WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVEN BROW, *Applicant*

vs.

SEPRAGEN CORPORATION and THE HARTFORD, *Defendants*

Adjudication Number: ADJ12210104
San Jose District Office

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

Defendant seeks reconsideration of the Findings, Award and Order of December 1, 2021, in which the Workers' Compensation Judge (WCJ) found that on February 7, 2018, the injured employee, Steven Brow, sustained industrial injury to his left thumb while employed as a machinist by Sepragen Corporation, insured by The Hartford (defendant). The WCJ also found that the injury resulted in the need for medical treatment and surgery provided by the lien claimant herein, the United States Department of Veterans Affairs (V.A.). In addition, the WCJ found that the injured employee's case-in-chief was never the subject of a Stipulated Award or Compromise and Release, that the case was administratively closed by defendant, that the current proceeding was initiated by the V.A. for reimbursement of treatment provided for the injured employee's left thumb injury, including for an outpatient nerve repair procedure, and that although defendant partially reimbursed the V.A., the V.A. seeks additional reimbursement. Finally, the WCJ found that an extensive body of federal or state case law, and statutory law, supports preemption of Labor Code section 5307.1 and the California Official Medical Fee Schedule (OMFS) with respect to the V.A.'s billings, that section 5307.1 and the OMFS are preempted by federal law, and that the applicable federal billing schedules, and not the OMFS, apply to the V.A.'s billings herein.

Defendant contends, in substance, that there is nothing to trigger federal preemption of state law because there is no conflict between state and federal law, which both hold that a standard of reasonableness applies to the medical treatment charges incurred by the V.A.

The V.A. filed an answer.

We have considered the allegations of defendant's Petition for Reconsideration and the contents of the WCJ's Report and Recommendation ("Report") with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will deny defendant's Petition for Reconsideration.

We further note that although defendant states it does not contend that the California OMFS applies to the V.A.'s billings for medical treatment, defendant nevertheless contends that the V.A.'s billings are subject to a standard of reasonableness under California state law. (Petition for Reconsideration, p. 6:26-28.) As such, defendant's contention indirectly attacks part of the WCJ's seventh Finding, wherein the WCJ found that "applicable *federal* billing schedules" apply to the V.A.'s billings in this case.

We deny defendant's contention that the V.A.'s billings are subject to a standard of reasonableness under state law, because the contention is based on the incorrect premise that the WCJ found federal preemption based on a conflict between state and federal law. Rather, the WCJ stated on page five of his Opinion on Decision that federal law *expressly* preempts state law on the question of the extent of the V.A.'s entitlement to reasonable reimbursement. That is, there are various kinds of preemption, but here defendant erroneously relies upon conflict preemption, which is not on point given the facts of this case. (See *People v. Hamilton* (2018) 30 Cal.App.5th 673 [The four species of preemption include express, conflict, obstacle, and field preemption].)

We also reject, as premature, defendant's allegation that the V.A.'s medical treatment charges are unreasonable. As noted by the WCJ on page six of his Opinion on Decision, the V.A. "still has the burden of establishing the reasonableness of its charges in accordance with the billing applicable to V.A. cases, as well as establishing all other applicable elements justifying the payment sought." In other words, the issue of reasonableness of the V.A.'s medical treatment charges under applicable federal law remains outstanding, and thus there is no "final order" on the issue of reasonableness. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) To be clear, however, we affirm the WCJ's finding that the V.A.'s medical treatment charges are not governed by California state law, but rather are subject to the "applicable federal billing schedules."

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ AMBER INGELS, DEPUTY COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 14, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

STEVEN BROW
BOEHM & ASSOCIATES
LAW OFFICES OF MELODY Z. COX

JTL/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o

REPORT OF WORKERS COMPENSATION JUDGE ON RECONSIDERATION

The above-entitled matter was submitted for decision on limited issues (specifically, whether and to what extent preemption applies to the V.A. billings in this case, and whether or not an extensive body of federal or state case law supports preemption, with all other issues deferred) following the hearing held in this matter on September 21, 2021, as set forth in the Minutes of Heming of that date.

Findings, Award and Order, together with Opinion on Decision, issued on 12/1/2021, and defendant The Hartford timely filed a Petition for Reconsideration therefrom on 12/15/2021, with lien claimant The Department of Veterans Affairs filing an Answer thereto on 12/23/2021.

This Report is being provided as per CCR 10962.

a. Statement of Contentions Raised by Petition

In my decision of 12/1/2021, I found that preemption does apply and the OMFS is not applicable, finding that Labor Code Section 5307.1 and the OMFS are preempted by federal law, and thus applicable federal billing schedules and reasonableness standards, and not the OMFS, apply to the billings, and that an extensive body of case and statutory law supports the finding of preemption.

Frankly, the contention of Petitioner is somewhat unclear to the undersigned. Petitioning defendant seems to argue that lien claimant is only entitled to be reimbursed a reasonable amount for its billings, and to agree that OMFS does not apply, but to dispute that preemption applies or even needs to be considered.

With respect to any issue or contention of reasonableness, that issue was specifically deferred. The trial issues were limited, as noted above, to the issue of preemption. Therefore, defendant's argument as to reasonableness is premature.

Although Petitioner may, therefore, in fact agree with the decision, I will attempt to address the Petition as if it disputes it.

It should be noted that lien claimant Department of Veterans Affairs did file an Answer to defendant's Petition for Reconsideration, on or about December 23, 2021, which accurately and succinctly sets forth the issues decided, statement of material facts, and argument, recommending that the Petition be denied.

b. Discussion

1. Summary of Proceedings and History of Case

Steven Brow, born [], while employed on or about February 7, 2018 as a machinist in Hayward, California by Sepragen Corporation, insured by The Hartford for workers' compensation purposes,

sustained injury arising out of and in the course of employment, to his left thumb. The underlying case was never the subject of a Stipulated Award or Compromise and Release but was administratively closed by The Hartford.

The current proceeding was initiated by lien claimant The Department of Veterans Affairs, for treatment provided for the left thumb injury referenced above, including for an outpatient nerve repair procedure on the left thumb, for which it has submitted billings and sought reimbursement, and for which it received partial payment. Lien claimant seeks further payment.

The present proceeding involves a lien filed by The Department of Veterans Affairs, seeking the sum of $100,169.65, in addition to some amounts which it had previously received by way of partial payment. That lien was for medical treatment received by applicant, a former Navy serviceman entitled to services at the VA, for the results of his left thumb work injury sustained on or about February 7, 2018 (Mr. Brow testified it may have occurred on February 6, 2018). The treatment involved an initial emergency room visit with suturing and a subsequent outpatient visit lasting at least a couple of hours, where a nerve repair was performed on the left thumb, as well as subsequent physical therapy visits, and related treatment.

The case proceeded to hearings on January 13 and March 9, 2020, with the issues involving a determination regarding the lien, with defendant contending that the reasonable value of the medical treatment was the sum of $11,591.57, and lien claimant seeking recovery of the sum of $100,169.65, claiming exemption/preemption from the California official medical fee schedule, or any limitations on reasonableness considering California's official medical fee schedule.

Both sides presented exhibits and two witnesses testified. Mr. Brow, called by lien claimant, basically confirmed the injury and treatment received at the VA facility in Palo Alto, California. Billing expert Martin Landa testified for defendant, and basically testified that in accordance with the official medical fee schedule applicable in California, the reasonable allowable charges for the billing were $11,591.57, which was the amount I awarded, less credit for sums paid in an amount to be adjusted. I did not find that preemption applied.

Thereafter, Reconsideration was sought by lien claimant, to which I prepared and filed a Report on Reconsideration. Defendant, for unknown reason, filed no reply or answer to the Petition for Reconsideration. The attorney handling the case at that time for defendant is a different attorney than the one currently handling the case.

The Reconsideration was granted for further study, on 6/15/2020 and then an Opinion and Decision After Reconsideration was issued by the Appeals Board on 2/9/2021, requesting further briefing and decision on the issue of preemption, and a “clear determination” on the issue of preemption, and as to whether a body of case law or statutory law supports preemption.

The further briefing was accomplished, and a new hearing was conducted, on September 21, 2021, limited to the preemption issue on which a clear determination was requested, and as set forth in the Findings and Order and Opinion which thereafter issued, I found that preemption does apply, a body of federal or state law supports preemption, and the VA billing is exempt from application of the OMFS. I further deferred all other issues, including a determination as to the reasonableness

of the amount of the billings, for further proceedings and/or informal adjustment by the parties, using applicable federal and VA billing standards.

As noted above, it appears that the current handling attorney filing the Petition for Reconsideration on behalf of defendant actually agrees to the essential finding that the OMFS does not apply, but perhaps disputes the finding of preemption. Hence, I will further address that issue, or at least restate the legal basis for my findings.

2. Preemption

In considering the issue of preemption, it was necessary to consider applicable federal statutes. Of relevance is 38 USC 1729, subparagraphs (a)(l) and (f), stating as follows:

> (a)(l) Subject to the provisions of this section, in any case in which the United States is required by law to furnish or pay for 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 from a third party the reasonable charges of care or services so furnished or paid for to the extent that the recipient or 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 or paid for by a department or agency of the United States.
>
> …….
>
> (f) 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 or with respect to care or services furnished under section 1784 of this title (38 USCS Section 1784)

The foregoing language can be reasonably read to permit reduction of a VA billing by utilizing or applying the California Medical Fee Schedule, because it allows the VA the right of recovery from a third party (such as The Hartford) "to the extent" that the provider of care had been any other provider in California. This language would therefore arguably support applicability of the OMFS to the billing.

However, there is a relevant federal regulation, 38 CFR 17.106(e), which states more specifically as follows:

> ".. Preemption of conflicting State laws and contracts. Any provision of a law or regulation of a State or political subdivision thereof and any provision of any contract or agreement that purp01ts to establish any requirement on a third-party payer that would have the effect of excluding from coverage or limiting payment for any medical care or services for which payment by the third-patty payer under 38 U.S.C 1729 or this part is required, **is preempted by 38 U .S.C. 1729 (f) and shall have no force or effect in connection with the third-party payer's obligations** under 38 U.S.C. 1729 or this part." (underlining added)

Based upon the foregoing federal authority, it appears that express preemption is applicable, based on the language of the statutory and regulatory authority. There is federal and state case law, including those cited by lien claimant (including ***Borgosano v. Babcock & Wilcox Power Co*** (1996) 10 Mass. Workers' Comp Rep 120, wherein the Massachusetts equivalent of the WCAB found preemption of their fee schedule; ***Zenith Ins. Vs. WCAB (Enriquez)*** 79 CCC1097 (2014), writ denied air ambulance billing case; see also Rhode Island case of ***Blount v. CD Burns Co, R.I.W.C.C.*** 96-06132 (2001); also U.S. Court of Appeals Fifth Circuit case of ***AirEvac EMS v. Sullivan*** (2021) 2021 U.S. App Lexis 23129), involving federal preemption for air ambulance charges under Texas workers' compensation act; see also ***LSO, Ltd. v. Stroh***, 205F3d 1146 (9th Circuit), regarding supremacy clause applicability in general), which in my opinion sufficiently establishes preemption of Labor Code Section 5307.1 (and the non-applicability of the OMFS to the VA billing in this case). I therefore found, in accordance with the direction of the WCAB decision, that an extensive body of federal or state case law supports preemption of Labor Code Section 5307.1 and the regulations that embody the OMFS, on the facts and evidence and law applicable herein.

As noted in the WCAB Opinion and Decision After Reconsideration, the finding of preemption (on the OMFS and L.C. 5307, et seq) as applied to this case does not end the discussion. Lien claimant still has the burden of establishing the reasonableness of its charges in accordance with the billing applicable to VA cases, as well as establishing all other applicable elements justifying the payment sought. I also issued no separate finding on the applicability of IBR (independent bill review), or whether an additional factual hearing is required on whether and to what extent IBR applies or was applied in this case, or as to whether such finding is moot if the OMFS (and L.C. 5307.1, et seq, generally) are preempted. The record would likely need to be developed on that issue if the lien does not resolve based on the instant decision. The decision issued by me provides at this point only that the amount to be paid is subject to adjustment of the pai1ies. As stated in my Decision after Reconsideration, the finding of preemption by me does not mean that the WCAB only has jurisdiction to award whatever the VA has billed. The VA charges must be proven to be computed in accordance with federal law, and will likely require, if not informally adjusted, presentation by lien claimant of expert testimony to confirm that the charges were computed in accordance with federal law and standards.

c. The action recommended on the Petition

It is recommended that defendant's Petition for Reconsideration be denied.

Dated: 12/29/2021

ROBERT K. WICKLER
Workers' Compensation Judge