



December 14, 1999

**VIA FEDERAL EXPRESS**

Andrew R. Baron, Executive Officer  
Industrial Welfare Commission  
Department of Industrial Relations  
1121 L Street, Suite 307  
Sacramento, CA 945814

Re: California Ambulance Industry

Dear Mr. Baron:

The ambulance industry in California has historically operated under specific rules adopted for the industry by the Industrial Welfare Commission and supported by management and labor. During 1999, while AB 60 was under consideration, the Legislature considered and adopted section 21 to the bill. It reinstated IWC Orders No. 5-89 (Public Housekeeping) and No. 9-90 (Transportation), which included sections 3(J) and 3(H), respectively. Those sections were the latest in a series of identical provisions, dating from 1976, by which the IWC sought to ensure public safety and continuity of the California Emergency Medical Services system. On behalf of the industry, the California Ambulance Association supports the maintenance of those historic provisions. This letter outlines their history. We would appreciate your providing copies to each of the members of the Commission. An original and five copies are enclosed.

**The California Ambulance Industry.** The California Ambulance Association represents companies providing emergency and non-emergency ambulance services. The Association was formed in 1948. There are approximately 11,000 licensed paramedics and 54,000 licensed EMT's providing essential ambulance services in the State of California. Ambulance providers operate under many different systems. Many provide the only ambulance service in a community. Others operate in cooperation with public services. Others provide services to a specific hospital. Some operate on a fee-for-service basis. Others receive partial subsidies for service. All are licensed by the California Highway Patrol and must be available to respond to medical emergencies on a 24-hour basis. All are subject to regulation by the State Emergency Medical Services Authority and by county Emergency Medical Services agencies under the provisions of the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act, Health & Safety Code §§ 1797 *et seq.* The policy of the Act is to promote the development of EMT and paramedic programs and the development, accessibility and provision of emergency medical services to the people of the State of California.

**Historic U.S. Supreme Court treatment of 24-hour shifts.** The origins of the provisions in question predate even the IWC's treatment. They go back to the earliest days of the federal overtime law, the Fair Labor Standards Act. In 1944, the United States Supreme Court issued two decisions *Armour v. Wantock*, 323 U.S. 126 (1944), and *Skidmore v. Swift*, 323 U.S. 134 (1944). Since 1944, they have set the standards for determining when an employee is working for purposes of minimum wage and overtime laws. Among other things, the Court determined, in the *Skidmore* case, that employees on 24-hours of continuous duty, who were

allowed time to sleep and to take their meals, would not be considered to be on duty for the full 24-hours, as they would have slept and taken their meals even if they were not on duty.

**Treatment of 24-hour shifts under federal regulations.** The Wage and Hour and Public Contracts Divisions of the U.S. Department of Labor incorporated these rules in its Statements of General Policy or Interpretations, published as Part 785 (Hours Worked) of Title 29 of the Code of Federal Regulations. Specifically, 29 C.F. R. § 785.22 provided, and continues to provide:

(a) *General.* Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. [Citations omitted.]

(b) *Interruptions of sleep.* If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least 5 hours sleep during the scheduled period the entire time is working time.

**Historic IWC treatment of 24-hour shifts.** The ambulance industry operated under section 785.22 nationwide and in California without issue until the period 1972 to 1976. As you know, prior to 1972, the IWC's jurisdiction had been limited to women and minors. Although the IWC's Orders required daily overtime, there was no clash with the industry's 24-hour shifts, because, compared to the number of women in the industry today, there were then apparently no women employed as ambulance personnel.

In 1968, the federal court struck down the IWC's jurisdiction exclusively over women as a violation of the Civil Rights Act. See *Rosenfeld v. Southern Pacific Company*, 293 F. Supp. 1219 (CD Calif. 1968), aff'd 444 F.2d 1219 (9<sup>th</sup> Cir. 1971). In 1972, the California Legislature extended the IWC's jurisdiction to men as well as women.

Thereafter, representatives of the industry in California appeared before the IWC. They explained that the ambulance industry had traditionally operated on the basis of twenty-four hour shifts, much of which was stand-by and that actual performance varied depending on the number of calls received. They explained that not being able to perform under the traditional 24-hour shift would work a hardship on the health care industry. The IWC agreed that the industry should be able to continue operating 24-hour shifts without daily overtime. In 1976, sections 3(J) of Public Housekeeping Order No. 5 and 3(G) [originally 3(H)] of Transportation Order No. 9 were adopted. Enforcement was delayed because of unrelated litigation, but, in 1980, Orders 5 and 9 went into effect. Sections 3(J) and 3(G) remained in the IWC's Orders from 1976 through December 31, 1997, when daily overtime was repealed. Section 3(G) of Order No. 9-90 reads:

The daily overtime provisions of subsection (A) shall not apply to ambulance drivers and attendants scheduled for twenty-four (24) hour shifts of duty who have agreed in writing to exclude from daily time worked not more than three (3) meal periods and a regularly scheduled uninterrupted sleeping period of not more than eight (8) hours. The employer shall provide adequate dormitory and kitchen facilities for employees on such a schedule.

Section 3(J) of reinstated Order No. 5-89 is the same.

**Restatement of the IWC's treatment of 24-hour shifts during the Jerry Brown administration** On October 16, 1981, during the Jerry Brown administration, the IWC adopted a Statement on Special Provision for Ambulance Industry in Orders 5-80 and 9-80. The Statement read in part as follows:

... the Commission has reviewed the language of these sections, and we find there is no reason to adopt any amendment to the current language. ... If an ambulance service employee is scheduled to work a shift of 24 hours or more, the employee may agree in writing to exclude from daily time worked not more than three uninterrupted meal periods of not more than one each and regularly scheduled sleep time of no more than eight hours during each 24 hours of duty. The employer must provide adequate dormitories and sleeping facilities for those employees on such a schedule. If the employee does not have the opportunity to get at least five hours of sleep, the entire time (that is, the sleeping time) must be considered as hours worked.

The five hours of sleep need not be continuous, uninterrupted hours of sleep. The exemption from the daily overtime requirement is established by the agreement, and the question of uninterrupted sleep period affects the issue of compensable hours and not relief from overtime itself. For example, if one assumes a valid agreement that meets the minimum requirements of Section 3(H) or 3(J), and pursuant to this agreement the employee is scheduled for eight hours of sleep time and three one-hour meal periods, and if one assumes further that due to interruptions in his scheduled sleep period he gets only four hours of sleep, our view is that for that day, compensable hours are 24 hours minus three for the valid meal exclusion, or 21 hours. If we assume further that his rate of pay is \$4 an hour, the proper payment for that day would be four times 21 or \$84.

**California judicial treatment of the 24-hour shifts** Sections 3(J) and 3(G) were reviewed by a California appellate court for the first time in 1989. In *Auchmoody v. 911 Emergency Services*, 214 Cal.App.3d 1510 (1989), an ambulance service had chosen to pay its ambulance personnel for all 24 hours of a 24-hour shift. That practice was challenged as disqualifying the company for relief from daily overtime. The Court found that interpretation "illogical." The Court held that an otherwise valid agreement under subsection 3(G) of IWC Order No. 9-80 was not rendered invalid just because the employer had voluntarily elected to pay some or all of the eleven hours that the employee had agreed was excludable.

The same provisions were reviewed again in *Monzon v. Schaefer Ambulance Service*, 224 Cal.App.3d 16 (1990), in which the Court held that the right to exclude meal and sleep periods during a 24-hour shift derived from a different source than relief from daily overtime. The court held that an agreement was required in either case, but that the agreement in the former case did not have to be in writing, while an agreement in the latter case did.

**Conclusion: AB 60's treatment of 24-hour shifts.** Since 1976, ambulance providers in California have operated 24-hour shifts of duty, as authorized by both federal and California law. Typically, ambulance personnel on 24-hour shifts work two to three shifts per week or an average of ten shifts per month. The rest of the time is off. Many are students or meet other employment or family obligations during the days they are not working as ambulance personnel. Many have built their lives around the opportunities afforded by the industry's 24-hour shifts. Adoption of section 21 of AB 60 was designed to enable the industry to maintain this historic practice. The industry looks forward to its maintenance in the future.

Very truly yours,

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

By  
Robert W. Tollen

RWT/vhr