THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0685

Appeal of Andrew Panaggio

Rule 10 Appeal from the N.H. Compensation Appeals Board

BRIEF OF APPELLANT ANDREW PANAGGIO

Counsel for Andrew Panaggio,
and oral argument by:

Jared P. O'Connor, Esq.
SHAHEEN & GORDON, P.A.
180 Bridge Street
Manchester, NH 03104
(603) 669-8080
joconnor@shaheengordon.com

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PRESERVED: *Claimant's Mot. for Rehearing, CERTIFIED RECORD (C.R.) 7.*

2. Alternatively, did the Board err in refusing to order the insurer to issue reimbursement for medical expenses where the insurer failed to demonstrate that there has ever been a single prosecution nationwide for aiding and abetting under the circumstances presented here, in light of well-established limits on prosecutorial discretion through both U.S. Department of Justice policy guidance and Congressionally-enforced funding restrictions of medical marijuana prosecutions?

PRESERVED: *Claimant's Mot. for Rehearing, CERTIFIED RECORD (C.R.) 6.*

GOVERNING STATUTES

18 U.S.C. § 2(a), Aid and Abet.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(June 25, 1948, ch. 645, 62 Stat. 684; Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

RSA 281-A:23 Medical, Hospital, and Remedial Care.

I. An employer subject to this chapter, or the employer's insurance carrier, shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital services, remedial care, nursing, medicines, and mechanical and surgical aids for such period as the nature of the injury may require. The injured employee shall have the right to select his or her own physician.

[Paragraphs II -VIII elided as irrelevant to this appeal.]

Source. 1988, 194:2. 1990, 254:14. 1994, 268:1. 1995, 205:1. 1996, 51:1. 2003, 269:3. 2005, 85:7, eff. June 7, 2005. 2010, 84:1, eff. July 1, 2010. 2013, 95:1, 131:1, eff. Jan. 1, 2014.

Lab Rule 501.02 <u>Compliance.</u>

In order to comply with the statute and administrative regulations, all employers subject to the statute or their carriers shall pay benefits in amounts, manner and when due, as provided by the statute and this chapter. Employers and carriers shall comply with the provisions of the statute and this chapter, without fail, so that when they have knowledge of an occupational injury or disease, or when a claim as to an alleged occupational injury or disease is made by an employee, they shall act with due regard for his or her constitutional right of due process.

STATEMENT OF THE FACTS AND THE CASE

I. Factual background; the 2017 appeal.

Andrew Panaggio suffered a work-related spine injury in July of 1991 while in the course of his employment with W.R. Grace & Company. *PANAGGIO I, CERTIFIED RECORD* (*C.R.*)[1] *14*. His claim was deemed compensable after a Labor Department hearing, *see PANAGGIO I, C.R. 37*, and by 1992 treatment of his injury required a lumbar fusion at L4-5. The fusion ultimately did not hold. Mr. Panaggio needed refusion with pedicle screw instrumentation, bone grafts and rods in 1994, after which he suffered permanent low back and mechanical right leg pain increasing with activity. *PANAGGIO I, C.R. 32*.

Mr. Panaggio settled his workers' compensation claim in 1997. *PANAGGIO I, Appendix to Claimant's Brief* (*App.*) *41*. Like all such settlements under New Hampshire law, the workers' compensation insurer remained forever liable under RSA 281-A:23 to pay for all related medical treatment, whether curative or palliative.

[1] This case returns to the Court following remand to the Compensation Appeals Board. Appeal of Panaggio, 172 N.H. 13 (2019). The questions now presented are pure issues of law. Because the undisputed facts are only glanced at or assumed known by the parties in the appealed-from order here dated 8/30/19, the information in this section is largely drawn from the Certified Record and Appendix to Claimant's Brief submitted in the prior appeal, on file with this Court. *Appeal of Andrew Panaggio, Case No. 2017-0469.* Citation to those previously-filed documents are distinguished from the current Certified Record by the label "*Panaggio I.*"

Mr. Panaggio has remained permanently disabled from gainful employment as a consequence of his work injury. It was understood as early as 1995 that "it would be highly improbable that Mr. Panaggio would benefit from a vocational rehabilitation plan with the goal of returning him to competitive employment." *PANAGGIO I, App. 43*. He remains on Social Security Disability Insurance benefits and has struggled with various pain management regimens to address the chronic pain caused by his permanent post-surgical condition. He had been prescribed opiates for the pain in the past, but in addition to the now well-known hazards of such medication, Mr. Panaggio presented particular challenges to the safe use of long-term opiates. He is separately diagnosed with diverticulitis, and regular opiate use is known to wreak havoc with even healthy individuals' gastrointestinal tracts. See *PANAGGIO I, C.R. 14-15*.

In 2013, New Hampshire passed its comprehensive therapeutic cannabis statute, RSA 126-X. The first "alternative treatment center" authorized by the statute completed its years-long regulatory compliance under RSA 126-X:7 and opened its doors to the public in April 2016. *PANAGGIO I, App. 64*.

In May 2016, Mr. Panaggio asked his primary care provider about the possibility of obtaining a therapeutic cannabis card to address his chronic pain. *PANAGGIO I, App.*

51. As his diagnosis of back pain with radiculopathy was unchanged, his provider "advised patient to go onto the medical marijuana website and complete application then give to me and I will complete my part." *PANAGGIO I, App. 53*.

He did so, and on June 7, 2016, he scheduled an office visit specifically to discuss therapeutic cannabis. *PANAGGIO I, App. 54*. The medical note from that visit describes the meeting in relevant part:

> History: Disabled since a work-related back injury on 7/9/91. Diagnosed with bilateral spondylosis L4 and L4-5 disc herniation. [status post] back surgery x2 with Jurgen Piper, M.D. February 1992 lumbar fusion L4-L5 and 7/27/94 refusion transverse process L4-5 with pedicle screw fixation and augologous iliac bone graft, bilateral decompression of L4-L5 nerve roots, harvesting iliac bone graft from left iliac crest.
>
> Always has pain across his lower back, sometimes has radiation into right or left leg but is associated with tingling and numbness, has his good days and bad days depending on his activity but his pain is never completely gone, pain is worse with walking, twisting, lifting, forward bending and kneeling, improved with lying down and resting, using ice or heating pad.
>
> When he does household chores or works in his garden then is unable to do anything for 2-3 days. Has taken Percocet and Vicodin in the past and wants to keep away from narcotics, also takes muscle relaxants, ibuprofen or aleve as needed.

> Smoking marijuana also helps and Andrew is here to discuss the use of medical cannabis for his pain management.
> *PANAGGIO I, App. 54-55*.

Mr. Panaggio's medical provider then filled out the State of New Hampshire's written certification for the therapeutic use of cannabis, where she certified "spinal cord injury or disease" as Mr. Panaggio's qualifying condition, and that he suffered from "moderate to severe pain on a daily basis" since his injury in 1991. *PANAGGIO I, App. 56-57, 59*. She further certified in accordance with He-C 401.06(b)(2) that she completed a full assessment of Mr. Panaggio's medical history and current medical condition made in the course of the patient/provider relationship that she had sustained with him since 2005. *PANAGGIO I, App. 60*.

She signed the certifying provider document, affirming her status as an Advanced Practiced Registered Nurse licensed in New Hampshire to prescribe drugs under RSA 326-B:18, and who possesses an active registration from the U.S. Drug Enforcement Administration to prescribe controlled substances. This was signed on June 7, 2016. *PANAGGIO I, App. 60*.

The paperwork was duly submitted to the New Hampshire Department of Health and Human Services, which approved Mr. Panaggio's application to register as a qualifying patient in the Therapeutic Cannabis Program via notice dated

July 21, 2016. *PANAGGIO I, App. 61*. The State assigned Mr. Panaggio a Patient ID number and issued a N.H. Cannabis registry identification card valid through July 31, 2017. *PANAGGIO I, App. 62-63*.

Attached to the State's notice of approval was notice of the opening of Alternative Treatments Centers at which therapeutic cannabis could be lawfully purchased within the state. *PANAGGIO I, App. 64*. On the State's Department of Health and Human Service's letterhead, Mr. Panaggio was informed:

> The Therapeutic Cannabis Program (Program) is pleased to notify you that the first of New Hampshire's Alternative Treatment Centers (ATC) is nearly ready to open for dispensing cannabis to qualifying patients and their designated caregivers. [RSA 126-X] creates an exemption from criminal penalties for the therapeutic use of cannabis provided its use remains in compliance with RSA 126-X. State law does not exempt a person from federal criminal penalties for the possession of cannabis.
>
> The current federal administration has declared its intention not to pursue or target patients and their caregivers who possess or use small amounts of cannabis for therapeutic use that is part of and compliant with a well-regulated state therapeutic cannabis program. However, federal law does not allow for the medical or therapeutic use of cannabis and the federal government can enforce federal cannabis laws anywhere in the United

> States including in states that allow the therapeutic use of cannabis. Federal criminal penalties for the possession of cannabis in any amount range from misdemeanors to felonies and may include incarceration and fines.
>
> To decrease the risk of any federal law enforcement action, patients and caregivers should know and abide by New Hampshire law with regard to the possession and use of therapeutic cannabis at all times.
>
> *PANAGGIO I, App. 65*.

Mr. Panaggio then purchased 14 grams of therapeutic cannabis at Sanctuary ATC in Plymouth, New Hampshire on July 27, 2016 for $170. The bill for same, along with the documentation qualifying Mr. Panaggio as a patient in New Hampshire's Therapeutic Cannabis Program, was forwarded to the workers' compensation insurance carrier in this matter by letter dated August 4, 2016 along with a request for reimbursement. *PANAGGIO I, App. 66*.

The insurer denied the request on the grounds that "medical marijuana is not reasonable/necessary or causally related to your injury 7/9/91." *PANAGGIO I, App. 67*.

After a hearing, the Compensation Appeals Board unanimously held that Mr. Panaggio's use of therapeutic cannabis is reasonable, medically necessary, and causally related to his work injury. *PANAGGIO I, C.R. 18-19*. That

finding was never challenged and remains the law of this case.

However, the Board declined to order reimbursement due to concerns about the Controlled Substances Act and the majority's interpretation of RSA 126-X [the Therapeutic Cannabis Act] as overriding the insurer's obligation to reimburse created by RSA 281-A:23 [the Workers' Compensation Act]. *PANAGGIO I, C.R. 16-17*.

Mr. Panaggio appealed from that order to this Court, which held in Appeal of Panaggio, 172 N.H. 13 (2019) that RSA 126-X did not prohibit reimbursement, but that the Board's reliance on "possession of marijuana as…a federal crime" to refuse to order reimbursement was insufficiently developed to permit meaningful appellate review. "The board did not cite any legal authority for its conclusion, much less identify a federal statute that, under the circumstances of this case, would expose the insurance carrier to criminal prosecution; thus, we are left to speculate." Id. at 19 (emphasis in original). Accordingly, the case was remanded.

II. The Present Appeal.

A hearing on remand was held before the Compensation Appeals Board on August 30, 2019. *CERTIFIED RECORD* (*C.R.*) *at 9*. Legal arguments were presented on the question whether the insurer could be held criminally liable

for complying with the administrative finding that the claimant's use of therapeutic cannabis is reasonable, medically necessary and causally related to his industrial injury. The Board ultimately concluded that by reimbursing Mr. Panaggio, the insurer would be exposed under 18 U.S.C. § 2(a) to prosecution for aiding and abetting the claimant's federally criminal possession. The Board explicitly adopted in full the reasoning of the majority opinion in Bourgion v. Twin Rivers Paper Company, LLC, et al., 187 A.3d 10 (Me. 2018), to date the only other state Supreme Court case in the nation to have squarely addressed this issue. *C.R. 12*.

A timely motion for rehearing was filed, *C.R. 5*, objected to, *C.R. 2*, and denied without further analysis or engagement of the arguments by order dated October 29, 2019. *C.R. 1*. This appeal timely followed.

SUMMARY OF ARGUMENT

This is a workers' compensation case. Mr. Panaggio was prescribed therapeutic cannabis to treat the pain caused by his work-related spine injury and paid out of his own pocket for it. When the workers' compensation insurance carrier refused to reimburse him, the Board unanimously held his treatment to be reasonable, medically necessary, and related to his work injury. This created a legal obligation under RSA 281-A:23 for the insurer to issue reimbursement.

A workers' compensation insurer, compelled by New Hampshire law to make a ministerial payment of reimbursement to an injured worker for his purchase of therapeutic cannabis after the Compensation Appeals Board determines the treatment was medically necessary treatment for his industrial injury, does not have sufficient freedom of action to be found criminally culpable of "aiding and abetting" the claimant's own federally-criminal possession of a Schedule 1 substance within the meaning of 18 U.S.C. §2(a). Mere knowledge that the injured worker, in perfect compliance with state law, had nevertheless violated federal law—particularly where the offense had already occurred—is not enough to implicate the insurer and excuse its own statutory obligation to reimburse him for the medical treatment deemed necessary by the Board.

ARGUMENT

I. Standard of Review

This appeal presents questions of law ruled upon by the Compensation Appeals Board. This Court shows no deference to the Board on appellate review of such administrative decisions, and when interpreting the Workers' Compensation Law, this Court construes any ambiguities in the statute in favor of the injured worker:

> "Our standard of review is set forth by statute: [A]ll findings of the [Board] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. RSA 541:13 (2007). Thus, we review the factual findings of the CAB deferentially. Appeal of N.H. Dep't of Corrections, 162 N.H. 750, 753 (2011). We review its statutory interpretation *de novo.* Id.
>
> On questions of statutory interpretation, we are the final arbiters of the intent of the legislature as expressed in the words of a statute considered as a whole. Id. We first examine the language of

> the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Appeal of Gamas, 158 N.H. 646, 648 (2009). We construe the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose. Id. Thus, when construing it, we resolve all reasonable doubts in favor of the injured worker. Id."

Appeal of Phillips, 165 N.H. 226, 229-230 (2013).

II. The insurer has no exposure under 18 U.S.C. § 2(a) because its mandatory compliance with state law voids the intent required to support a prosecution.

This case returns to you after being remanded to the Board for the purpose of specifically identifying a legal theory that ostensibly excuses a workers' compensation insurance carrier from complying with its statutory and regulatory obligation to furnish causally related medical treatment to an injured worker. RSA 281-A:23 ("the employer's insurance carrier, shall furnish or cause to be furnished to an injured employee … remedial care…")(emphasis added); Lab Rule

501.02 ("In order to comply with the statute and administrative regulations, all employers subject to the statute or their carriers shall pay benefits in amounts, manner and when due, as provided by the statute and this chapter. Employers and carriers shall comply with the provisions of the statute and this chapter, without fail…") (emphasis added).

The Board has endorsed a theory of criminal liability under 18 U.S.C. § 2(a) that misstates the level of criminal intent a prosecution for aiding and abetting requires, and therefore incorrectly let the insurer avoid the dictates of state law.

This Court's holding in Appeal of Panaggio, 172 N.H. 13 (2019) established that New Hampshire's Therapeutic Cannabis enabling statute (RSA 126-X:3,III) does not prohibit an insurer from complying with an order for reimbursement. 173 N.H. at 17. This holding, coupled with longstanding New Hampshire workers' compensation law that requires reimbursement upon a finding of causally-related medical necessity as was determined here, means the only remaining bar to reimbursement is a potential conflict between the insurer's affirmative state statutory obligation to reimburse the injured worker, and (arguably) any federal prohibition of that same conduct.

"Arguably" is the key word, because there is no direct and irreconcilable clash of federal and state law, no federalism thicket to parse or preemption analysis to engage in, if the insurer's own conduct does not rise to the level of a federal crime in the first place. The case boils down to what level of criminal intent is required to establish aiding and abetting under 18 U.S.C. § 2(a), and whether the government could demonstrate that the insurer exhibits that level of criminal intent. Because state law gives the insurer no discretion to choose whether to comply with state law once a finding is made that the treatment at issue is reasonable and related to the work injury, the government cannot prove beyond a reasonable doubt that the insurer not only had "advance knowledge" of the outcome, but the ability to "opt to walk away" from its statutory obligation. Rosemond v. U.S., 572 U.S. 65, 78 (2014).

The therapeutic cannabis authorized for purchase by the State of New Hampshire for qualifying patients like Mr. Panaggio is classified as a Schedule 1 substance by the Controlled Substances Act (CSA). 21 U.S.C. § 812(c)(Sched. I)(c)(10). It is therefore unlawful to knowingly or intentionally "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense" the drug, id. § 841(a)(1), or to "knowingly or intentionally … possess" it. Id. § 844(a). But it is the insurer's own conduct that is at issue.

The Board did not find that complying with an order to reimburse the claimant would result in the insurer's direct violation of the CSA by "manufactur[ing], distribut[ing], dispens[ing], or possess[ing]" therapeutic cannabis.[2] The concern is whether the insurer is punishable under 18 U.S.C. § 2(a): "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Finding that such a violation would occur if the insurer were to reimburse Mr. Panaggio, the Board endorsed in full the reasoning of the majority (5-2) opinion in Bourgion v. Twin Rivers Paper Company, LLC, et al., 187 A.3d 10 (Me. 2018), the only state Supreme Court decision to date to squarely address the identical question presented here of a workers' compensation insurance carrier's obligation to reimburse an injured worker whose treatment with therapeutic cannabis is fully in compliance with state law.

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[2] New Hampshire uses the term "cannabis" in authorizing its use for medicinal purposes under RSA 126-X, defined as "all parts of any plant of the Cannabis genus of plants, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, salt, derivative, mixture, or preparation of such plant, its seeds, or resin." § X:1,III. The CSA itself uses the term "marihuana"; other states and agencies often refer to "medical marijuana". Although the terms may differ slightly, and there are in fact some states that draw distinctions among marijuana, cannabis, and certain chemical derivatives of same, they are not relevant to this appeal. This brief mainly refers to "therapeutic cannabis" in deference to New Hampshire law, but where "medical marijuana" appears, the Court may consider the terms interchangeable. The substance scheduled by the CSA, authorized for therapeutic purposes by the State, and prescribed by the claimant's medical provider is the same.

The Board below emphasized that the insurer's compliance with an order to reimburse the claimant would be criminal because payment would be made knowingly: i.e., with the mere awareness that the claimant was previously in possession of a federally-prohibited substance for treatment of his work injury. Citing the U.S. Supreme Court's most recent canvass of the elements of aiding and abetting under 18 U.S.C. § 2(a) in Rosemond v. U.S., 572 U.S. 65 (2014), the Board characterized the opinion as having held that "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme's commission…is criminally liable". *C.R.* at 10.

The Board's decision rests on a misreading of Rosemond's explication of the intent required to support a conviction under 18 U.S.C. § 2(a), the same flaw that mars the majority opinion in Bourgoin.[3] Bourgoin properly recognized that to prove a party is guilty of aiding and abetting, the government must establish two elements: that the defendant (1) took an affirmative act in furtherance of that offense, and did so (2) with the intent of facilitating the offense's commission. Rosemond, 572 U.S. at 71. The question of intent under the second prong is critical here, as mere association with the principal, even with knowledge that

[3] Because the Board explicitly adopted the reasoning of the Maine Supreme Court in Bourgoin, *C.R. 12*, this brief's challenge to the analysis in Bourgoin may be assumed to apply directly to the Board's own.

the crime is to be committed, is not enough to meet this burden. U.S. v. Rodriguez-Duran, 507 F.3d 749, 759 (1st Cir. 2007).

The error in reasoning in Bourgoin (and thus, by the Board) was to equate mere knowledge of the criminal act with specific intent that the offense occur. Bourgoin's relevant holding in full, with emphasis added by the court, reads as follows:

> The mens rea required for aiding and abetting is an "intent [that] must go to the specific and entire crime charged," such as "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." Put another way, "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme *knowing* its extent and character *intends* that scheme's commission," and, on that basis, is criminally liable. ("The law does not, nor should it, care whether [the defendant] participates with a happy heart or a sense of foreboding. Either way, [the defendant] has the same culpability, because either way [the defendant] has *knowingly* elected to aid in the commission of a [crime]."). Therefore, were [the insurer] to comply with the

> administrative order by subsidizing Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a).

Bourgoin, 187 A.3d at 17 (quoting Rosemond, 572 U.S. at 76-80).

What the Bourgoin court ignores is the requirement Rosemond laid out in plain English in the quoted text above – the emphasis should equally be that the defendant "has knowingly *elected* to aid in the commission" of a crime. 572 U.S. at 80 (emphasis added).

In other words, mere knowledge of the underlying crime is insufficient. What justifies criminal liability for an aider and abettor is that they elect by their own free will to participate in the prohibited activity. The defendant may do so with grave reservations or open enthusiasm, but in either event they have nevertheless made the culpable choice to engage.

Judge Learned Hand drove the nail true when he wrote that, in order to aid and abet another in commission of a crime, it is necessary that a defendant

> in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed. All the words used—even the

> most colorless, 'abet'—carry an implication of purposive attitude towards it.

U.S. v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938).

Rosemond itself endorses Judge Hand's "canonical formulation of that needed state of mind", id. at 76, and could not be clearer on this point. "What matters for purposes of gauging intent, and so what jury instructions should convey, is that the defendant has ***chosen***, with full knowledge, to participate[.]" 572 U.S. 79 (emphasis added).

The specific intent dealt with in Rosemond addressed whether a defendant, who admittedly participated in drug trafficking, was further guilty of aiding and abetting an armed felony in violation of 18 U.S.C. § 924(c) where one of his conspirators carried a gun. The question of intent in Rosemond ultimately turned on timing, for reasons that are directly on point for this case.

> An active participant in a drug transaction has the intent needed to aid and abet a §924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice ***has decided*** to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. In so doing, ***he has chosen*** (like the abettors in Pereira and Bozza or the driver in

an armed robbery) to align himself with the illegal scheme in its entirety—including its use of a firearm. And ***he has determined*** (again like those other abettors) to do what he can to "make [that scheme] succeed." Nye & Nissen, 336 U.S., at 619, 69 S.Ct. 766. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—i.e., an armed drug sale.

For all that to be true, though, the § 924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, *knowledge that enables him to make the relevant legal (and indeed, moral) choice*. When an accomplice knows beforehand of a confederate's design to carry a gun, *he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise;* ***it is deciding instead*** *to go ahead with his role in the venture that shows his intent* to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or

> even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun.

572 U.S. at 77-78 (emphasis added).

Rosemond's persistent use of the language of volition, of the defendant's action as purposeful expression of his own will, demonstrates the shortfall in Bourgoin's analysis. It is precisely the defendant's ability to choose *not* to participate that makes criminally liable the defendant's active choice *to* participate. That is why mere knowledge that a crime has been committed is insufficient. Both foreknowledge of the crime and the ability to walk away are required. In this case, there is no ability for the insurer to 'alter the plan or withdraw from the enterprise.' That choice is not afforded to the insurer because of the Board's unanimous, unchallenged finding that the claimant's use of therapeutic cannabis is medically necessary pursuant to RSA 281-A:23. There accordingly arises a positive obligation under state law to "furnish or cause to be furnished" the treatment at issue.

Because New Hampshire law unambiguously requires the insurer to pay for the claimant's medically related treatment, reimbursement to Mr. Panaggio for this drug determined to be medically necessary is simply done as a straightforward matter of procedure in compliance with the

New Hampshire statute. The insurer's duty is a ministerial one allowing no discretion. BLACK'S LAW DICTIONARY, REVISED 4TH ED., p.1148 (ministerial duty is "[o]ne regarding which nothing is left to discretion—a simple and definite duty, imposed by law and arising under conditions admitted or proved to exist"); see also e.g., State, Dept. of Mental Health v. Allen, 427 N.E.2d 2, 4 (Ind. App. 4th Dist. 1981) (ministerial duty is "[o]ne which a person or board performs under a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his or their own judgment upon the propriety of the act being done."); Sch. Dist. No. 6 in Orford v. Carr, 63 N.H. 201, 205 (1884)(public officer, entrusted with the collection and disbursement of revenue in any of the departments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may possibly be unconstitutional).

There is no exercise of independent judgment involved in a ministerial act, no choice, no expression of' will that can even be implied: the insurer is an automaton simply obeying the legal authority of the state statute that obligates it to pay for treatment. Thus, the insurer lacks the requisite criminal intent to support a prosecution. To the extent an insurer could be said to have any specific intent at all, it is only to

comply with its undisputed state statutory and regulatory obligations. To hold otherwise would impose a standard of strict liability directly at odds with the state of mind required for conviction of inchoate crimes. U.S. v. U.S. Gypsum Co., 438 U.S. 422, 436 (1978)(recognizing that "[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo–American criminal jurisprudence")(quoting Dennis v. U.S., 341 U.S. 494, 500 (1951); see also Morissette v. U.S., 342 U.S. 246, 250 (1952)(the law seeks to align its punitive force with the "ability and duty of the normal individual to choose between good and evil").

The obligation to pay created by RSA 281-A:23 - which entirely distinguishes this case from any of the innumerable cases arising under 18 U.S.C. § 2(a), as far as counsel has been able to determine - makes this circumstance unique. In no successful Section 2(a) prosecution can the insurer point to the existence of a state statute that mandates the conduct which gives rise to the criminal charge. None of the precedent cases involve a legal obligation on the part of the alleged aider and abettor which directs it to act in a predetermined fashion. It is perhaps for this reason that the insurer has provided no evidence, after more than four years of litigating this case, that any such prosecution has ever been brought against an workers' compensation insurer under these circumstances.

But there is another, equally plausible reason.

III. A defendant cannot aid and abet a completed crime.

The block quote above from Rosemond highlights a second, equally and independently fatal flaw in the Board's reliance on Bourgoin. That is, aiding and abetting culpability is only possible where the offense has not yet been committed. The "defendant's knowledge of [the predicate crime] must be advance knowledge—or otherwise said, knowledge that enables him to make the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense." Rosemond, 572 U.S. at 77-78 (emphasis added).

The First Circuit has also cited Rosemond for the principle that aiding and abetting liability requires the government to show that the defendant had "advance knowledge" of the elements of the offense. U.S. v. Martinez-Rodríguez, 778 F.3d 367, 371 (1st Cir. 2015). Advance knowledge "means knowledge at a time the accomplice can do something with it—most notably, opt to walk away." Rosemond, 572 U.S. at 78.

The rule is simple, and simply stated. "[O]ne cannot aid and abet a completed crime." U.S. v. Ledezma, 26 F.3d 636,

642 (6th Cir. 1994); Roberts v. U.S., 416 F.2d 1216, 1221 (5th Cir.1969); see also U.S. v. Figueroa-Cartagena, 612 F.3d 69, 73 (1st Cir. 2010); U.S. v. Shulman, 624 F.2d 384, 387 (2d Cir. 1980); U.S. v. Murry, 588 F.2d 641, 646 (8th Cir. 1978); U.S. v. Keach, 480 F.2d 1274, 1287 (10th Cir. 1973).[4]

Here, the conduct prohibited by the Controlled Substances Act, the claimant's state-compliant possession and use of medical marijuana, has already occurred. By definition, it had already occurred at the time the claimant first sought reimbursement from the insurer for the drug he purchased in June of 2016. Accordingly, no aiding and abetting liability can attach to the insurer here. When the bullet has already left the chamber, it is impossible to help pull the trigger.

It was precisely this theory relied upon by a three judge panel of the Superior Court of New Jersey, Appellate Division in a case materially identical to this one when unanimously ordering a workers compensation insurer to reimburse a claimant for his purchase of medical marijuana.

> Here, [the insurer] is not purchasing or distributing the medical marijuana on behalf of

[4] To the extent Appellant relies here on Circuit Court of Appeals case law that pre-dates Rosemond, it has been recognized that "Rosemond did not establish a new rule, nor did it impose a new obligation on state law. Also, the holding in Rosemond was dictated by established precedent, and nowhere in that decision did the Supreme Court state that its holding broke "new ground." Whitaker v. State, 199 A.3d 1021, 1030–31 (R.I. 2019)(internal citation elided).

> petitioner; it is only reimbursing him for his legal use of the substance. In addition, petitioner has obtained the medical marijuana before [the insurer] reimburses him. [The insurer] is never in possession of the marijuana. Therefore, the federal offense of purchasing, possessing or distributing has already occurred. [The insurer] cannot abet the completed crime.

Hager v. M & K Constr., 225 A.3d 137, 148 (N.J. Super. Ct., App. Div. 2020).

Aiding and abetting is a forward-looking offense. No prosecution under 18 U.S.C. § 2(a) is possible.

IV. There is no demonstrable threat of prosecution, even in the abstract.

a. For a decade, the U.S. Department of Justice has declined to prosecute lawful actors in state-regulated medical marijuana markets.

In 2013, then-U.S. Deputy Attorney General James M. Cole issued a formal memorandum to all U.S. Attorneys providing "Guidance Regarding Marijuana Enforcement" ("Cole Memorandum"). This was published in response to state-level initiatives to legalize outright small amounts of marijuana for possession and regulate its production and

sale.[5] The Cole Memorandum marked an expansion of the Department's similar guidance in October 2009 introducing a lenient prosecutorial stance toward states' medical marijuana-only initiatives.[6] In attempting to balance Congress's judgment as reflected in the CSA that marijuana remains a Schedule 1 substance with the growing march of the states toward approval of marijuana for both medical and recreational purposes, the Cole Memorandum instructed local U.S. Attorneys to focus their limited resources on the following enforcement priorities:

> (1) Preventing the distribution of marijuana to minors;
>
> (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
>
> (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
>
> (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

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[5] *"Cole Memorandum"*, 8/29/13, *available at*: https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.
[6] *"Ogden Memorandum"*, 10/19/09, *available at*: https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf.

> (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
>
> (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
>
> (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;
>
> (8) Preventing marijuana possession or use on federal property.

"Cole Memorandum", 8/29/13.

In doing so, the Department reaffirmed the position it publically held since 2009 that it is "likely not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers." Id. Moving forward, the Department recognized that a strong and well-regulated state marijuana market (whether for medical or recreational purposes) would not be likely to threaten these enforcement priorities, and that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." Id.

This hands-off approach to enforcement of federal law – one that appropriately focused prosecutorial resources on large-scale criminal cartels – gave states throughout the

country the space to experiment with Compassionate Use Acts and to regulate medical marijuana, and they responded at speed. Forty-six states, the District of Columbia and four U.S. territories now permit some degree of medicinal use of cannabis or its derivatives.[7]

The Cole Memorandum's continued federal assurance of non-prosecution has been cited as among the reasons to discount any formal threat of criminal penalty presented by the CSA, and to order reimbursement for therapeutic cannabis in the workers' compensation context. Lewis v. American General Media, 355 P.3d 850 (N.M. Ct. App. 2015).

As in this case, the insurer in Lewis argued that aiding and abetting liability would be implicated by an order compelling reimbursement for therapeutic cannabis purchases. The Court nevertheless rejected the argument as raising too remote a threat to be of any legitimate concern:

> According to Employer, if it were to follow the WCJ's order, and despite the Department of Justice's memoranda, it would be civilly responsible for violation of the CSA by way of conspiracy or aiding and abetting [citing 18 U.S.C. § 2(a)].
>
> However, Employer's argument raises only

[7] As of March 10, 2020, fully 29 states, the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands have each authorized the use of medical marijuana; an additional 17 states allow low-THC, high-cannabidiol products for medical use. See NATIONAL CONFERENCE OF STATE LEGISLATURES, State Medical Marijuana Laws, Tables 1 & 2, *available* at: http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

> speculation in view of existing Department of Justice and federal policy. Nothing in the Department of Justice's second memorandum alters its position regarding the areas of enforcement set forth in the initial memorandum. Medical marijuana is not within the list.

355 P.3d at 858.

This decision was issued in 2015. Although there was a change in leadership at the U.S. Department of Justice following the general election of 2016, the Cole Memorandum remained the official policy of the DOJ until January 4, 2018, when then-U.S. Attorney General Jeff Session issued a new memorandum addressing "Marijuana Enforcement."[8] This memorandum deems "previous nationwide guidance specific to marijuana enforcement… unnecessary…" and "rescind[s the Cole Memorandum] effective immediately." Id.

On its face and by its own terms, the "Sessions Memorandum" does not direct U.S. Attorneys to take any particular action regarding marijuana prosecutions. It simply withdraws the Cole guidance and permits individual U.S. Attorneys to follow pre-existing federal guidelines when marshalling their limited resources to prosecute the federal crimes they deem worthy of their attention. Id. Current Attorney General William Barr has not issued any further amendment to the DOJ's official guidance, so the Sessions

[8] "*Sessions Memorandum*", 1/4/18, *available at*: https://www.justice.gov/opa/press-release/file/1022196/download.

Memorandum remains in force. Its practical effect has not yielded any prosecutions brought against third party insurers such as those described here.

Indeed, since the advent of the Sessions Memorandum, DOJ has instead acted to bring public corruption charges that protect state-compliant marijuana businesses. DOJ press releases since January 2018 proclaim cases involving a former Maryland state delegate who took bribes in exchange for voting in favor of a bill to increase the number of medical marijuana grower and processing licenses available to an out-of-state company.[9] Another involved a police officer who used his official position to protect a marijuana trafficking business. [10] The mayor of Fall River, Massachusetts was charged with extorting more than $250,000 in bribes from cannabis businesses in return for assistance with licenses.[11] In these extortion cases, state law-compliant marijuana businesses, far from being prosecuted, are treated as victims.

But if the Sessions Memorandum is to have any effect at all on federal prosecutions involving marijuana generally, it

[9]DOJ Press Release, 12/23/19, *available at:* https://www.justice.gov/usao-md/pr/former-baltimore-delegate-facing-federal-honest-services-wire-fraud-and-bribery-charges.
[10]DOJ Press Release, 3/22/18, *available at:* https://www.justice.gov/usao-wdwa/pr/former-seattle-police-officer-sentenced-six-years-prison-role-marijuana-smuggling.
[11]DOJ Press Release, 9/6/19, *available at:* https://www.justice.gov/usao-ma/pr/fall-river-mayor-charged-extorting-marijuana-vendors-cash.

can only serve to increase the risk to entities participating in state-regulated markets in *recreational* marijuana.

Medical marijuana remains a protected class of its own, for reasons identified by the Lewis court that remain in force today, and which serve as grounds to disregard the phantasm of federal prosecution raised by workers' compensation insurers. Regardless of the status of the Department of Justice's forbearance in any given state's recreational marijuana market, Congress itself specifically prohibits the use of any federal funds to enforce the CSA against entities acting, as in this case, lawfully within a state-regulated medical marijuana market.

b. Congressional restrictions on DOJ funding establish a judicially-enforced safe harbor in states that have approved and regulate medical marijuana.

Any concern presented with the withdrawal of the Cole Memorandum is only legitimate for parties acting in compliance with a state's recreational marijuana market. Parties in compliance with a state-regulated medical marijuana framework continue to enjoy an independent bulwark of protection against federal interference that is independent of any vicissitudes of attitude at the U.S. Department of Justice.

Beginning with an amendment to the federal budget in December 2014, Congress has consistently prohibited the Department of Justice from using any federal funds for medical marijuana prosecutions in states that regulate it. The language drafted in "The Consolidated and Further Appropriations Act of 2015 to Fund the Operations of the Federal Government" (known at the time as the Rohrabacher-Farr Amendment, in current form below as the Rohrabacher-Blumenauer Amendment) and reapproved without interruption since, has only expanded over time to increase the list of states and territories to which it applies. Its purpose is unequivocal:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the

> use, distribution, possession, or cultivation of medical marijuana.
>
> *Consolidated Appropriations Act, 2020*, Pub.L. 116-93, Sec. 531 (12/20/2019),*available at*: https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.pdf (emphasis added).

This Congressional refusal to fund medical marijuana prosecutions is no technicality; it has been enforced against the DOJ by the Ninth Circuit Court of Appeals. U.S. v. McIntosh, 833 F.3d 1163 (9th. Cir. 2016). In McIntosh, ten separate interlocutory appeals and petitions for writs of mandamus arising from criminal indictments in California and Washington were consolidated; defendants who were charged with federal marijuana offenses each moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice was barred by the Rohrabacher-Blumenauer Amendment from spending funds to prosecute them. Id. at 1168-69.

The Circuit Court of Appeals read the Amendment's funding limitation on the DOJ's power to prosecute to be strictly limited to the kinds of activity around medical marijuana that were specifically enumerated – but the limitation is very real.

> [W]e conclude that [the appropriations rider] prohibits the federal government only from preventing the implementation of those specific

> rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the appropriations rider].

833 F.3d 1163, 1178 (2016)(emphasis added).

McIntosh therefore remanded to the district court for a further evidentiary hearing that would assess whether the defendants' conduct was indeed fully and completely authorized by state law, in which case their indictments would remain enjoined. See id. at 1179. And indeed, since that time the DOJ has prosecuted individuals when their conduct strays from strict compliance with state medical marijuana laws, as in the case of an Auburn, Maine man alleged to have "grown and distributed large quantities of marijuana in violation of federal law, and under the cover of, but in violation of, Maine's Medical Marijuana program. The organization cultivated marijuana at numerous warehouses

in Androscoggin County and distributed marijuana to people who were not participants in Maine's Medical Marijuana program, including out-of-state customers" (emphasis added).[12]

While the McIntosh court recognized that funding to the DOJ for such prosecutions could in theory be restored, it also noted that the lack of funding "could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills." Id. (also instructing the district court on remand to consider how this lingering lack of funds affected the appellant's Sixth Amendment right to a speedy trial). That withholding of funds has remained in force for four years and counting.

Not only has this remained the consistent policy of Congress since 2015, Congress notably kept the policy in force despite the direct request of then-Attorney General Sessions in a letter to the House and Senate Majority and Minority leaders, imploring them not to strip the Department of Justice of any funding that would "in any way inhibit its authority to enforce the Controlled Substances Act."[13] In that letter, then-Attorney General Sessions conceded that the DOJ

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[12] DOJ Press Release, 2/28/18, *available at:* https://www.justice.gov/usao-me/pr/auburn-man-charged-illegal-firearm-possession-and-marijuana-trafficking.

[13] Office of the Attorney General, 5/1/17, *available at*: https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections.

remains bound by the Ninth Circuit's McIntosh decision not to prosecute individuals or organizations that are "in compliance with state medical marijuana law." He simply reiterated his own personal "belief" that it would be "unwise for Congress to restrict the discretion of the Department to fund particular prosecutions", and closed the letter by again beseeching Congress to "oppose" any such limitation "in Department appropriations." Id.

Within two days, Congress rejected his plea and stripped federal funding for DOJ prosecutions of state-approved medical marijuana by a vote held in the House on May 3, 2017, approved by the Senate on May 4, 2017.[14] The Consolidated Appropriations Act of 2017, H.R. 244, Sec. 537, limiting exactly such prosecutions, was signed into law by the President the following day. Id.

Congress's swift, unequivocal rebuke to the DOJ, and reaffirmation of this commitment to protect states which regulate medical marijuana and the individuals and entities acting in compliance with those state laws, has remained in force. Congress has taken care to extend the safe harbor provided by the Rohrabacher-Blumenauer amendment in

[14] Consolidated Appropriations Act 2017, Pub.L. 115-31, H.R. 244, *available at*: https://www.congress.gov/bill/115th-congress/house-bill/244/actions?q=%7B%22search%22%3A%5B%222015+HR+244%22%5D%7D&r=14&s=1.

each and every Appropriations Act since it was first introduced in 2015.[15]

Any and all legislation is potentially subject to change, of course. But neither the insurer nor the Board in this case has pointed to any evidence of any actual criminal conviction in any court nationwide suffered by any workers' compensation insurance carrier who has complied with an administrative order to reimburse an injured worker for the purchase of medically necessary, causally related treatment with state-approved therapeutic cannabis. "Evaluated in terms of practical effect, a criminal statute which is wholly ignored [or, in this case, Congressionally-estopped from enforcement] is the same as no statute at all." Fort v. Fort, 425 N.E.2d 754, 759 (Mass. App. Ct. 1981). The facts as they exist today, and as they have existed for a decade, is that there is no genuine threat of criminal liability that excuses the insurer from fulfilling its clear statutory obligation to provide for the injured worker's medical care under RSA 281-A:23. The insurer should be ordered to comply.

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[15] See "Continuing Appropriations Act, 2018" Pub.L. 115-56, H.R. 601; "Further Continuing Appropriations Act, 2018" Pub.L. 115-90; "Further Additional Continuing Appropriations Act, 2018", Pub.L. 115-96, H.R. 1370; "Extension of Continuing Appropriations Act, 2018", Pub.L 115-120, H.R. 195; "Continuing Appropriations Amendments Act", Pub.L. 115-124; "Consolidated Appropriations Act, 2018", Pub.L. 115-141;
"Further Additional Continuing Appropriations Act, 2019", Pub.L. 116-5. The injunction remains in effect. "Consolidated Appropriations Act, 2020", Pub.L 116-93, *available at:* https://www.congress.gov/116/plaws/publ93/PLAW-116publ93.htm.

CONCLUSION

If this Court remands to the Board with instructions to order reimbursement, every participant in this case will have done precisely what state law requires, and no more. The claimant's primary care provider certified that he has a qualifying condition under RSA 126-X:1,XVII, just as the law demands. The claimant also purchased and used the drug in full compliance with RSA 126-X. The Board then held a routine hearing pursuant to RSA 281-A:43,I(b) and found the claimant's use of that drug to have been reasonable and medically necessary pursuant to RSA 281-A:23. The insurer is now bound by the statutory mandate of RSA 281-A:23 and regulatory command of Lab Rule 501.02 to reimburse him, no different than if the drug in question were Neurontin or Tramadol. State law gives the insurer no choice to avoid that obligation, and thus it can have no culpability under 18 U.S.C. § 2(a).

For all the reasons stated above, Mr. Panaggio asks this Court to hold the Board erred as a matter of law, and to remand with instructions to order reimbursement.

Respectfully submitted by:

Andrew Panaggio
By his attorney
SHAHEEN & GORDON, P.A.

Dated: July 6, 2020 By: /s/ Jared P. O'Connor

Jared P. O'Connor
NH Bar ID No. 15868
180 Bridge Street
Manchester, NH 03104
(603) 669-8080
joconnor@shaheengordon.com

STATEMENT REGARDING ORAL ARGUMENT

By order dated February 3, 2020, this appeal was assigned for argument before the full court. Mr. Panaggio's argument will be presented by Attorney Jared O'Connor.

SUPREME COURT RULE 16(3)(i) CERTIFICATION

The written decision appealed from begins at page 9 of the Certified Record, and is also appended to this brief.

CERTIFICATE OF SERVICE

A PDF copy of this brief was electronically served on James M. O'Sullivan, Esq., and Robert S. Martin, Esq., counsel for the insurer, and the Attorney General of the State of New Hampshire via this Court's e-filing system.

Dated: July 6, 2020

/s/*Jared P. O'Connor*

Jared P. O'Connor
NH Bar ID No. 15868
SHAHEEN & GORDON, P.A.
180 Bridge Street
Manchester, NH 03104
(603) 669-8080
joconnor@shaheengordon.com

State of New Hampshire

COMPENSATION APPEALS BOARD

Hugh J. Gallen
State Office Park
Spaulding Building
95 Pleasant Street
Concord, NH 03301
603/271-3176
TDD Access: Relay NH
1-800-735-2964
FAX: 603/271-5015
http://www.nh.gov/labor

August 30, 2019

DECISION OF THE WORKERS' COMPENSATION APPEAL BOARD

ANDREW PANAGGIO

V.

W.R. GRACE & COMPANY

DOCKET # 2017-L-0248

APPEARANCES: Jared O'Connor, Esquire, appeared for Andrew Panaggio
James O'Sullivan, Esquire, appeared for CNA Insurance Company

WITNESS: None

ISSUE: RSA 281-A: 23: Medical, Hospital and Remedial Care

DATE OF INJURY: July 9, 1991

HEARING: A hearing on remand from the New Hampshire Supreme Court decision dated March 7, 2019, was held at the New Hampshire Department of Labor, Concord, New Hampshire on July 27, 2019.

PANEL: The panel was composed of Daniel Manning, Susan Jeffrey and Richard Mitchell, Esquire, chairperson.

BACKGROUND AND FINDINGS

The background of this case is simple. The Compensation Appeals Board ruled that Mr. Panaggio's use of medical marijuana was reasonable and medically necessary. However, the majority ruled that the carrier could not be compelled to pay for the medical marijuana as the payment would violate both state and federal law.

In its partial decision, the Supreme Court ruled that payment for the prescription would not violate New Hampshire law. However, the CAB majority decision had ruled that by paying for drug, the carrier would be committing a crime without specifying the

crime it would commit. The Supreme Court remanded the case to the board for a determination on the issue of whether the carrier would be committing a federal crime by reimbursing the claimant for the drug or paying for it directly.

Coincidentally, on the day this case was argued to our Supreme Court, the Maine Supreme Court decided Bourgoin v Twin Rivers Paper Company, LLC, et al, 187 A.3rd 10 (2018) which is directly on point with this one. The Maine Supreme Court analyzed the federal law and found that payment by the worker's compensation carrier for medical marijuana, duly prescribed in accordance with Maine's medical marijuana law, would constitute a federal crime. The claimant here argues that the dissent in that case had the greater wisdom.

The primary issue is the conflict between the Federal Controlled Substances Act, 21 U.S.C.S. Sec. 801-904) and the state medical marijuana laws. The Maine Supreme Court first analyzed the Supremacy Clause of the United States Constitution which "unambiguously provides that if there is a conflict between federal and state law, federal law shall prevail". Citations omitted. It went on to hold that Congress framed the CSA to expressly preserve its supremacy. 21 USCS 903.

Under the CSA, marijuana is classified as a Schedule I drug barring its use even in states with local laws allowing its medical use and application. 21 USCS 812(b)(1)(A)-(C). The Bourgoin Court then found that the CSA not only provides that possession, manufacture, and distribution illegal, but that federal prosecution can be directed at any "principle". The principle includes any individual who "commits an offense against the United States or *aids, abets,* counsels, induces or procures its commission". 18 USCS 2(a) (emphasis in citation). That has been interpreted by federal courts: "a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." Rosemond v United States, __US___, 134 S.Ct. 1240, 1245 (2014).

From there, the Court addressed the *mens rea,* a sticking point for the dissenters. It found that "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme's commission…is criminally liable".

Finishing its analysis on the Supremacy of CSA, the Bourgoin court concluded: "Therefore, were [the carrier] to comply with the administrative order by subsidizing

Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a)."

It summarized that compliance with both the CSA and the state's medical marijuana law is an impossibility. If Twin Rivers were to comply with the hearing officer's order that it pay for the prescription marijuana, the order would cause Twin Rivers to be criminally aiding and abetting Bourgoin's purchase, possession and use of marijuana – by acting with the knowledge that it was subsidizing the worker's purchase of it. Such an act is punishable by up to a $1000 fine and up to a year in prison, but repeated acts may result in up to 20 years in prison.

In related cases, courts in Oregon and New Mexico have found that the CSA preempts those states' medical marijuana laws and the states' law application to workplace accommodation, drug tests and discrimination (after a failed test). Supra, 22-23. These cases demonstrated that a person's right to use medical marijuana "cannot be converted into a sword that would require another party, such as [a worker's compensation carrier], to engage in conduct that would violate the CSA." Bourgoin, 24.

The claimants here, and in Bourgoin, raised the so-called Ogden Memo (and its progeny). That was a Department of Justice memo that instructed its prosecutors to forgo prosecuting marijuana users. The Bourgoin Court noted (as did the CAB, it should be noted) that "Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration". Supra at 26. But the Court concluded that even if the Ogden memo were "still alive today", it could not weaken the conclusion that there is positive conflict between the CSA and [medical marijuana law] as applied here." 27.

It continued: "Most importantly, however, the magnitude of the *risk* of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that [the carrier] would be forced to commit a federal crime" if ordered to pay for the claimant's medical marijuana. 28.

This leads us to another argument made by the claimant. He notes that since 2014, Congress has added a rider that provides for no funding for the prosecution of participants in medical marijuana. That rider has changed only in adding states as they pass such legalization. One must reflect to the words of the Bourgoin court. Risk is not

the issue, forcing the carrier to commit a federal crime is. The ephemeral nature of the rider and the Ogden memo is underscored by the provision of the CSA that allows for prosecution of crimes up to five years old.

DECISION

The panel unanimously finds that were the carrier to pay for Mr. Panaggio's prescription medical marijuana it would commit a federal crime (violation of CSA) by aiding and abetting Mr. Panaggio's illicit purchase and possession. As such, it can not be ordered to pay for Mr. Panaggio's medical marijuana. The panel adopts the reasoning in Bourgoin v. Twin Rivers Paper Company, LLC in full.

Richard Mitchell, Esq., Panel Chair
Compensation Appeal Board

RM/tb