THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0685

Appeal of Andrew Panaggio

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

REPLY BRIEF OF APPELLANT ANDREW PANAGGIO

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and oral argument by:

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I. Federal preemption issues are secondary to the question of the insurer's potential criminal liability, and it is the latter the Board was instructed to review on remand.

Contrary to the insurer's assertion, this court did not remand "for a determination on the issue of federal preemption", INSURER'S BRIEF at 10, but to determine whether the insurer bore criminal liability. In the prior appeal, this Court observed

> [T]he board did not address whether, under those circumstances, the government would be able to prove the commission of a federal crime beyond a reasonable doubt, including proof that the carrier had the requisite criminal intent.
>
> ...
>
> 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.

Appeal of Panaggio, 172 N.H. 13, 18-19 (2019)(internal citation omitted)(emphasis in original).

The threshold issue on remand was whether reimbursing the claimant for his prior purchase of medical marijuana exposes the insurer to prosecution of a federal crime. The Board identified aiding and abetting under 18 U.S.C. § 2(a) as a ground for prosecution, but the insurer has no such exposure and thus no conflict exists between state and federal law. As set forth more fully in Appellant's brief, the insurer has no such exposure because: 1) it is impossible to aid and abet a crime that has already occurred, U.S. v. Martinez-Rodriguez, 778 F.3d 367, 371 (1st Cir. 2015); and 2) a defendant cannot aid and abet a crime if it lacks the requisite intent. APPELLANT'S BRIEF at 20-31. Without any violation of the Controlled Substances Act, there is no need to conduct a preemption analysis. In other words, there is no direct conflict between what New Hampshire law requires and what the Controlled Substances Act forbids if there is no crime committed by the insurer in the first place.

II. The specific intent required for aiding and abetting is not an inquiry into the defendant's motivation. It is predicated on the defendant's

choice to participate, and the insurer has no such choice here.

The insurer's framing of the question as one of "motivation" to take an act, versus its mere "knowledge" of an underlying crime, misses the mark. The question whether the insurer can be charged with aiding and abetting is not about the insurer's mere knowledge that a crime was committed or its motivation when issuing a check for reimbursement. Both parties have cited U.S. v. Rosemond, 572 U.S. 65 (2014) for the proposition that it matters not whether the act in question is done enthusiastically or begrudgingly. The key is the criminal defendant's choice to participate.[1] It is that choice to participate that the criminal law seeks to sanction. "What matters for purposes of gauging intent…is that the defendant has chosen, with full knowledge, to participate…" Id. at 79-80. When the Board enters a finding that the disputed treatment is reasonable and medically necessary, RSA 281-A:23 requires reimbursement,

[1] Please note that this argument differs slightly from that urged by the dissent in Bourgoin v. Twin Falls Paper Co., Inc., 187 A.3d 10 (Me. 2018). Justice Jabar reasoned, by pointing to the insurer's contrary position in the litigation itself as evidence, that government could not infer that the insurer met Learned Hand's canonical formulation of aiding and abetting liability as "something that he *wishes* to bring about, that he seek by his action to make it succeed." Id. at 25 (emphasis in original). This reasoning may well be accurate, and Appellant does not abandon it here. But appellant's primary, alternative argument is that the insurer's "wishes" simply do not matter in the face of RSA 281-A:23's command.

full stop. At this point, the insurer is denied any ability to choose what to do – it must pay the bill. The insurer therefore cannot be criminally culpable. The situation would be different if state law required the insurer to directly violate the Controlled Substances Act itself. It does not.

III. Reimbursement does not create a physical impossibility of complying with both state and federal law.

"Impossibility" preemption is relevant only where there is a physical impossibility of complying with both state and federal law. INSURER'S BRIEF at 20; Bourgoin v. Twin Rivers Paper Co., LLC, 187 A.3d 10, at 14 (majority) and 23 (dissent). There is no evidence in this case that the insurer would directly engage in conduct forbidden by federal law.

The cases cited by the insurer regarding physical impossibility only serve to highlight the absence of that problem in this case. For example, in People v. Crouse, 388 P.3d 39, 40-42 (2017), the Colorado Supreme Court declined to require police offers to physically return contraband to medical marijuana patients because doing so would place them in a position of personally, physically "distributing" marijuana in direct violation of the Controlled Substances Act. That is not the situation here. The Workers' Compensation Law does not require the insurer to physically deliver marijuana to the claimant, manufacture it for his use,

or otherwise come into possession of the substance itself. *See* 21 U.S.C. § 841(a)(1)(prohibiting manufacture, distribution, dispensing or possession with intent to do any of the foregoing), § 844(a)(prohibiting simple possession). Rather, RSA 281-A:23 only requires that the insurer reimburse claimants for reasonable and medically necessary treatment. The insurer can comply with RSA 281-A:23 without violating the Controlled Substances Act.

IV. The insurer cannot aid and abet a crime that has already occurred, and the Labor Department addresses bills for treatment that has already occurred.

As above with the contours of the specific intent element of 18 U.S.C. § 2, the settled law addressing the impossibility of aiding and abetting an already completed crime has already been set forth in Appellant's brief, beginning at page 32. However, it is worth highlighting precisely the procedural posture of this case, and how the Department of Labor actually handles medical bill disputes in worker's compensation cases.

An order from the Department of Labor directing the insurer to pay for medical treatment is necessarily backward-looking. Such an order relates only to the specific bills for treatment that were already incurred by the claimant and

denied by the insurer. RSA 281-A:23, I(e) provides that insurers have an obligation

> within 30 days after receipt of a medical bill: (1) To make payment of such medical bill pursuant to this section; or (2) To deny such payment, notifying the health care provider, employee, and labor department of such denial. This denial shall give a valid reason for the denial and shall advise the claimant of the right to petition the commissioner for a hearing.

See also Lab Rule 506.02(r)(1)[2]. The insurer also has the right to review any medical treatment note to determine whether justification exists to deny payment. See RSA 281-A:23, V(a)(1)("The act of the worker in applying for workers' compensation benefits constitutes authorization to any physician, hospital, chiropractor, or other medical vendor to supply all relevant information regarding the worker's occupational injury or illness to the insurer[.]")

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[2] Lab 506.02 Acceptance or Denial of Claims and Filing of Reports and Payment of Benefits.

…

(r) If payment of the bill under RSA 281-A: 23 is denied, the carrier shall:

(1) Write the employee on carrier letterhead and copy the provider and the labor department, providing explanation of the denial, which shall:
a. Be issued within 30 days of the receipt of the bill or invoice;
b. Be in narrative form;
c. Advise the employee of the reason for the denial;
d. Advise the employee of the identity of the entity issuing the denial; and
e. Advise the employee of their right to request a hearing within 18 months of the date of denial if the employee disagrees with the denial[.]

Once denied, the bill is presented to the Department of Labor for hearing, and when reviewing the reasonableness of treatment, "the proper analysis is whether the petitioner presented objective evidence showing, that *at the time the tests were ordered*, it was reasonable for her to seek further treatment, be it diagnostic or palliative." Appeal of Lalime, 141 N.H. 534, 538 (1996)(emphasis added).

That is the situation here. Mr. Panaggio presented the insurer with a receipt for the therapeutic cannabis he purchased on 7/27/2016 from Sanctuary Alternative Treatment Center in Plymouth, New Hampshire for $170. His request for reimbursement for that treatment was denied by letter dated 8/23/2016 from CNA Insurance. *Appeal of Panaggio I (2019)*, Case No. 2017-0469, CERTIFIED RECORD at 67. If the insurer is ordered to reimburse, a check will be cut to Mr. Panaggio for $170, as that is the only bill that will have been ruled on by the Department of Labor.

V. Where there is no evidence that reimbursement funds will be used for future purchases, there is no obstacle preemption.

The result urged in this case does not provide an obstacle to the purposes of the Controlled Substances Act. Congress has specifically declined to occupy the field of workers compensation, which remains firmly within the states' sphere of delegated power. 21 U.S.C. § 903 ("No

provision of this title [the Controlled Substances Act] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.").

Rather, to refuse to allow reimbursement here would frustrate the clear purpose of New Hampshire's Workers Compensation Law, which requires insurers to provide medical treatment to injured workers when the Board has determined that such treatment is causally related to the industrial accident and medically necessary. Doing so is no obstacle to the purpose of the Controlled Substances Act when the offending substance in question is not directly possessed, manufactured, or distributed by the insurer.

Because the funds to purchase the drug have already been expended in 2016, reimbursement cannot be shown to directly "bankroll" future purchases any more than the weekly indemnity benefits insurers simultaneously furnish to injured workers, workers who themselves may also be validly prescribed cannabis for their industrial accident. No funds are earmarked for the prospective purchase of any substance prohibited by the Controlled Substances Act, nor will any

funds be paid directly by the insurer to any cannabis dispensary.

The insurer refers to a "scheme" of payment but fails to connect a series of reimbursements with any clear connection to a federal crime. There is no nefarious plot at work here: there is only necessary medical treatment recommended by a doctor for her patient pursuant to RSA 126-X:1, XVII, and a patient's request for reimbursement pursuant to RSA 281-A:23, I, deemed necessary by the Board in the ordinary course of a routine hearing process at the Department of Labor. New Hampshire law and federal law can exist in their separate spheres without direct conflict, and this Court should decline the insurer's invitation to interpret the law in such a way as to create one.

Respectfully submitted by:

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Dated: August 25, 2020

By: */s/ Jared P. O'Connor*

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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: August 25, 2020

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