10 Mass. Workers' Comp. Rep. 120, 1996 WL 73891 (Mass.Dept.Ind.Acc.)

Department of Industrial Accidents
Commonwealth of Massachusetts

***1** GAETANO BORGOSANO, EMPLOYEE
BABCOCK & WILCOX POWER CO., EMPLOYER
ROYAL INSURANCE CO., INSURER
U.S. DEPARTMENT OF VETERAN'S AFFAIRS, 3RD PARTY PETITIONER

Board No. 025127-67

Filed: February 12, 1996

Appearances

Gerald A. Shay, Esq. and Roberta T. Brown, Esq., for the 3rd party petitioner

Timothy F. Nevils, Esq., for the insurer

## REVIEWING BOARD DECISION

**SMITH, J.**The United States Department of Veteran's Affairs (“VA”) appeals from a decision in which the administrative judge denied its claim that the Supremacy Clause of the United States Constitution mandated the insurer to reimburse it for medical expenses incurred by the employee at rates set by the United States Office of Management and Budget, in accordance with the Code of Federal Regulations, 38 C.F.R. §17.62(h) (1995), rather than the rates set by the Massachusetts Rate Setting Commission, pursuant to G.L. cc. 152 and 6A. Other issues litigated between the VA and the insurer at the hearing continue to aggrieve the VA and are brought before the reviewing board. We summarily affirm the decision in all respects outside of the Supremacy Clause issue. We therefore limit our discussion solely to the facts and law pertinent to that issue.

In this case of first impression for the reviewing board, we hold that §13 of c.152, the Massachusetts Workers' Compensation Act, is preempted by Title 38, 1991 United States Code, §1729 (1991), insofar as the two statutes conflict. Therefore we vacate the order limiting the Veterans Administration's reimbursement for the medical services provided the injured worker to the maximum rate allowed by the Massachusetts Rate Setting Commission and order payment at the rate set by federal law.

## FACTS

The employee is a World War II veteran who sustained a work-related spinal cord injury in 1967 which rendered him paraplegic. In 1978 the employee applied for and received inpatient admittance at the Brockton VA Hospital, where he has since resided. Medical testimony on the part of the employee's doctor, adopted by the judge, was that the employee continues to be permanently and totally disabled, requiring extensive medical and personal care due to his work-related physical impairments. (Dec. 7-8.)

In 1986 the insurer filed a complaint to modify or discontinue its obligation to pay the VA charges in connection with the employee's residency at the VA hospital. A conference order of September 1, 1989 required the insurer to pay medical benefits pursuant to §§13 and 30 as to all bills outstanding as of June 30, 1989, which were paid. The instant claim commenced when a dispute arose as to the VA's subsequent charges. The VA filed a third-party claim for reimbursement on June 18, 1991, and the insurer successfully moved and was allowed to join the issue of reasonableness under §§13 and 30 at the December 9, 1991 conference. The conference order directed the insurer to reimburse the VA for medical expenses at the rate of $5,000.00 per month continuing from July 1991. The employee and the VA appealed. (Dec. 4-5.)

***2** The matter went to a hearing *de novo* on February 25, 1993. Regarding the issue of the reasonableness of the VA's charges for the medical services provided to the employee, the judge first reviewed the relevant law, which we summarize.

The VA asserted its right to recover under 38 U.S.C. §1729, (1991) entitled "Recovery by the United States of the cost of certain care and services," which states in pertinent part:

> (a) (1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect the reasonable cost of such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.
>
> (2) Paragraph (1) of this subsection applies to a non-service connected disability --
>
> (A) that is incurred incident to the veteran's employment and that is covered under a workers' compensation law or plan that provides for the payment for the cost of health care and services provided to the veteran by reason of the disability;…
>
> …
>
> (c) (2)(A) The Secretary, after consultation with the Comptroller General of the United States, shall prescribe regulations for the purpose of determining the reasonable cost of care or services under subsection (a)(1) of this section. Any determination of such cost shall be made in accordance with such regulations.

38 U.S.C. 1729(a) and (c) (1991) (emphasis added).

The VA claimed reimbursement for approximately $900,000 of medical expenses under the above-cited statute and G.L. c. 152, §§13 and 30. The relevant language of the applicable version of §30, as amended by St. 1991, c. 398, and deemed "procedural" thereby (St. 1991, c. 398, §107), requires the insurer to "furnish to an injured employee adequate and reasonable health care services, and medicines if needed, together with the expenses necessarily incidental to such services."G.L. c.152, §30. The applicable version of §13(1), also as amended by St. 1991, c. 398, provides, regarding the payment of §30 medical expenses:

> [N]o insurer shall be liable for hospitalization expenses adjudged compensable under this chapter at a rate in excess of the rate set by the Rate Setting Commission, or for other health services in excess of the rate established for that service by the Rate Setting Commission regardless of the setting in which the service is administered.

G.L. c.152, §13(1) (emphasis added).

The VA argued that the rates for medical services set in accordance with 38 C.F.R. §17.62(h)(3), the regulations established by §1729(c)(2)(A) cited above, preempted the rates for those same services set by the Rate Setting Commission pursuant to §13(1) by virtue of the application of the Supremacy Clause of the United States Constitution. [FN1] (Dec. 15-17.)

***3** While acknowledging that a state may not condition a workers' compensation scheme in a manner which frustrates the purpose of a federal statute, see Nash v. Florida Industrial Commission, 389 U.S. 235 (1967), the judge found that there was no conflict between the application of the federal and state statutes in question that would raise the issue of preemption. The judge found the VA's assertion that the federal rate must be applied by the Industrial Accident Board had "no bearing on this case since this board is not, under any circumstances relative to these proceedings, calling into question the reasonableness of the federal rate."(Dec. 18.) The judge focused on the part of §1729 which he considered germane to the instant case, that which allows the VA to recover its costs "to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment…if the care or services had not been furnished by a department or agency of the United States" (emphasis added). See 38 U.S.C. §1729(a)(2) (1991). The judge read this language as defining the rate of medical benefits which the veteran employee, or a health care provider, would receive within G.L. c. 152, §13(1). Therefore, upon finding that the employee's treatment at the VA consisted of "adequate and reasonable medical and hospital services" within the meaning of §30, the judge ordered payment of the employee's medical benefits in accordance with a rate set by the Rate Setting Commission under G.L. c. 6A, §32 and G.L. c. 152, §13. (Dec. 18-20, 24-26.)

The VA sought to recover under the judge's order and was frustrated because the Massachusetts Rate Setting Commission has not set rates for the employee's hospital which is operated by the Department of Veterans Affairs.

## ISSUE

The issue we confront is whether G.L. c.152, §13, which establishes the rate of payment for medical services found compensable pursuant to G.L. c. 152, §30, is preempted by this federal law. We conclude that it is.

## LEGAL ANALYSIS

Where there is a clear conflict between federal and state laws, state law must give way under the Supremacy Clause, Article VI of the United States Constitution. Free v. Bland, 369 U.S. 663, 666, 82 S. Ct. 1089, 1092, 8 L. Ed.2d 180 (1962); United States v. Ohio, 957 F.2d 231, 233 (6th Cir. 1992).

Here the federal statute in question mirrors the Supremacy Clause [FN2] by providing that: "No law of any state or of any political subdivision of a State, and no provision of any contract or other agreement, shall operate to prevent recovery or collection by the United States under this section…."38 U.S.C. §1729(f)(1991). Yet we find that the interpretation of state law in the decision has in fact prevented collection by the VA, in contravention of this provision.

The federal statute states in no uncertain terms that, "the United States [[[Veterans Administration (VA)] has the right to recover or collect the reasonable cost of such care or services [provided to a veteran for non-service-connected disability] (as determined by the Secretary)".38 U.S.C. § 1729(a)(2) (1991) (emphasis added). The criteria for the Secretary's determination of "reasonable cost" are contained in 38 C.F.R. §17.62 (1995) under the authorization of §1729(c)(2)(A) (1991).[FN3] Specific rates in accordance with the regulation are then set by the Office of Management and Budget and published in the Federal Register. These are the rates that the VA claims are due in the instant case.

***4** The judge erred when he looked past the language, "as determined by the Secretary," and hinged his interpretation of §1729 on the clause that follows, "…to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States" (emphasis added). See 38 U.S.C. §1729(a)(2) (1991). The judge read the phrase, "to the extent that," as referring to the amount of the "reasonable cost" to be recovered. This interpretation, however, does not comport with the statutory directive that the Secretary determine that amount.

The statute must be construed to lend meaning to all of its words. See Meunier's Case, 319 Mass. 421, 423 (1946) (no words of a statute are to be rejected as surplusage). The words "as determined by the Secretary" require us to interpret the words "to the extent that" as a designation of qualification, rather than one of cost limitation. In other words, under this statutory scheme, the state determines an injured worker's entitlement to the medical service rendered and the federal government determines the cost which may be recovered for its provision.

A state administrative judge pursuant to the Massachusetts Workers' Compensation Act, G.L. c.152, §30, has the sole authority to determine whether the medical care for which reimbursement is sought is adequate, reasonable and causally related to the work injury. However, once that medical care is determined to be compensable, then the rate of payment is governed by the federal process, not by G.L. c.152, §13. Viewed this way, the phrase, "to the extent that," refers to the nature of the claim underlying the non-service-connected disabilities for which the veteran or non-federal facility would receive reimbursement, not the amount of the reimbursement that would be due that veteran or non-federal provider. Since the federal rate "determined by the Secretary" would conflict with the state rate determined by the Rate Setting Commission, whatever that might be in any case, [FN4] the federal rate must prevail.

This interpretation of "to the extent that" is supported by two other provisions in §1729. The first follows the subsection authorizing the promulgation of regulations, §1729(c)(2)(A), mentioned above. After stating that the determination of the reasonable cost of care and services "shall be made in accordance with such regulations[,]" the statute continues:

> Such regulations shall provide that the reasonable cost of care or services sought to be recovered or collected from a third-party liable under a health-plan contract may not exceed the amount that such third-party demonstrates to the satisfaction of the Secretary it would pay for the care or services if provided by facilities (other than facilities of departments or agencies of the United States) in the same geographic area.

***5** 38 U.S.C. §1729(c)(2)(B) (1991) (emphasis added) [FN5]. The term, "health-plan contract" is defined as "an insurance policy or contract, medical or hospital service agreement, membership or subscription contract, or similar arrangement, under which health services for individuals are provided or the expenses of such services are paid."38 U.S.C. §1729(i)(1)(A) (1991).

The second provision supporting this interpretation appears in §1729(i)(1)(B). This section explicitly excludes from the definition of "health-plan contract," as used above, "a workers' compensation law or plan described in subparagraph (A) of subsection (a)(2) of this section."[FN6]38 U.S.C. § 1729(i)(B)(iii) (1991).

Thus, it is apparent that for some types of cases, the federal statute does limit the amount which the VA may receive for medical services to the maximum rate established by the Massachusetts Rate Setting Commission for non-VA medical care providers. The problem for the insurer is that the statute specifically does not provide it for workers' compensation cases. If ever there was a clearer case for the application of the maxim, "*expressio unius est exclusio alterius*," [FN7] we have not seen it. Certainly the implication cannot be drawn that Congress intended that workers' compensation cases be treated the same as generic health insurance ("health plan contract") cases, when it explicitly segregated the two.

Moreover, the legislative history supports the view of the phrase, "to the extent that," as a designation of qualification rather than of cost limitation. The House report described the bill as it was finally enacted:

> The reported bill would strengthen and clarify the Veteran's Administration's authority to recover the costs of veterans' nonservice-connected care from State workers' compensation, "no-fault" auto insurance and crimes of personal violence where a veteran would have entitlement to payment or reimbursement by a third party for appropriate medical care furnished in a non-federal hospital.

H.R. Rep. No. 97-79, 97th Cong., 1st Sess. 8, (1981) reprinted in U.S. Code Cong. & Ad. News 1685, 1693 (emphasis added). The congressional intent expressed in this excerpt reads "to the extent that" as "where." This simply refers to the kinds of cases in which the veteran or provider "would have entitlement to payment or reimbursement," i.e. workers' compensation cases. It makes no reference to the amount of that entitlement.

CONCLUSION

We hold as a matter of law that the rate of reimbursement for medical services found compensable under G.L. c.152, §30 is preempted by federal law. In accordance with G.L. c.152, §11C, we reverse the decision with respect to the preemption issue and order the insurer to reimburse the VA at rates in accordance with those established by the applicable federal regulations pursuant to 38 U.S.C. §1729 (1991). In all other respects, the decision is affirmed.

***6** So ordered.

Suzanne E.K. Smith
Administrative Law Judge

Edward P. Kirby
Administrative Law Judge

Susan Maze-Rothstein
Administrative Law Judge

FN1. "Federal laws 'enacted pursuant [to constitutional authorization] are supreme (Art. VI); and, in cases of conflict, they control state enactments."'United States v. New Jersey, 831 F.2d 458, 461 (3rd Cir. 1987), quoting Panhandle Oil Co. v. Knox, 277 U.S. 218, 221 (1928).

FN2. The Supremacy Clause states, in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; … shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding."U.S. Const. art. VI, cl.2.

FN3. Section 1729(c)(2)(A) provides: "The Secretary, after consultation with the Comptroller General of the United States, shall prescribe regulations for the purpose of determining the reasonable cost of care or services under subsection (a)(1) of this section. Any determination of such cost shall be made in accordance with such regulations. 38 U.S.C. §1729(c)(2)(A) (1995) (emphasis added).

FN4. It is at least probative to this inquiry that the Rate Setting Commission has not set rates for hospitals operated by the Department of Veteran's Affairs.

FN5. The cognate regulation, 38 C.F.R. §17.62(h)(4) (1995), simply recites the same language as the authorizing statutory section.

FN6. Subsection (a)(2)(A) makes the general right-to-recovery provisions of § 1729 applicable to a non-service-connected disability "that is incurred incident to the veteran's employment and that is covered under a workers' compensation law or plan that provides for payment for the cost of health care and services provided to the veteran by reason of the disability;…"

FN7. The expression of one thing is the exclusion of another. Ianelle v. Fire Comm. of Boston, 331 Mass. 250, 252 (1984). Where, as here, the "exclusion" is patent, the maxim actually becomes a redundancy.

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