COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 04387-15**
Daniel Wright	Employee
Pioneer Valley	Employer
Central Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Calliotte)

This case was heard by Administrative Judge Rose.

APPEARANCES
Katherine Lamondia-Wrinkle, Esq., for the employee
Leonard Y. Nason, Esq., for the insurer

LONG, J. The employee appeals from a hearing decision denying and dismissing his claim for the insurer to reimburse him for medical marijuana which he obtained and paid for pursuant to the Massachusetts Act for the Humanitarian Use of Marijuana (hereinafter "Massachusetts Act"). This claim requires us to squarely address the relationship between the federal Controlled Substances Act (hereinafter "CSA") and the Massachusetts Act. We hold, based upon the specific facts presented by this claim, that where an employee seeks an order from an Administrative Judge at the Department of Industrial Accidents to compel a workers' compensation insurer to pay for the employee's medical marijuana, a positive conflict exists between the federal and state laws, such that the CSA preempts the Massachusetts Act as applied in these circumstances. We therefore affirm the decision of the Administrative Judge.

The employee's claim for payment of medical benefits under §§ 13 and 30, specifically reimbursement for the cost of medical marijuana, was the subject of a § 10A conference on May 10, 2017. The administrative judge denied the employee's claim and a timely appeal was filed by the employee. A de novo hearing was held on August 31,

2017. Citing federal law prohibiting the use of marijuana for any purpose, the judge denied the employee's claim for benefits pursuant to §§ 13 and 30. (Dec. 5.)

The employee appeals the hearing decision, arguing that the federal CSA[1] does not preempt the Massachusetts Act,[2] or prohibit an administrative judge from ordering an

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[1] In Gonzales v. Raich, 545 U.S. 1 (2005), the U. S. Supreme Court stated:

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.
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> To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. §§811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution and use of the substances listed therein. §§ 821-830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid*. 21 CFR § 1301 et seq. (2004).
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> In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." Schedule I drugs are categorized as such because of their high potential for abuse, *lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment*. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. §§ 823(f), 841(a)(1), 844(a); see also United States v. Oakland Cannabis Buyers' Cooperative, 32 U.S. 483 (2001).
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> The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

Gonzales v. Raich, supra at 12-15 (emphasis added).

insurer to pay for an employee's medical marijuana pursuant to G.L. c. 152. The insurer seeks affirmance of the hearing decision, arguing that compliance with an order to pay for the employee's medical marijuana would require the insurer to violate the CSA, which preempts the Massachusetts Act and Chapter 152, thus subjecting it to criminal prosecution.[3]

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[2] In Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017), the Massachusetts Supreme Court explained:

> In 2012, Massachusetts voters approved the initiative petition entitled, "An Act for the humanitarian medical use of marijuana," St. 2012, c. 369 (medical marijuana act or act), whose stated purpose is "that there should be no punishment under state law for qualifying patients[, physicians and health care professionals, personal caregivers for patients, or medical marijuana treatment center agents] for the medical use of marijuana." *Id*. at § 1.
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> . . . .
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> Under the medical marijuana act, a "qualifying patient" is defined as "a person who has been diagnosed by a licensed physician as having a debilitating medical condition"; … The act protects a qualifying patient from "arrest or prosecution, or civil penalty, for the medical use of marijuana" provided the patient "(a) [p]ossesses no more marijuana than is necessary for the patient's personal, medical use, not exceeding the amount necessary for a sixty-day supply; and (b) [p]resents his or her registration card to any law enforcement official who questions the patient … regarding use of marijuana." St. 2012, c. 369, § 4. The act also provides, "Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." *Id.*

Barbuto, supra at 457, 459-460.

On December 31, 2018, the 2012 medical marijuana act was repealed, and Chapter 94I, "Medical Use of Marijuana," became effective. However, at all times relevant to this case, St. 2012, c. 369, "An Act for the humanitarian medical use of marijuana," was in effect.

[3] The employee also challenges the hearing decision on alternative grounds: (1) the Massachusetts Act does not prohibit the Department of Industrial Accidents from ordering the payment of medical marijuana in the context of a workers' compensation case; and (2) a lack of FDA approval should not preclude the DIA from awarding benefits for medical marijuana for the treatment of chronic pain. Because we conclude the employee's claim for reimbursement is barred by the CSA, we need not reach the merits of these alternative arguments.

The facts of this claim are undisputed, and the parties jointly stipulated to the following, which the judge adopted as findings:

1. Accepted injury for May 15, 2012.
2. Employee is totally and permanently disabled from that injury.
3. Employee is in pain with respect to that injury.
4. Employee receives a positive benefit from the use of medical marijuana as to reducing or eliminating pain in regards to the knee injury.

(Dec. 2; Tr. 15-16.)

In his decision, the judge found as follows:

> There is no dispute that so-called medical marijuana provides a "positive benefit" for the Employee in relationship to his industrial injury. In addition to the stipulations, I find the Employee's testimony defining the positive benefits as entirely credible. The medical marijuana reduces his pain and increases his mobility. His sleep is better, and he has less anxiety and anger. The marijuana has stopped his "twitching" and he has been able to eliminate any opioids. … However, an Administrative Judge is charged with impartially applying the law to the facts, not following his or her own opinions or beliefs. All attorneys and judges take an oath to uphold and follow the United States Constitution. It is a basic, fundamental principle of federalism and constitutional law that under the Supremacy Clause the "Constitution, and the laws of the United States… shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The federal law in this area is crystal clear; marijuana is an illegal and prohibited drug. For decades, the federal government has waged a so-called "war on drugs", and still to this day, enforces those laws in multiple areas. Quite specifically, the F.D.A. has not approved marijuana as a safe and effective drug for any indication. The political winds of prosecutory discretion do not erase duly enacted laws, only legislative action can accomplish what the Employee desires. There may come a day when medical marijuana is legal under the Federal Law and receives approval from the F.D.A. Until that time, despite the Employee's credible testimony, the claim must be denied.

(Dec. 4-5.)

While the employee acknowledges that "[t]he Supremacy clause of article VI of the United States Constitution grants Congress the power to pre-empt state law" (Employee br. 17), he nevertheless argues on appeal that the CSA "does not preclude the insurer from being ordered to reimburse the Employee the cost of medical marijuana in the context of a workers' compensation claim." (Employee br. 17.) The employee

maintains that Supremacy clause analysis " 'starts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). (Employee br. 17.)

The employee accurately notes in his brief that there are three categories of preemption analysis: express preemption, field preemption and obstacle/conflict preemption; but he does not indicate which type is applicable in analyzing the instant case. (Employee's br. 18-19.) The employee does not allege that there is an express statement in the CSA of an intent to preempt state law. Similarly, § 903 of the CSA eliminates field preemption:

> No provision of this title 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 stand consistently together.

CSA, § 903. However, "[§ 903] has preserved the supremacy of the CSA where its provisions conflict with state law in a way that makes compliance with the requirements of both impossible. In this way Congress has specified that the principles of conflict preemption are to be invoked to determine if state laws must yield to the CSA." Bourgoin v. Twin Rivers Paper Co., LLC, 187 A. 3d 10, 15 (2017)(citations omitted). Accordingly, we conclude that conflict preemption (also known as "obstacle" or "impossibility" preemption) applies to the analysis of this case

With conflict/obstacle preemption, federal law takes precedence where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Arizona v. United States, 567 U.S. 387, 399, 132 S. Ct. 2492, 183 L. Ed. 2d 351 (2012). "The mere fact of 'tension' between federal and state law is generally not enough to establish an obstacle supporting preemption, particularly when the state law involves the exercise of traditional police power." Madeira v. Affordable Hous. Found., Inc., 469 F.3d 219, 241 (2d Cir. 2006). "[O]bstacle preemption precludes

only those state laws that create an 'actual conflict' with an overriding federal purpose and objective. What constitutes a 'sufficient obstacle' is 'a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.'" Noffsinger v. SSC Niantic Operating Co., LLC, 273 F. Supp. 3d 326, 333 (2017), citing Mary Jo C. v. N.Y. State & Local Ret. Sys., 707 F.3d 144, 162 (2d Cir. 2013).

Although "field" preemption has clearly been eliminated by § 903, the employee asserts that "'[w]here the field which congress has said to have pre-empted' includes areas that have 'been traditionally occupied by the states,' congressional intent to supersede state laws must be 'clear and manifest.'" (Employee br. 18-19.) In Gonzalez v. Raich, 545 U.S. 1 (2005), the United States Supreme Court held that, "[t]he CSA is a valid exercise of federal power," in the context of medical marijuana, id. at 9, so that Congress may prohibit the intrastate cultivation and use of marijuana, even where those activities are in compliance with state law. (See supra note 1.) However, the court did not address whether the federal law preempted the state law, so as to render the state law ineffective. Subsequent federal and state cases addressing the preemption issue have gone both ways.[4]

The employee cites to Gonzales v. Oregon, 546 U.S. 243, 248 (2006) as an example of a state law surviving federal preemption by the CSA in a field "traditionally occupied by the states," the practice of medicine. In that case, the Supreme Court

[4] See United States v. Hicks, 772 F. Supp. 2d 829 (2010)(possession of marijuana remained illegal under federal law, even if possessed for medicinal purposes in compliance with the Michigan Marihuana Act); People v. Crouse, 388 P. 3d 39 (2017)(amendment to Colorado constitution requiring police officers to return medical marijuana to criminal defendants following acquittal found to be preempted by the CSA); Lewis v. American General Media, 355 P. 3d 850 (2015)(insurer ordered to pay for injured employee's medical marijuana due to equivocal federal policy and clear New Mexico policy expressed in its medical marijuana act); White Mountain Health Ctr., Inc. v. Maricopa County, 386 P. 3d 416 (2016)(holding that the CSA does not preempt the Arizona Medical Marijuana Act).

addressed the question "whether the [CSA] allows the United States Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." Id. at 248-249. However, the Supreme Court decided Gonzales v. Oregon without utilizing any preemption analysis by concluding that the Attorney General exceeded the specifically enumerated and limited powers granted to him or her by the CSA. The court noted:

> Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. *It is unnecessary even to consider the application of clear statement requirements or presumptions against preemption to reach this commonsense conclusion.*

Gonzales v. Oregon at 274 (citations omitted; emphasis added.) Without any applicable preemption analysis contained therein, the employee's reliance upon Gonzales v. Oregon in support of his position on preemption is misplaced.[5]

The employee also relies upon the New Mexico Court of Appeals cases of Vialpando v. Ben's Automotive Services, 331 P.3d 975 (N.M. Ct. App. 2014), and Lewis v. American Gen. Media, 355 P.3d 850 (N.M. Ct. App. 2015), in support of his position that the Massachusetts Act is not preempted by the CSA. In both Vialpando and Lewis, the court agreed that the CSA conflicts with the state medical marijuana law insofar as the CSA does not authorize medical marijuana for any purpose. Lewis, supra at 857. Nonetheless the court in those cases held that the conflict between federal and state law did not prevent an order of payment for medical marijuana pursuant to the workers' compensation law. We disagree with the court's rationale in these cases. In Vialpando, the court, in upholding a workers' compensation judge's order for payment of an injured employee's medical marijuana, found that the insurer failed to demonstrate the order

[5] We note that the drugs at issue in Gonzales v. Oregon, supra, were Schedule II drugs, which may be prescribed in accordance with rules and regulations promulgated by the Attorney General. Id. at 250-251 Schedule I drugs, such as marijuana, are more strictly regulated, having been determined by Congress to have no "accepted medical use." § 812(b)(1). Raich, supra at 14.

would have required it to violate a federal statute or public policy. In the instant case, the insurer has clearly identified both federal statutes and federal policy that it would violate if required to pay for the employee's medical marijuana. (Insurer br. 2, 5, 7, 10, 11.) In Lewis, the insurer did cite federal statutes it would violate if it paid for medical marijuana ordered by a workers' compensation judge, but the court upheld an order for payment, holding that the insurer's "argument raises only speculation in view of existing Department of Justice and federal policy." Lewis, supra at 859. Both Vialpando and Lewis relied heavily upon the court's interpretation of previously issued Department of Justice memoranda regarding areas of marijuana trafficking enforcement by federal authorities. However, this reliance was specifically criticized by the Maine Supreme Judicial Court in Bourgoin, supra:

> Any reliance on this internal departmental policy, however, is entirely misplaced. Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration.
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> . . . .
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> Most importantly, however, the magnitude of the *risk* of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that [the insurer] would be forced to commit a federal crime if it complied with the directive of the Workers' Compensation Board.

Id. at 21-22, *citing* Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 651 (1989) (Marshall, J., dissenting) ('The absence of prosecutions to date … hardly proves that prosecutors will not avail themselves [of the applicable law] in the future.') As Judge Rose aptly notes in his hearing decision, "[t]he political winds of prosecutory discretion do not erase duly enacted laws, only legislative action can accomplish what the employee desires." (Dec. 4.) Thus, we do not find convincing the employee's arguments that there is no conflict between state and federal law, and thus no preemption, in the specific circumstances presented here. Rather, we agree, in part, with the insurer's argument.

The insurer argues not only that the CSA preempts the Massachusetts Act, but also that an order requiring it to pay for an employee's medical marijuana would violate the applicable provisions of the CSA and also subject it to additional criminal liability for

violating the federal criminal aiding and abetting statute. As previously noted, pursuant to the CSA, it is "unlawful to manufacture, distribute, dispense or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a)." (See supra note 1.) "[Sections] 13 & 30 cannot be interpreted to require an insurer to pay for a Schedule I Controlled substance because it would require an Insurer to violate the provisions of 18 U.S.C. § 2(a)(2011) (imposing accomplice liability on anyone who aids in the commission of any offense against the United States, including violations of the CSA)."[6] (Insurer br. 7.) The insurer also notes that its home office is located in Van Wert, Ohio, is engaged in interstate commerce, and is not willing to violate federal law. (Insurer br. 8, 11.) The insurer's argument, that its reimbursement or payment for an employee's marijuana would implicate the insurer for aiding or abetting a violation of federal law and exposure to criminal prosecution has merit.

In Rosemond v. United States, 572 U.S. 65 (2014), the United States Supreme Court provides a detailed examination of the concept of aiding and abetting and the circumstances under which a violation of 18 U.S.C. § 2 may occur. The court noted:

> The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part – even though not every part – of a criminal venture. As a leading treatise, published around the time of §2's enactment, put the point: Accomplice liability attached upon proof of '*[a]ny* participation in a general felonious plan' carried out by confederates.

Rosemond, supra at 72.

The Rosemond court distilled these concepts into a simplified form and declared that "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." Id at 77. The provision of money by the insurer in return for medical marijuana provided to

[6] 18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

this or any other employee is a critical component in the distribution channel of a Schedule I controlled substance and, in fact, criminal liability can be established even without such payment. As has been noted,

> the Controlled Substances Act … contains no sale or buying requirement to support a conviction; there is now an offense of participation in the transaction viewed as a whole. This statute defines the crime broadly enough to include acts which other statutes may have defined merely as aiding and abetting. Activities in furtherance of the ultimate sale such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying or delivering the drug are sufficient to establish distribution."

United States v. Wigley, 627 F.2d 224, 226 (10th Cir. 1980)(citations omitted). As such, any insurer payments would be made knowing that the insurer was participating in activity in contravention to federal laws and policies, even if under an order from an administrative judge.[7]

The insurer further cites to Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017), (the only Massachusetts Supreme Judicial Court case addressing medical marijuana), in support of its position. There, the court held that the plaintiff's claims of handicap discrimination, based upon termination from her job for her private, at-home use of medical marijuana to treat Crohn's disease, were erroneously dismissed in Superior court. Although noting that, "Under Massachusetts law . . . the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication," id. at 464, the court acknowledged that, pursuant to the CSA, Congress has designated marijuana as "contraband for any purpose," and has expressly found it has " 'no acceptable medical

[7] Though not addressed by the parties, we note that all cited and reported cases addressing a workers' compensation insurer's payment for an employee's medical marijuana involve insurers being ordered to pay for medical marijuana following a workers' compensation judge's order or decision. See Vialpando; Lewis; Bourgoin, supra and Petrini v. Marcus Dairy, Inc., 6021 CRB-7-15-7 (Compensation Review Board State of Connecticut, May 12, 2016). We also think it worthy to consider the potential, albeit unlikely, scenario where an insurer voluntarily pays for medical marijuana. Any doubts about the insurer's knowledge of its participation in activity that violates federal criminal law, or of its intent to accomplish such a criminal violation, would be removed and its exposure to criminal prosecution all the more evident.

uses.' " Id. at 460, quoting Raich, supra at 27. Thus, "a qualifying patient in Massachusetts who has been lawfully prescribed marijuana remains potentially subject to Federal criminal prosecution for possessing the marijuana prescribed." Barbuto, supra. The court concluded,

> The fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation. The only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee. An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use.

Id. at 465. Although the court did not address the question of federal preemption, noting that the defendant had waived that argument, Id. at 466 n. 9, it refused to defer, as a matter of public policy, to "Federal law prohibiting the possession of marijuana even where lawfully prescribed by a physician." Id. at 465. Citing the more than ninety percent of the States which have enacted laws reflecting their determination that medical marijuana does have an accepted medical use, the court stated that, "[t]o declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions." Id. at 465-466.

Nonetheless, as the insurer points out, the Barbuto court did recognize situations where the Massachusetts Act could negatively impact an employer's ability to conduct its business. The court noted:

> But it does not necessarily mean that the employee will prevail in proving handicap discrimination. The defendant at summary judgment or trial may offer evidence to meet their burden to show that the plaintiff's use of medical marijuana is not a reasonable accommodation because it would impose an undue hardship on the defendants' business. For instance, an employer might prove that the continued use of medical marijuana would impair the employee's performance of her work or pose an "unacceptably significant" safety risk to the public, the employee or her fellow employees.

> Alternatively, an undue hardship might be shown if the employer can prove that the use of marijuana by an employee would violate an employer's contractual or statutory obligation, and thereby jeopardize its ability to perform its business. We recognize that transportation employers are subject to regulations promulgated by the United States Department of Transportation that prohibit any safety-sensitive employee subject to drug testing under the department's drug testing regulations from using marijuana. In addition, we recognize that Federal government contractors and the recipients of Federal grants are obligated to comply with the Drug Free Workplace Act, which requires them to make "a good faith effort … to maintain a drug-free workplace," and prohibits any employee from using a controlled substance in the workplace.

Barbuto, supra at 467-468 (citations omitted).

While Barbuto deals with handicap discrimination in the workplace, the court's identification of potentially negative effects upon a business' ability to legally conduct its business, if compelled to accede to or engage in activity associated with a federally prohibited Schedule I controlled substance, are easily analogized to the case at bar. The court's acknowledgment of circumstances where a business, such as the insurer here, may jeopardize its ability to conduct business if forced to enter the medical marijuana arena, support the insurer's position, insofar as it maintains it cannot be required to violate federal law by reimbursing an employee for medical marijuana.

With the above competing principles in mind, we are persuaded by the Maine Supreme Court's analysis of a situation similar to the case at bar in Bourgoin, supra:

> These conflicting federal and state laws, and their embodiment of competing policies and underlying conclusions about the efficacy of marijuana as a legitimate therapeutic substance, frame the narrow issue that is central to this case: given this network of statutes, can [an insurer] be required to pay for [an employee's] acquisition and use of marijuana – conduct that is proscribed by federal law but allowed by the State because a [ ] certification has been issued to him?
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> Compliance with both is an impossibility. Were [the insurer] to comply with the hearing officer's order and knowingly reimburse [the employee] for the cost of the medical marijuana as permitted by the [Massachusetts Act], [the insurer] would necessarily engage in conduct made criminal by the CSA because [the insurer] would be aiding and abetting [the employee] – in his purchase, possession and use of marijuana – by acting with knowledge that it was subsidizing [the employee's] purchase of marijuana. See 18 U.S.C.S. § 2(a); 21

> U.S.C.S. § 844(a); Rosemond, 134 S.Ct. at 1248-50; see also e.g., United States v. Pinillos-Prieto, 419 F.3d 61, 63-66 (1st Cir. 2005) (describing a third-party intermediary drug transaction that resulted in guilty verdicts for aiding and abetting); United States v. Dingle, 114 F .3d 307, 309-12, 324 U.S. App. D.C. 453 (D.C. Cir. 1997) (affirming the defendant's conviction for aiding and abetting illegal drug possession). Conversely, if [the insurer] complied with the CSA by not reimbursing [the employee] for the costs of medical marijuana, [the insurer] would necessarily violate the [Massachusetts Act]-based order of the hearing officer.

Bourgoin, supra at 18-19. In Bourgoin, the court acknowledged that several courts have held that a consumer's use of medical marijuana in compliance with state law does not trigger the limited preemption provision of § 903 of the CSA. Id. at 19, citing Reed-Kalliher v. Hoggatt, 237 Ariz. 119 (Ariz. 2015); Ter Beek v. City of Wyoming, 495 Mich. 1 (Mich. 2014); Qualified Patients Ass'n v. City of Anaheim, 187 Cal. App. 4th 734 (Cal.Ct.App. 2010). "This is because state laws . . . provide safe harbor from *state* prosecution, but do not – and cannot – create a 'state right to commit a federal crime'. . ." Bourgoin, supra. However, the court held that the case before it, like the case before this Board, does not require it to determine whether the Maine medical marijuana act is preempted in its entirety by the CSA. Instead, those cases highlight the issue before the court, which is that by affirming an order requiring an employer (or insurer, as in the case before us) to pay for an employee's medical marijuana, it would be requiring that employer to commit a federal crime in violation of the CSA. Id. Accordingly, the court found a positive conflict between the CSA and the Maine medical marijuana law, insofar as the employee sought to have it applied, and further, that the CSA preempted the Maine law when that law "is used as the basis for requiring an [insurer] to reimburse an employee for the cost of medical marijuana … ." Id. at 22. We agree with that conclusion.

We are mindful that, at the state level, the tide is turning in favor of legalizing medical and recreational possession and distribution of marijuana. However, the CSA clearly and manifestly criminalizes these very same activities as punishable offenses involving this Schedule I controlled substance. While the Massachusetts Act provides a

"safe harbor" and protects medical marijuana users from prosecution under Massachusetts' criminal law, this does not mean that the Massachusetts Act can affirmatively require insurers, under the cloak of M.G.L. c. 152, to act in a manner that violates federal law. "[A] person's right to use medical marijuana cannot be converted into a sword that would require another party, such as [the insurer], to engage in conduct that would violate the CSA." Bourgoin, supra at 20.

To be clear, we do not suggest that the Massachusetts Act is preempted in its entirety by the CSA as such a determination is outside the parameters of this dispute. However, until marijuana is removed from Schedule I of the CSA or is otherwise "legalized" by federal authorities, a workers' compensation insurer that is ordered to pay for an employee's medical marijuana pursuant to M.G.L. c. 152 and the Massachusetts Act would risk prosecution for violating the CSA and the cited federal aiding and abetting law, 18 U.S.C. § 2(a). Where such action would be akin to state law requiring what federal law forbids, there is a positive conflict between the two laws, and, we hold that, as applied to the facts of this case, the Massachusetts Act is preempted by the CSA.

Accordingly, we affirm the decision.

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: February 14, 2019