODE SECTION 4600

Lien Clamant holds the affirmative on issues required to establish its right to compensation based on *Colamonico v. Secure Transportation* (2019) 84 Cal.Comp.Cases 1059 (Appeals Board en banc). Petitioner's argument that "the entire ADA preemption issue can be avoided by construing Section 4600's term "reasonable" when applied to air-ambulances - to mean the market-based rate provider charges to private insurers" [l]eads to a circular analysis as the cases of *Kunz* and *Tapia* provide for consideration of what providers of a service accept for the service in a geographically relevant area at the time the services were provided. This method of determining what lien claimants are entitled to be paid is a market rate analysis. While the amount billed by a provider is a starting point for the analysis the defendant's Constitutional due process rights cannot be waived by a statute or regulation. (OOD 8-24-2023 Pages 10 - 12.) Following Petitioner's argument that, "By construing the "reasonableness" standard factors to focus exclusively on the GMR Providers's [sic] market-based rates, and by avoiding using other factors to detract from or reduce the GMR Providers' rates, the Board could resolve the question under existing doctrine without invalidating any part of Section 4600 or running afoul of the ADA's federal preemption provisions[,]" would violate defendant's Constitutional right to due process [in the same way that concluding Reach] must accept what defendant asserts is the "market rate" without consideration of any evidence beyond the Explanation of Review issued when the invoice is received. (Petition Page 25, ODD 8-24-2023 Pages 11 – 12.)

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit.8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236).)

If Labor Code Section 4600 is not found to be preempted by the Airline Deregulation Act of 1978, then the Petition should be denied and the consolidated proceeding should be unconsolidated with the individual cases returned for evaluation on an individual basis pursuant to existing en bane decisions to ensure each lien claim is evaluated on its own merits and all parties are afforded due process.

DATE: September 22, 2023

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE