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 DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings, Award and Order of March 11, 2020, the Workers' Compensation Judge (WCJ) found that applicant Steven Brow, while employed on or about February 7, 2018 as a machinist by Sepragen Corporation, insured by The Hartford, sustained industrial injury to his left thumb, that applicant's case-in-chief was never the subject of a Stipulated Award or Compromise and Release but was administratively closed by The Hartford (defendant), and that the instant proceeding was initiated by lien claimant, the United States Department of Veterans Affairs (V.A.), for treatment provided for applicant's left thumb injury, including for an outpatient nerve repair procedure. Finally, the WCJ found that the V.A. submitted billings and sought reimbursement for the medical treatment it provided, that the V.A. received partial payment from defendant in an unspecified sum, and that the reasonable allowable charges for the medical treatment provided by the V.A. is the sum of $11,591.57, to which the V.A. is entitled in full satisfaction of its billings, less credit for any amount previously paid by defendant, subject to proof.

The V.A. filed a timely petition for reconsideration of the WCJ's decision. The V.A. contends that federal law preempts California's Official Medical Fee Schedule (OMFS)[1] and

[1] The OMFS is promulgated by the Administrative Director of the Division of Workers' Compensation (DWC) under California Labor Code section 5307.1 and is set forth in sections 9789.10 et seq. of Title 8, California Code of Regulations.

related law regarding reimbursement of medical treatment provided by the V.A., and that the V.A. is entitled to reimbursement for the full amount billed, less credit for any payments made by defendant.

We have not received an answer to the petition for reconsideration.

The WCJ submitted a Report and Recommendation (Report).

Based on our review of the record, we conclude that there are unresolved issues regarding Independent Bill Review (IBR) and preemption, both of which must be revisited and resolved by the WCJ. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ.

BACKGROUND

Lien trial hearings were held in this matter on January 13, 2020 and March 9, 2020. On January 13, 2020, the following disputed issues were set forth in the record:

> 1. Lien of the Department of Veterans Affairs for medical treatment in the sum of $100,169.65.
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> 2. Lien claimant claimed exemption from the OMFS (Official Medical Fee Schedule), as per its trial brief on file herein.
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> 3. Reasonableness of the billings and charges. Defendant contends that they have paid reasonable reimbursement already.
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> 4. Claimed failure by lien claimant to meet its burden of proof.
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> 5. Credit for amounts paid by the Hartford. The parties are unable to stipulate as to the amount of payment made to date.
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> 6. Issue of costs, attorney's fees, and sanctions raised by both sides against the other. These issues are deferred for subsequent proceedings pending the filing of petitions related thereto.

Applicant provided testimony at the second lien trial hearing of March 9, 2020, and defendant also presented the testimony of Martin Alberto Landa, an expert in medical bill review. Applicant confirmed that he received the treatment at issue provided by the V.A., while Mr. Landa testified about the reasonable value of the treatment pursuant to California workers' compensation law. Mr. Landa testified that the reasonable value was the amount already paid by defendant, $11,591.57. The WCJ followed Mr. Landa's testimony and found that the V.A. is entitled to reimbursement in the amount of $11,591.57.

In his Opinion on Decision, the WCJ provided additional details and explained the basis for his finding:

> The present proceeding involves a lien filed by The Department of Veterans Affairs, seeking the sum of $100,169.65, apparently in addition to some amounts which it had previously received by way of partial payment (at the initial hearing in January lien claimant could not confirm the precise amount already paid). That lien was for medical treatment received by applicant, a former Navy servicemen 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 a couple of physical therapy visits, and related treatment.
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> …
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> Both sides presented exhibits and two witnesses were called at the [second] hearing. One was Mr. Brow, called by lien claimant, who basically testified to having sustained the injury and receiving the treatment outlined above at the VA in Palo Alto, all of which was undisputed information. The other was a billing expert, Martin Landa, called as a billing expert regarding the disputed amount. All exhibits offered were taken into evidence, some over lien claimant's objection, and following conclusion of the hearing, the case was submitted for decision. Following filing and service of the Minutes of Hearing and Summary of Evidence, Findings and Order issued, wherein I allowed the lien in part, to the extent supported by the billing expert's testimony. Lien claimant objected to the billing expert's testimony as based on California law and workers' compensation rules generally, and claimed that the testimony was irrelevant, the expert was not qualified as an expert in the case, and his testimony and exhibits should not have been allowed.
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> I concluded and ruled that the lien of the VA is subject to standards of reasonableness, and in the workers' compensation forum it is appropriate to consider valuation and reasonableness standards as represented by the medical fee schedules applicable in California workers' compensation cases. Otherwise, there would be no reasonableness limitation to the VA billing. I found that Mr. Landa was qualified as an expert, and found his testimony credible and persuasive, and accordingly found that the reasonable allowable charges for the medical treatment provided by The Department of Veterans Affairs in this case is the sum of $11,591.57.

In his Opinion on Decision, the WCJ also addressed the issue of preemption, but without mentioning it directly:

> Lien claimant is seeking recovery in the workers' compensation forum. It is arguing that standards of reasonableness for its billings are not subject to rules applicable in this forum. I disagree. To accept its argument, there would be no limit on its billings. It is seeking recovery as a lien claimant, not outside this forum.
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> …
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> Lien claimant called no witness regarding the reasonableness of the billing. Basically, lien claimant argued in their legal pleadings that they are exempt from being questioned regarding their billing.

In response to the V.A.'s petition for reconsideration, the WCJ states in his Report that he disagrees with the V.A.'s claim that the California official medical fee schedule is preempted by federal law, but without citing legal authority in support of his disagreement:

> Mr. Landa testified, as set forth on page 16 of the Transcript apparently obtained and filed by lien claimant (lines 12-17) that the fee schedule value of services rendered, even if involving an exempt facility, such as the Veterans Affairs facility in Palo Alto where Mr. Brow received his outpatient treatment for the thumb injury, "…would provide a yardstick with which to measure reasonableness. I think that's something that's stated in [*Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en bane).]" As stated on page 15 of that same transcript, consistent with the Summary of Evidence and with the Findings and Award, the reasonable fee schedule value for the treatment which is the subject of this lien is the sum of $11,591.57, the amount awarded by me.
>
> Lien claimant called no witness regarding the reasonableness of the billing. Basically, lien claimant argued in their legal pleadings that they are exempt from being questioned regarding their billing, and that consideration of the foregoing standards or reasonableness as represented by the California official medical fee schedule is preempted by federal law.
>
> I disagreed, and accordingly, I allowed the lien to the extent that I believe the evidence, in the form of the credible and persuasive testimony of Mr. Landa, supports reasonableness, in the sum of $11,591.57, less credit for sums already paid to lien claimant by The Hartford, in an amount subject to proof and to be adjusted by the parties.

DISCUSSION

We find two issues that require further exploration by the parties and by the WCJ: (1) the effect of Independent Bill Review (IBR) on the V.A.'s lien and its claim of preemption; and (2) the extent of the WCAB's authority to find preemption.

As for the first issue, we note that ordinarily, medical treatment expense disputes are subject to the jurisdiction of IBR, pursuant to which the Administrative Director of the DWC issues a final determination, subject to review by the WCAB on limited grounds. In light of the primacy of IBR, this raises the question of whether and how the WCAB has jurisdiction, in the first instance, to reach the issue of federal preemption.

I. WHETHER THE WCAB HAS JURISDICTION TO REACH PREEMPTION, GIVEN THE PRIMACY OF IBR

As explained by the Board (adopting the WCJ's Report) in *Payne v. Workers' Comp. Appeals Bd.* (*Holder*) (2019) 84 Cal.Comp.Cases 523, 525 (writ den.), disputes over medical treatment charges have been subject to the jurisdiction of IBR since 2013:

> "With respect to jurisdiction for dates of service on or after 1/1/2013, the WCJ explained that Labor Code § 4603.2 was amended effective 1/1/2013 to establish the IBR process, which requires the employer to provide an EOR [Explanation of Review] when paying less than the amount requested by the provider. If the provider disputes the amount paid after receiving the EOR, the provider may request a second review. The WCJ pointed out that the IBR process does not apply to disputes in which the employer fails to provide the required EOR; however, *if a valid EOR is provided, the WCAB does not have jurisdiction over the dispute, which must be resolved through IBR*." (Italics added.)

In *Tilmon v. County of Los Angeles* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 23, the Board panel provided the following overview about how IBR is supposed to function:

> "If the provider disputes the amount paid, the provider must request a second review within 90 days of service of the EOR. (Lab. Code, § 4603.2(e)(1).) Section 4603.2(e)(2) provides that "[i]f the only dispute is the amount of payment and the provider does not request a second review within 90 days, the bill shall be deemed satisfied and neither the employer nor the employee shall be liable for any further payment." If the employer provides a second review and the provider still contests it, the provider must file for IBR. (Lab. Code, § 4603.2(e)(4).) If the employer never provides a second review, the WCAB has jurisdiction to determine the billing dispute. (Lab. Code, § 4603.2(f); Cal. Code Regs., tit. 8, § 10451.2(c)(1)(D).)"

In *Senquiz v. City of Fremont* (2017) 83 Cal.Comp.Cases 782, 786 (writ den.), the Board panel cited Labor Code section 4603.6(a)[2] and explained that notwithstanding IBR, the Board may have jurisdiction over medical treatment expense disputes where a "threshold" issue is raised:

> "The ['only dispute is the amount of payment' per section 4603.6(a) exists] if there are no other issues that would impact whether defendant is required to pay the provider. It is well established that threshold issues that would entirely defeat an applicant's right to medical treatment must be resolved by the WCAB prior to proceeding to IBR. Threshold issues include whether applicant sustained an industrial injury, employment, statute of limitations, or insurance coverage. (Cal. Code Regs., tit. 8, § 10451.2(c)(1)(C).) Other potential disputes that could render IBR premature include disputes over whether the treatment is authorized, disputes over whether treatment is reasonable and necessary, and disputes over whether an applicant is entitled to treat outside of a medical provider network."

Based on the foregoing authorities, including section 4603.2(e)(4) and (f), it appears that the WCAB may have jurisdiction over a medical treatment expense dispute where: (1) after the employer provides a first review and the provider continues to dispute the amount paid, the provider requests an order of the WCAB to resolve a "threshold issue" pursuant to section 4603.3(a)(5); (2) there is a second review but the employer continues to dispute the charges based on a "threshold issue" (section 4603.6(a)); (3) the provider requests but the employer never provides a second review; or (4) the dispute proceeds through IBR, resulting in a determination and order of the Administrative Director, subject to an appeal to the WCAB (section 4603.6(f)).

In this case, the record is unclear as to whether the parties have engaged in any of the four procedures listed above. As for the first two procedures, and although it is uncertain whether federal preemption of the OMFS may be a "threshold issue," it is unknown whether the V.A. invoked the relevant statutory procedures to resolve the issue before filing the Application for Adjudication of Claim that ultimately resulted in the WCJ's decision herein. As for the other two procedures, again it is uncertain whether the V.A. requested, but the employer never provided, a second review; it also does not appear that this case was pursued as an appeal of an IBR determination issued by the Administrative Director.

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[2] Section 4603.6(a) provides in relevant part: "If the only dispute is the amount of payment and the provider has received a second review that did not resolve the dispute, the provider may request an independent bill review within 30 calendar days of service of the second review pursuant to Section 4603.2 or 4622. If the provider fails to request an independent bill review within 30 days, the bill shall be deemed satisfied, and neither the employer nor the employee shall be liable for any further payment. If the employer has contested liability for any issue other than the reasonable amount payable for services, that issue shall be resolved prior to filing a request for independent bill review…"

At the same time, we note that in the Pretrial Conference statement dated October 23, 2019 (p. 3), defendant did raise the issue of the potential applicability of IBR, with defendant claiming that the V.A. "has not properly engaged in the IBR process." The WCJ never addressed the issue, because for unknown reasons, it was not carried over into the Minutes of Hearing of the lien trials that took place on January 13, 2020 and March 9, 2020. We further note that defense Exhibit I, admitted into evidence on January 13, 2020, includes an Explanation of Review (EOR) sent by defendant to the V.A. Without expressing a final opinion, we observe that Exhibit I suggests defendant may have complied with Labor Code section 4603.3(a), the part of the IBR process in which a defendant must provide an EOR that includes, among other things, "the basis for any adjustment, change or denial of the item or procured billed."

Labor Code section 4603.2(e)(2) states that "[i]f the only dispute is the amount of payment and the provider does not request a second review within 90 days, the bill shall be deemed satisfied and neither the employer nor the employee shall be liable for any further payment."

In this case, if defendant provided the V.A. with a first EOR as suggested by Exhibit I, an unresolved question arises as to whether the V.A. needed to request a second EOR (and, if defendant provided a second review, a request for IBR) to preserve WCAB jurisdiction over its lien claim. We also note that if IBR was pursued all the way, resulting in the Administrative Director upholding defendant's initial payment, the V.A. may have had a proper appeal to the WCAB on grounds "the administrative director acted without or in excess of his or her powers," i.e., by applying the OMFS notwithstanding its alleged preemption. (Lab. Code, § 4603.6(f)(1).)

In the final analysis, we note that the V.A. is claiming preemption of the OMFS while also attempting to invoke the jurisdiction of the California workers' compensation system to obtain reimbursement. As shown by the discussion above, the California Legislature has seen fit to cede such jurisdiction, to a significant degree, to the Administrative Director of the DWC, by implementing IBR. It appears there are exceptions to this jurisdiction embedded within the IBR process, but they are limited (Lab. Code, §§ 4603.2, 4603.3 & 4603.6), as are the grounds for appeal to the WCAB. (Lab. Code, § 4603.6(f).)

Again, we remain uncertain about how the instant dispute over reimbursement for the medical treatment provided by the V.A. came before the WCJ. As noted before, defendant raised the issue of IBR but it was never addressed. Because the extent to which the parties engaged in IBR (if any) is unknown, it is unclear whether there is an exception to IBR that would provide the

WCAB with jurisdiction over the instant dispute. We conclude that this issue must be squarely addressed by the parties and by the WCJ. Therefore, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings and new decision by the WCJ. The parties are directed to brief the WCJ on the applicability of IBR and the specific basis for WCAB jurisdiction herein.

II. WHETHER THE WCAB HAS AUTHORITY TO FIND PREEMPTION

In the absence of IBR, the WCAB generally has subject matter jurisdiction over liens for medical treatment pursuant to Labor Code sections 4604, 4903(b) and 5304. However, the V.A. contends that the WCAB does not have jurisdiction to limit reimbursement of its lien because the OMFS is preempted by federal law.

In evaluating the V.A.'s contention, it is helpful to consider the origin of the OMFS. In their treatise *California Workers' Compensation Law*, Rassp & Herlick explain in relevant part:

> In 2003 the Legislature, seeking to control rising costs of medical treatment in the workers' compensation system, repealed former Labor Code section 5307.1, which had authorized official medical fee schedules, and enacted a new Labor Code section 5307.1, creating a different, and statutorily more complex, regime of official medical fee schedules [Stats. 2003, ch. 639, §§ 34, 35].
>
> Under the new system, the Administrative Director, after public hearings, is required to adopt and revise periodically an official medical fee schedule that establishes reasonable maximum fees paid for medical services (other than physician services), drugs and pharmacy services, health care facility fees, home health care, and all other treatment, care, services, and goods described in Labor Code section 4600 and provided pursuant to this new official medical fee schedule statute [Lab. Code, § 5307.1(a); see Cal. Code Regs., tit. 8, §§ 9789.10–9789.111]. Except for physician services, all fees are to be in accordance with the fee-related structure and rules of the relevant Medicare and Medi-Cal payment systems, provided that employer liability for medical treatment, including issues of reasonableness, necessity, frequency, and duration, are to be determined in accordance with Labor Code section 4600 [Lab. Code, § 5307.1(a)].
>
> Commencing January 1, 2004, and continuing until the time the Administrative Director adopted an official medical fee schedule in accordance with the fee-related structure and rules of the relevant Medicare payment systems, maximum reasonable fees were to be 120 percent of the estimated aggregate fees prescribed in the relevant Medicare payment system for the same class of services before application of inflation factors [Lab. Code, § 5307.1(a); see Cal. Code Regs., tit. 8, §§ 9789.20–9789.24 (inpatient hospital fee schedule, definitions, and payments)].

> Maximum reasonable fees for physician and non-physician practitioner medical treatment provided pursuant to Labor Code section 4600, which is rendered on or after January 1, 2014, are to be no more than the amount determined by the Official Medical Fee Schedule for Physician and Non-Physician Practitioners, consisting of the regulations set forth in California Code of Regulations, title 8, sections 9789.12.1 through 9789.19 (Physician Fee Schedule). […]
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> (1 *Cal. Workers' Comp. Law* (Rassp & Herlick, 6th ed. 2020) Official Medical Fee Schedules, § 4.20 [2], footnotes omitted.)

Notwithstanding the California Legislature's desire to control the rising costs of medical treatment by implementing the OMFS, the V.A. claims it is preempted by various federal statutes and regulations. The most relevant statute is 38 United States Code section 1729, subparagraphs (a)(1) and (f) of which state as follows:

> (a)(1) 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 [38 USCS §§ 1701 et seq.] 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 § 1784].

Based on the statutory language, the above provisions expressly allow the V.A. to recover its treatment charges "to the extent" a provider would be eligible to receive payment in the California workers' compensation system, with the "extent" presumably defined by the OMFS.

The most relevant federal regulation, 38 CFR 17.106(e), specifically states 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 purports 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-party 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.* (Italics added.)

Thus, 38 CFR 17.106(e) goes a step further than 38 USC section 1729, with the regulation expressly preempting "[a]ny provision of a law or regulation of a State…that purports to establish any requirement on a third-party payer that would have the effect of…*limiting payment* for any medical care or services for which payment by the third-party payer under 38 U.S.C. 1729 or this part is required…"

Notwithstanding the claim of "field preemption" raised in the V.A.'s petition for reconsideration, it is apparent that 38 CFR 17.106(e) raises the issue of "express preemption" because the regulation expressly uses the word "preempted" in relation to conflicting state laws.

We note that "express preemption arises when Congress define[s] explicitly the extent to which its enactments pre-empt state law. [Citation.] Pre-emption fundamentally is a question of congressional intent, [citation], and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." (*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 936, quoting *English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79; accord *Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949 (internal quotation marks omitted.)

In this case, reading 38 USC 1729(a)(1) and (f) together, and based on the express language of 38 CFR 17.106(e), it appears there is some indication of Congressional intent to preempt conflicting state laws such as the OMFS at issue here. This does not end our analysis, however, because the Appeals Board is limited in its authority to declare that Labor Code section 5307.1 - the origin and foundation of the OMFS – is not applicable to the V.A.'s lien because it is preempted by federal law.

In *Enriquez v. Couto Dairy* (2013) 78 Cal.Comp.Cases 323, 326-327 (Appeals Board en banc), the Board discussed the extent of its authority to find preemption of a statute, as follows:

> … [W]e are not finding preemption of section 5307.1 insofar as it relates to the general authority of the AD to adopt an OMFS. Furthermore, Article III, section 3.5(c) does not preclude the Appeals Board from determining that a state law is unconstitutional if that determination is based on an extensive body of federal or state case law. (*Cumero v. Pub. Employment Relations Bd.* (1989) 49 Cal. 3d 575, 583, 262 Cal. Rptr. 46, 778 P.2d 174 [holding that Article III, 9 3.5 does not "prevent [a state agency] from construing [state law] in light of constitutional standards"]; *Schmid v. Lovette* (1984) 154 Cal. App. 3d 466, 473-474, 201 Cal. Rptr. 424 [holding that Article III, 9 3.5 did not require community college officials to enforce a statute requiring public employees to sign an anti-Communist Party loyalty oath when comparable statutes had been held unconstitutional by both federal and state supreme court decisions]; see also *Navarro v. A&A Farming*

(2002) 67 Cal. Comp. Cases 145 (Appeals Board en banc) [finding federal preemption of state statute based on extensive body of federal and state case law].)

Here, we base our finding of preemption of AD Rule 9789.70, relating to air ambulance services and adopted by the AD under authority of Labor Code section 5307.1, on [an]extensive body of case law…

In addition, we note that *Navarro v. A&A Farming* (2002) 67 Cal.Comp.Cases 145 (Appeals Board en banc) illustrates the breadth and depth of analysis necessary to find preemption "based on an extensive body of federal or state case law." In *Navarro*, the Board held that where an injured employee's claim of discrimination under Labor Code section 132a is premised upon the employer's termination of (or refusal to provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the employee's section 132a claim "relates to" the ERISA plan and, therefore, is preempted by ERISA, 29 U.S.C. § 1144(a). (Cf. *Rodriguez v. RWA Trucking Co., Inc.* (2013) 238 Cal.App.4th 1375, 1409 [Lab. Code, § 3751, which prohibits employers from deducting the cost of workers' compensation insurance from employees' wages, is not preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 49 United States Code section 14501 et seq. (the truth-in-leasing act)]; *United States Dep't of Veterans Affairs v. Boresi* (2013) 396 S.W.3d 356, 361-362 [38 USCS § 1729 and supremacy clause of the U.S. Constitution permitted the V.A. to intervene in veteran's Missouri workers' compensation claim to assert its claim for recovery of treatment provided to the veteran]; *Richardson v. Lahood & Assoc.* (1990) 571 So.2d 1082 [upholding Alabama statute prohibiting reduction of workers' compensation plan benefits by the amount of ERISA payments received].)

In this case, by contrast, the V.A. cites only one relevant state case in support of its claim of preemption. In *Borgosano v. Babcock & Wilcox Power Co.* (1996) 10 *Mass. Workers' Comp. Rep.* 120, 126, the Reviewing Board of the Department of Industrial Accidents of Massachusetts (apparently the equivalent of the California Appeals Board) held that the rate of reimbursement for medical services found compensable under Massachusetts state law was preempted by federal law; the insurer was ordered to reimburse the V.A. at rates in accordance with those established by the applicable federal regulations, pursuant to 38 U.S.C. §1729.

Nonetheless, in California the burden is on the lien claimant to prove all elements necessary to establish the validity of its lien. (Lab. Code, §§ 5705, 3202.5; *Zenith Insurance Co. v. Workers' Comp. Appeals Bd*. (*Capi*) (2006) 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374]; *Torres v. AJC*

Sandblasting (2012) 77 Cal.Comp.Cases 1113 (Appeals Board en banc); *Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc).) Consistent with this principle, we conclude that the V.A. has the burden of establishing preemption because it is a necessary element in support of the V.A.'s claim that it is entitled to reimbursement in excess of the OMFS. Upon reconsideration, however, the V.A. has cited the single case of a sister state's administrative body in support of its claim of preemption. Therefore, we find it premature to conclude that the V.A. has presented "an extensive body of federal or state case law" establishing preemption of Labor Code section 5307.1 and the host of regulations comprising the OMFS.

As for federal case law, we have not found a federal decision invalidating a state OMFS based on preemption, though there are several decisions involving preemption of state crime victim compensation cases. (See *United States v. Maryland* (4th Cir. 1990) 914 F.2d 551 and *United States v. New Jersey* (3d Cir. 1987) 831 F.2d 458 [V.A. permitted to recover the costs of care provided to crime victims at veterans hospitals]; *United States v. Ohio* (6th Cir. 1992) 957 F.2d 231, 233 ["[W]e join the Fourth and Third Circuits which have held that Maryland and New Jersey [crime victim compensation] statutes, similar to the Ohio statute, do not prevent recovery by the V.A. under § 1729 for the reasonable cost of medical care or services rendered to veterans."].) Conflict preemption also was invoked by one U.S. District Court to hold that California Code of Civil Procedure section 580b did not bar the V.A. from seeking indemnity from veterans who defaulted on their V.A.-guaranteed loans, because application of California Anti-Deficiency Law to V.A.-guaranteed veterans would conflict with 38 C.F.R. section 36.4323(e). (*Jones v. Turnage* (N.D.Cal. 1988) 699 F.Supp. 795, 800.)

We conclude that without further briefing by the parties at the trial level, it remains uncertain whether the cases cited above amount to "an extensive body of federal case law" that would justify the Appeals Board in finding preemption of Labor Code section 5307.1 and the regulations pertaining to the OMFS. As explained before, the burden is on the V.A. to make that showing, and the WCJ has yet to squarely address the issue. Therefore, we will rescind the WCJ's decision and return this matter to the trial level with directions to the parties to thoroughly brief the WCJ, who must make a clear determination on the issue.

CONCLUSION

The V.A.'s claim of preemption gives rise to a dilemma. On one hand, the V.A. is invoking the jurisdiction of the California WCAB to obtain reimbursement of its medical treatment costs.

On the other hand, the V.A. is claiming that the OMFS is preempted, resulting in the questionable proposition that the WCAB only has jurisdiction to award whatever the V.A. has billed. We further note that even if a persuasive case for preemption of the OMFS can be made, it is not clear that the V.A.'s charges were computed in accordance with federal law. This is because the billed items included in lien claimant's trial exhibit 5 are found on the letterhead of the V.A.'s representative, and they provide no explanation of the amounts charged other than websites referenced in various footnotes. Therefore, it may be necessary for the V.A. to produce an expert to confirm that its charges were computed in accordance with federal law. As with IBR, defendant raised this issue in the Pretrial Conference statement dated October 23, 2019.

We will rescind the WCJ's decision and return this case to the trial level. In further proceedings, the parties are directed to submit briefs to the WCJ thoroughly addressing the question of whether "an extensive body of federal or state case law" supports preemption of Labor Code section 5307.1 and the regulations that embody the OMFS. The WCJ must make a specific determination on this issue, as well as the IBR issues discussed above. We express no final opinion on these questions. When the WCJ issues a new decision, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 et seq.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of March 11, 2020 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

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 9, 2021

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
MELODY COX

JTL/bea

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