WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS ENRIQUEZ (DECEASED), ***Applicant,*** **vs.** **COUTO DAIRY and ZENITH INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ6833713** **(Stockton District Office)** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

INTRODUCTION

Administrative Director ("AD") Rule 9789.70(a) provides, in relevant part, that "[t]he maximum reasonable fee for ambulance services rendered after January 1, 2004 shall not exceed 120% of the applicable fee for the Calendar Year 2004 set forth in CMS's Ambulance Fee Schedule, which is established pursuant to Section 1834 of the Social Security Act (42 U.S.C. § 1395m) and applicable to California." (Cal. Code Regs., tit.8, § 9789.70.)

In the Opinion on Decision that accompanied the Findings and Order of September 21, 2012, the workers' compensation judge ("WCJ") concluded that, to the extent it purports to apply to air ambulance services covered by the federal Airline Deregulation Act of 1978 ("ADA"), AD Rule 9789.70 is preempted. In the Findings and Order, the WCJ therefore found that "on April 26, 2009, [AD Rule 9789.70] did not apply to the provision of air ambulance services[,]" and that "lien claimant Mercy Air Services [("Mercy")] has established that the reasonable value of its services on behalf of defendant's employee Luis Enriquez on April 26, 2009 is $11,132.93." The WCJ ordered Zenith Insurance Company ("Zenith") to pay that sum to Mercy.

The Appeals Board granted Zenith's petition for reconsideration in order to further study the factual and legal issues. Thereafter, in order to secure uniformity of decision in the future, the Chairwoman of the Appeals Board, upon a majority vote of its members, assigned this case to the

Appeals Board as a whole for an en banc decision.[1] We hold that: (1) neither Article III, section 3.5 of the California Constitution nor Labor Code section 5307.1 prevents the Appeals Board from finding preemption of AD Rule 9789.70, which contains the Official Medical Fee Schedule ("OMFS") for air ambulance services; (2) the ADA preempts AD Rule 9789.70 if the lien claimant for air ambulance services is an "an air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA; and (3) the air ambulance provider has the burden of showing it is an "an air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA, including showing that it is authorized to provide interstate air transportation.

BACKGROUND

On April 26, 2009, applicant Luis Enriquez was working on a farm when he was gored by a bull, ultimately resulting in his death. At the time of the injury, Enriquez was employed by Couto Dairy, who was then insured for workers' compensation by Zenith. Mercy provided air ambulance services by airlifting Enriquez from the injury site to a hospital in Modesto, a distance of about 26 miles. Mercy billed Zenith in the amount of $11,132.93. Pursuant to AD Rule 9789.70(a), Zenith reimbursed Mercy in the amount of $4,756.42.

On January 19, 2010, the underlying claim for death benefits was settled by Order Approving Compromise and Release. Mercy subsequently filed a lien for the balance of its bill.

On April 23, 2012, Mercy's lien proceeded to trial before the WCJ. The parties stipulated that on April 26, 2009, Mercy was a valid corporation in good standing within California, that Mercy has a valid carrier certificate issued by the Federal Aviation Administration ("FAA"), and that Zenith paid 120 percent of the Medicare rate ($4,756.42) for all charges related to the date of service. The WCJ received exhibits and testimony offered by the parties, and the matter was submitted for decision.

On September 21, 2012, the WCJ issued the Findings and Order disputed here. The WCJ found, in essence, that AD Rule 9789.70 was preempted by the ADA of 1978, and that Mercy was entitled to the

[1] 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].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

full $11,132.93 it had billed.

Zenith petitioned for reconsideration, contending that (1) by making a substantive ruling on preemption, the WCJ exceeded his authority under the California Constitution; (2) the WCJ erred in concluding that AD Rule 9789.70 is preempted by the ADA; and (3) if the ADA preempts Rule 9789.70, it also preempts Labor Code section 4600, in which case Zenith allegedly "owes Mercy nothing."[2]

The WCJ submitted a Report and Recommendation.

Mercy filed an answer and a request for an en banc decision.

We received a request to submit an amicus brief and request for an en banc decision from California Shock Trauma Air Rescue and Reach Air Medical Services, two air ambulance companies who allege they have hundreds of pending lien claims similar to Mercy's. Their brief has been considered.

We also received an objection to an en banc opinion from the law firm of Porter & Scott, who alleges that it represents "numerous employers and insurers in air ambulance lien claims" throughout California. The objection included a request that we delay a decision after reconsideration until there is a ruling by a WCJ on a petition to consolidate filed in a different case. We have considered Porter & Scott's objection but deny their request for delay.

DISCUSSION

I. NEITHER ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION NOR LABOR CODE SECTION 5307.1 PREVENTS THE APPEALS BOARD FROM FINDING PREEMPTION OF AD RULE 9789.70.

Article III, section 3.5(c) of the California Constitution declares that "[a]n administrative agency … has no power … [t]o declare *a statute* unenforceable, or to refuse to enforce *a statute* on the basis that federal law … prohibit[s] the enforcement of such *statute* unless an appellate court has made a determination that the enforcement of such *statute* is prohibited by federal law … ." (Italics added.)

[2] Zenith also contends that it was denied due process on the issue of preemption. The contention is without merit. In his September 21, 2012 Opinion on Decision, the WCJ explained that he had issued a decision on June 26, 2012 but vacated it after Zenith filed a petition for reconsideration, raising "lengthy arguments" on "the question of federal preemption." Thus the WCJ gave Zenith the opportunity to raise the issue of preemption, and the WCJ responded to it. There was no denial of due process.

Although Article III, section 3.5(c) applies to the Appeals Board (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 [58 Cal.Comp.Cases 793, 798]), it has no bearing on the Appeals Board's ability to declare a *regulation* preempted by federal law. This is because the provision refers only to an administrative agency's lack of power "[t]o declare *a statute* unenforceable[.]" As further discussed below, we are finding preemption of AD Rule 9789.70, a *regulation*.

However, Zenith contends that because Labor Code section 5307.1 requires a fee schedule for air ambulance services, Article III, section 3.5(c) prohibits the Appeals Board from refusing to apply the fee schedule based on preemption. We disagree.

Labor Code section 5307.1(a)(1) provides in relevant part:

> "The administrative director, after public hearings, shall adopt and revise periodically an official medical fee schedule that shall establish reasonable maximum fees paid for medical services other than physician services, drugs and pharmacy services, health care facility fees, home health care, and all other treatment, care, services, and goods described in Section 4600 and provided pursuant to this section. Except for physician services, all fees shall be in accordance with the fee-related structure and rules of the relevant Medicare and Medi-Cal payment systems[.]"[3]

We reject Zenith's contention because we are not finding preemption of section 5307.1 insofar as it relates to the *general authority* of the AD to adopt an OMFS. Furthermore, Article III, section 3.5(c) does not preclude the Appeals Board from determining that a state law is unconstitutional if that determination is based on an extensive body of federal or state case law. (*Cumero v. Pub. Employment Relations Bd.* (1989) 49 Cal.3d 575, 583 [holding that Article III, § 3.5 does not "prevent [a state agency] from construing [state law] in light of constitutional standards"]; *Schmid v. Lovette* (1984) 154 Cal.App.3d 466, 473-474 [holding that Article III, § 3.5 did not require community college officials to enforce a statute requiring public employees to sign an anti-Communist Party loyalty oath when comparable statutes had been held unconstitutional by both federal and state supreme court decisions];[4]

[3] This language was in effect on the date of injury and was not changed in 2012, when the Legislature substantially amended section 5307.1 in Senate Bill ("SB") 863. (Stats. 2012, ch. 363, § 74.)

[4] Cited with approval in *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1104, fn. 31.

see also *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].)

Here, we base our finding of preemption of AD Rule 9789.70, relating to air ambulance services and adopted by the AD under authority of Labor Code section 5307.1, on the extensive body of case law discussed below, in part II. This finding is based on the condition that the air ambulance provider meets its burden of showing that it is an "air carrier that may provide air transportation" under 49 U.S.C. § 41713(b)(1), discussed in part III.

II. THE ADA PREEMPTS AD RULE 9789.70 IF THE LIEN CLAIMANT FOR AIR AMBULANCE SERVCIES IS AN "AIR CARRIER THAT MAY PROVIDE AIR TRANSPORTATION" WITHIN THE MEANING OF THE PREEMPTION PROVISION OF THE ADA.

The OMFS for air ambulance services is found in AD Rule 9789.70. (Cal. Code Regs., tit. 8, § 9789.70.) The Rule provides, in relevant part, as follows:

> "(a) The maximum reasonable fee for ambulance services rendered after January 1, 2004 shall not exceed 120% of the applicable fee for the Calendar Year 2004 set forth in CMS's Ambulance Fee Schedule, which is established pursuant to Section 1834 of the Social Security Act (42 U.S.C. § 1395m) and applicable to California. […]
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> "(b) For any ambulance service not covered by a Medicare payment system, the maximum reasonable fee paid shall not exceed the fee specified in the OMFS 2003.
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> "(c) This section is not applicable to services provided by any air ambulance provider which at the time of service is an 'air carrier' as defined in Title 49 U.S.C.A. Section 40102, a part of the Airline Deregulation Act of 1978 as amended."

Subdivision (c) was added to Rule 9789.70 effective July 13, 2010.[5] According to the AD's Notice of Proposed Rulemaking and Informative Digest, Rule 9789.70(c) was adopted because: "Section

[5] In footnote 12 of its petition, Zenith suggests that Rule 9789.70(c) cannot be applied retroactively to air ambulance services rendered before its July 13, 2010 effective date, such as the 2009 air ambulance services in this case. We need not reach this question because, due to preemption, Rule 9789.70(a) and (b) would not apply to this case even if Rule 9789.70(c) had never been adopted.

9789.70, which establishes fees for ambulance services, may be in conflict with the federal Airline Deregulation Act of 1978, to the extent that Section 9789.70 sets fees for providers which are air carriers within the meaning of the Act. This regulation amendment is intended to eliminate any conflict with the Act."[6]

Subdivisions (a) and (b) of Rule 9789.70 were adopted in January 2004. However, prior to the promulgation of Rule 9789.70(a) and (b), Congress enacted the ADA of 1978. Among other things, the ADA contains an express preemption provision that, as relevant here, provides that "a State [or] political subdivision of 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 an air carrier that may provide air transportation." (49 U.S.C.App. § 1305(a)(1), now codified at 49 U.S.C. § 41713(b)(1) [italics added].)

In *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374 [112 S.Ct. 2031, 119 L.Ed.2d 157], the US Supreme Court explained the rationale of the preemption provision of the ADA. The Court initially explained:

> "*Prior to 1978*, the Federal Aviation Act of 1958 (FAA) … gave the Civil Aeronautics Board (CAB) authority to regulate interstate airfares [but the FAA] did not, however, expressly pre-empt state regulation, and … [a]s a result, *the States were able to regulate intrastate airfares* (including those offered by interstate air carriers), see, e.g., *California v. CAB*, 189 U.S.App.D.C. 176, 178, 581 F.2d 954, 956 (1978), cert. denied, 439 U.S. 1068, 99 S.Ct. 834, 59 L.Ed.2d 32 (1979) … ."
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> (*Morales, supra*, 504 U.S. at p. 378 [italics added].)

The Court then went on to explain:

> "In 1978, however, Congress, determining that 'maximum reliance on competitive market forces' would best further 'efficiency, innovation, and *low prices*' … enacted the Airline Deregulation Act (ADA). [Citation omitted.] To ensure that the States would not undo federal deregulation with regulation of their own, *the ADA included a pre-emption provision, prohibiting the States from enforcing any law 'relating to rates*, routes, or services*' of any air carrier*."
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> (*Morales, supra*, 504 U.S. at pp. 378-379 [italics added].)[7]

[6] http://www.dir.ca.gov/dwc/DWCPropRegs/Ambulance_regulations/NOTICE_AirAmbulance.pdf, at p. 2.

[7] See also 49 U.S.C. § 40101(a) & (b) (stating the purpose of these provisions).

Thus, the purpose of the preemption provision of the ADA is to prevent states from "undoing" federal deregulation of air carriers by adopting any economic regulations of their own. (*Morales, supra*, 504 U.S. at p. 388; *Charas v. Trans World Airlines, Inc.* (9th Cir. 1998) 160 F.3d 1259, 1262-1263 (en banc).)[8] Accordingly, a state law that "relate[s] to a price, route, or service of an air carrier" (49 U.S.C. § 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." (*Morales, supra*, 504 U.S. at p. 378.) Moreover, the preemption provision displaces *all* state laws "relating to" a price, route, or service of an air carrier, even state laws that are consistent with the ADA. (*Id*.)

Nevertheless, the scope of the phrase "relating to" is not unlimited. The phrase has been interpreted to mean that only state laws having a "significant effect" on prices are preempted, while those having a "too tenuous, remote, or peripheral" impact are not. (*Morales, supra*, 504 U.S. at p. 390; *Charas, supra*, 160 F.3d at pp. 1265-1266.)

In *Morales*, however, the US Supreme Court determined that enforcement of fare advertising guidelines through a State's general consumer protection laws was preempted by the ADA, concluding among other reasons that "it is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares." (*Morales, supra*, 504 U.S. at p. 388.) Later, in *American Airlines, Inc. v. Wolens* (1995) 513 U.S. 219 [115 S.Ct. 817, 130 L.Ed.2d 715], the US Supreme Court held that the ADA preempted injunctive relief sought under the Illinois Consumer Fraud and Deceptive Business Practices Act by members of an airline's frequent flyer program challenging the airline's retroactive modification of that program. Even state law negligence claims against airlines for providing unsafe seating (i.e., lack of adequate legroom causing passengers to develop blood clots) are preempted if such suits have a significant impact on airline costs, leading to a significant increase in fares. (*Montalvo v. Spirit Airlines* (9th Cir. 2007) 508 F.3d 464, 474-475; *Witty v. Delta Air Lines, Inc.* (5th Cir. 2004) 366 F.3d 380, 383.)

[8] *Charas* was partially abrogated by *Rowe v. New Hampshire Motor Transp. Ass'n* (2008) 552 U.S. 364, 378 [128 S.Ct. 989, 169 L.Ed.2d 933] on grounds not relevant here. In *Rowe*, a group of transport carrier associations challenged a Maine statute that regulated the shipment of tobacco into the state. The Court concluded that the ADA preempted the statute.

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. § 41713(b)(1), then we have no doubt that state laws directly regulating costs for air ambulance services are also preempted.

Nevertheless, Zenith contends that the ADA of 1978 reveals no clear and manifest intent to supplant any component of the California workers' compensation system, an area traditionally regulated by the states. Zenith also contends that a finding of preemption would undermine Congressional intent in enacting the ADA, and that the historical context of the ADA shows it does not preempt Rule 9789.70. All of these contentions fail, however, because they are contradicted by the US Supreme Court's decision in *Morales, supra*.[9]

In addition, Zenith contends that federal enactment of a Medicare fee schedule for "rural air ambulance services"[10] shows that Rule 9789.70 is not preempted by the ADA. Although Zenith cites *People v. Guiamelon* (2012) 205 Cal.App.4th 383 to support this contention, the case is inapposite because it addresses "conflict" and "obstacle" preemption, not the issue presented here, i.e., "express" preemption.[11] (See *Sierra Pacific Holdings, Inc. v. County of Ventura* (2012) 204 Cal.App.4th 509, 514 fn. 3, quoting 49 U.S.C. § 41713(b)(1) [in contrast to the Federal Aviation Act of 1958, the ADA "expressly prohibits the enactment or enforcement of a state law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." (Internal quotation marks omitted.)]; see also *Tanen v. Southwest Airlines Co.* (2010) 187 Cal.App.4th 1156, 1159 [ADA preempted plaintiff's claim that an expired travel certificate violated Civil Code section 1749.5, because the claim (1) related to airline rates, routes or services, and (2) derived from the enactment or enforcement of state law].)

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[9] For instance, Zenith relies on *Ginsberg v. Northwest, Inc.* (9th Cir. 2012) 695 F.3d 873, in which the Court concluded that a frequent flier's common law claim for breach of the implied covenant of good faith and fair dealing did not relate to prices and services for purposes of the ADA's preemption provision. Unlike *Ginsberg*, however, this case involves preemption of a regulation that attempts to set a maximum reasonable fee for ambulance services. The regulation *directly* implicates the ADA's express preemption provision because there is no question it has a significant effect on prices, the impact of which is not at all tenuous, remote, or peripheral.

[10] 42 U.S.C. § 1395m(l)(14).

[11] In *Guiamelon*, the Court of Appeal noted that there are various species of preemption, including express, conflict, obstacle, and field preemption, and that conflict and obstacle preemption are often grouped together. (205 Cal.App.4th at 399-400.) *Guiamelon* addressed only conflict and obstacle preemption.

Finally, Zenith offers the serpentine contention that, in the absence of AD Rule 9789.70, Labor Code section 4600 would limit Mercy'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.

III. THE AIR AMBLUANCE PROVIDER HAS THE BURDEN OF SHOWING IT IS AN "AIR CARRIER THAT MAY PROVIDE AIR TRANSPORTATION" WITHIN THE MEANING OF THE PREEMPTION PROVISION OF THE ADA, INCLUDING SHOWING THAT IT IS AUTHORIZED TO PROVIDE INTERSTATE AIR TRANSPORTATION.

A "lien claimant must prove by a preponderance of the evidence all elements necessary to establish the validity of their lien before the burden of proof shifts to the defendant." (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 (Appeals Board en banc), citing Lab. Code, §§ 3202.5, 5705.) Among other things, this burden of proof requires the lien claimant to prove the reasonable value of its services. (*Torres, supra,* 77 Cal.Comp.Cases at 1119, citing *Zenith Insurance Company v. Workers' Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374].)

Unless the air ambulance provider can establish preemption of AD Rule 9789.70, the reasonable value of its lien for air ambulance services will be limited to the value prescribed by the rule.

The preemption provision of the ADA provides that "a State [or] political subdivision of 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 *an air carrier that may provide air transportation*." (49 U.S.C. § 41713(b)(1), italics added.)[12]

Accordingly, as part of the burden of establishing preemption, an air ambulance provider must show that it is "air carrier that may provide air transportation." (See *Med-Trans Corp. v. Benton* (E.D.N.C. 2008) 581 F.Supp.2d 721, 731 ["to benefit from federal preemption under this provision, plaintiff must show it is an air carrier for purposes of the ADA."]; see also *Danner v. International*

[12] Zenith contends that "the ADA's preemption provision does not apply to the workers' compensation emergency air ambulance industry - an industry that is entirely different than the commercial airlines industry." This contention misstates the issue because the question is whether Mercy is an "air carrier that may provide air transportation," not whether it is a "commercial airline."

Freight Systems of Washington, LLC (D.Md. 2012) 855 F.Supp.2d 433, 458 ["§ 41713(b)(1) preempts claims 'related to a price, route, or service of an *air carrier* that may provide air transportation' " (italics in original)].)

The air ambulance provider's burden of showing it is an "air carrier that may provide air transportation" includes several elements, which are discussed in detail below. The lien claimant and the defendant should stipulate as to any undisputed elements of this burden.

In order to be considered an "air carrier" under the ADA's preemption provision, the air ambulance provider must show all of the following: (1) it is a "citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation" (49 U.S.C. § 40102(a)(2); (2) it provides foreign, interstate, or mail transportation by air as a common carrier (49 U.S.C. § 40102(a)(5), (25));[13] and (3) it is subject to regulation under 49 U.S.C. §§ 41101 et seq. (*Med-Trans Corp., supra*, 581 F.Supp.2d at 731-732.)

Of course, air ambulance liens do not involve either foreign air transportation or the transportation of mail. Therefore, the essential question is whether the air ambulance "may provide" interstate air transportation. On this question, we note that an air carrier need not actually engage in interstate air transportation, as long as it is authorized to do so. (*ABC Charters, Inc. v. Bronson* (S.D.Fla. 2008) 591 F.Supp.2d 1272, 1298-1299 ["The Airline Deregulation Act prohibits [a] state …, or a political subdivision of [a] state, from enacting or enforcing any law, regulation or other provision 'relating' to a price, a route, or a service of any *air carrier authorized to provide* interstate air transportation" (italics added; fn. omitted)].) That point is worth noting here, because Mercy's airlifting of Enriquez from a point 26 miles outside of Modesto involved *intrastate* transportation. In fact, most air

[13] 49 U.S.C. § 40102(a)(2) states that " 'air carrier' means a citizen of the United States undertaking by any means, directly or indirectly, *to provide air transportation*[.]" (Italics added.) 49 U.S.C. § 40102(a)(5) then states that " 'air transportation' means foreign air transportation, *interstate air transportation*, or the transportation of mail by aircraft[.]" (Italics added.) In turn, 49 U.S.C. § 40102(a)(25) states that " 'interstate air transportation' means the transportation of passengers or property by aircraft as a *common carrier* for compensation…between a place in (i) a State, territory, or possession of the United States and a place in the District of Columbia or another State, territory, or possession of the United States." (Italics added.) "A 'common' carrier is a carrier 'that holds itself out to the public, or to a particular class or segment, as willing to furnish transportation for hire.' 14 C.F.R. § 375.40(b)." (*Gorman v. National Transp. Safety Bd.* (D.C. Cir. 2009) 558 F.3d 580, 582, fn. 1.)

ambulance liens filed with the WCAB probably will involve air services provided within California's boundaries.

There are two principal kinds of air carriers, i.e., a "Part 121 air carrier," which is an air carrier to which part 121 of title 14 of the Code of Federal Regulations applies, and a "Part 135 air carrier," which is an air carrier to which part 135 of title 14 of the Code of Federal Regulations applies. (49 U.S.C. § 41719(d)(1) & (2); see also *American Intern. Group, Inc. v. American Intern. Airways, Inc.* (E.D.Pa. 1989) 726 F.Supp. 1470, 1475.) In substance, Part 121 air carriers operate scheduled flights, while Part 135 air carriers provide commuter and on-demand operations. (14 C.F.R. § 119.21.) However, all "rotocraft operations," which would include air ambulances that are helicopters,[14] must be conducted under Part 135. (14 C.F.R. § 119.25; 60 Fed.Reg. 65832-01.) Moreover, it appears that at least some Part 135 air carriers receive certificates for *intrastate* operations. (14 C.F.R. §§ 135.64, 135.98, 135.127(b)(1)(iii) & (2), 135.243(a)(2), 135.345(a)(9); see also See 14 C.F.R. §§ 119.36(a), 119.39(b)(5).) Absent stipulation on the issue, if an FAA certificate does not clearly indicate whether an air ambulance company may provide *interstate* air transportation, then testimonial and/or supplemental documentary evidence should be introduced, as necessary to establish this fact.

If all of the foregoing elements are established, then the preemption provision of 49 U.S.C. § 41713(b)(1) will apply.

In this case, the record requires clarification as to whether Mercy is an "air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA. Although the parties stipulated that Mercy "is a valid corporation in good standing on April 26, 2009 within the State of California" and that Mercy "has a valid carrier certificate issued by the [FAA]," it is not clear that these stipulations specifically were intended to satisfy the elements of citizenship and FAA authorization to provide "interstate air transportation."

In its answer, Mercy asserts that addressing "the topic of air carrier licensing is complex and unnecessary," but Mercy also asserts that "[u]nder Federal Code of Regulation sections and the ADA, air

[14] Under 14 C.F.R. § 1.1, "rotorcraft" means a heavier-than-air aircraft that depends principally for its support in flight on the lift generated by one or more rotors" and "helicopter" means "a rotorcraft that, for its horizontal motion, depends principally on its engine-driven rotors." However, it may be that some air ambulances are "fixed wing." (14 C.F.R. § 1.1.)

ambulance operations are lumped under a genre of air carriers called 'air taxi.' " In effect, Mercy asks the Board to assume that, because an air ambulance provider is a type of air carrier called an "air taxi," all air ambulance providers – even those that may provide only intrastate transportation – are air carriers authorized to provide interstate air transportation. However, our review of the law shows that we cannot make such an assumption.

The federal regulation upon which Mercy relies is 14 C.F.R. § 298.21. This regulation states, in relevant part, as follows:

> "(a) Every air taxi operator who plans to commence operations under this part shall register with the Department not later than 30 days prior to the commencement of such operations, unless, upon a showing of good cause satisfactory to the Manager, Program Management Branch (AFS–260), Federal Aviation Administration, registration within a lesser period of time is allowed.
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> "(c) Registration by all air taxi operators shall be accomplished by filing with the Department at the address specified in paragraph (d) of this section the following:
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> ***
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> "(iv) The type of service the carrier will offer (scheduled passenger, scheduled cargo, mail under a U.S. Postal Service contract, on-demand passenger, on-demand cargo, or other service such as *air ambulance operations*, firefighting or seasonal operations)[.]" (Italics added.)

Even if "air ambulance operations" are one type of service that a federally-registered air taxi may "offer," this does not allow us to assume that all lien claimants for air ambulance services are air carriers authorized to provide *interstate* air transportation for purposes of preemption.

In fact, Mercy's claim that air ambulances are "air carriers" under the rubric of "air taxis" is not apparent from the testimony and evidence produced at trial. We observe that, although a "Mercy Air Carrier Certificate" was listed as a proposed MSC exhibit and later was lodged into EAMS, the certificate was not introduced into evidence. The "Mercy Air Carrier Certificate" shows that Air Methods Corporation and its subsidiaries, including Mercy, are authorized by the FAA to conduct "on-demand operations in common carriage" pursuant to 14 C.F.R. § 119.21(a)(5) and (b). However, 14 C.F.R. § 119.21(a)(5) refers to on-demand operations "in accordance with the applicable requirements of

part 135 of this chapter." But, as discussed above, Part 135 includes both "interstate" operations and "intrastate" operations.[15] Thus the production of an air carrier certificate, standing alone, is not enough to show that the lien claimant for air ambulance services is an air carrier authorized to provide interstate air transportation for purposes of preemption. As previously mentioned, the parties should enter into a clear stipulation if there is no material dispute over the air ambulance provider's status as an air carrier authorized to provide interstate air transportation.

In this case, however, the evidentiary record and the stipulations are insufficient to support a firm conclusion as to whether Mercy is an "air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA. Therefore, further development of the record is necessary. We will return this matter to the WCJ to conduct such further proceedings as he deems necessary or appropriate to resolution of this issue.

CONCLUSION AND DISPOSITION

Neither Article III, section 3.5 of the California Constitution nor Labor Code section 5307.1 prevents the Appeals Board from finding preemption of AD Rule 9789.70. The ADA preempts AD Rule 9789.70 if the lien claimant for air ambulance services is an "an air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA. The air ambulance provider has the burden of showing it is an "an air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA, including showing that it is authorized to provide interstate air transportation.

Here, because the record requires further development on whether Mercy is "an air carrier that may provide air transportation" within the meaning of the preemption provision of the ADA, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

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[15] 14 C.F.R. § 119.21(b) refers to "[p]ersons who are subject to requirements of paragraph (a)(4) of this section," but paragraph (a)(4) relates to "[c]ommuter operations in accordance with the applicable requirements of part 135." It seems unlikely that, in this case, the air ambulance could be deemed to have been engaged in "commuter operations." In any event, as just noted, Part 135 includes both interstate and intrastate operations.

For the foregoing reasons,

IT IS ORDERED, as the Appeals Board's Decision After Reconsideration (En Banc), that the Findings and Order of September 21, 2012 is **RESCINDED,** and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Chairwoman

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Marguerite Sweeney
MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
3/28/2013

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

CECILIA ENRIQUEZ
CHERNOW LIEB
CHERYL PETROPOULOS
JOSE ENRIQUEZ
MARIA GUILLEN FRANCO
MULLEN FILIPPI
NEXUS LAW GROUP
OCCUPATIONAL INJURY
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