BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

FILED
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WORKERS' COMPENSATION

MARK A. PRESSON, Claimant, vs. FREIBURGER CONCRETE & TOPSOIL, INC., Employer, and IOWA MUTUAL INSURANCE COMPANY, Insurance Carrier, Defendants.	File No. 5049542 ALTERNATE MEDICAL CARE DECISION Head Note No.: 2701

STATEMENT OF THE CASE

This is a contested case proceeding under Iowa Code chapters 85 and 17A. The expedited procedure of rule 876 IAC 4.48 is invoked by claimant, Mark A. Presson. Claimant appeared telephonically and through his attorney, Jerry A. Soper. Defendants appeared through their attorneys, Peter J. Thill and Paul M. Powers.

The alternate medical care claim came on for hearing on April 18, 2018, and was digitally recorded. That recording constitutes the official record of this proceeding. Pursuant to the Commissioner's February 16, 2015 Order, the undersigned has been delegated authority to issue a final agency decision in this alternate medical care proceeding. Therefore, this ruling is designated final agency action and any appeal of the decision would be to the Iowa District Court pursuant to Iowa Code section 17A.

The record consists of claimant's exhibits 1 through 9 and defendants' exhibits A through C. Claimant and Sylvia Reyes provided testimony.

ISSUE

The issue presented for resolution is whether claimant is entitled to alternate medical care consisting of a referral to Ramon Pla, M.D., for the sole purpose of obtaining medical marijuana.

FINDINGS OF FACT

Claimant sustained a head injury on May 19, 2014, when he was struck in the back of the head with a baseball. (Claimant's Exhibit 1:1) Defendants admitted liability for this injury and the episodic cluster headaches, post-traumatic headache, and occipital neuralgia (as diagnosed by the authorized treating physician, Rodney A. Short, M.D.) for which claimant seeks alternate medical care.

On February 23, 2018, claimant was seen by Dr. Short for a follow-up evaluation for his headaches. (Cl. Ex. 2:4) Dr. Short recommended treatment consisting of a right occipital nerve block and some nasal spray. (Id.) Claimant testified at hearing that the nasal spray helped take the edge off of his headaches and that he was scheduled to undergo the recommended nerve block on April 19, 2018. (Claimant Testimony)

At the same February 23, 2018 appointment, claimant reported to Dr. Short that he had "been using marijuana and thinks that provides relief." (Cl. Ex. 2:4) Given claimant's past intolerance of oral medication, Dr. Short indicated he believed "medical marijuana is a reasonable treatment option." (Id.) He stated he would look "into an Illinois physician that we could refer to prescribe this." (Id.)

The medical use of cannabis is legal in Illinois, subject to certain parameters, pursuant to the Illinois Compassionate Use of Medical Cannabis Pilot Program Act. 410 Ill. Comp. Stat. §§ 130/1, 130/25. Claimant is a resident of Illinois. (Cl. Testimony)

Dr. Short eventually recommended a referral to Dr. Pla, as he was the only medical provider in Illinois that Dr. Short "kn[e]w of who is helping patient's [sic] obtain medical marijuana." (Cl. Ex. 4:10) Dr. Short again stated claimant "may benefit from a trial [of] medical marijuana, particularly since he is already using marijuana and has found it helpful." (Id.)

Defendants refused to authorize the referral to Dr. Pla. (Cl. Ex. 7:14)

They based their refusal, in part, on the provision of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act that exempts insurers from having to pay for costs associated with the medical use of cannabis. It states, "Nothing in this Act may be construed to require a government medical assistance program, employer, property and casualty insurer, or private health insurer to reimburse a person for costs associated with the medical use of cannabis." 410 Ill. Comp. Stat. § 130/40(d).

There is some doubt as to whether this provision of the Illinois Compassionate Use of Medical Cannabis Pilot Program Act is controlling in this proceeding. This dispute is a contested case proceeding before the Iowa Workers' Compensation Commissioner pursuant to Iowa Code section 85.27 and the associated rules under the Iowa Administrative Code. Iowa Code § 85.27; 876 IAC 4.1(15), 4.48. If defendants were ordered to pay for the requested care in this case, such an order would come from the Iowa Workers' Compensation Commissioner. In other words, if ordered to pay,

defendants would be required to do so pursuant to Iowa law—not pursuant to the Illinois Compassionate Use of Medical Cannabis Pilot Program Act. Thus, because any requirement to pay for costs associated with the use of medical marijuana would not have originated under the Illinois act, defendants could not use the exclusionary provision in that act as a shield.

It is not necessary, however, to decide whether the exclusionary provision in the Illinois Compassionate Use of Medical Cannabis Pilot Program Act is controlling—or how it should be interpreted[1]—because defendants' refusal to authorize the referral to Dr. Pla is reasonable on other grounds.

The first of those grounds is defendants' concern that they may be in violation of Iowa or federal law by financing claimant's treatment related to and/or use of marijuana. With respect to federal law, marijuana is classified as a "Schedule I" controlled substance under the Controlled Substance Act (CSA). 21 U.S.C. § 812 (2012). As such, manufacturing, dispensing, distributing, or possessing marijuana is a criminal offense, with the sole exception being use in a Food and Drug Administration research study. See id. at §§ 823, 841(a)(1), 844(a); Gonzales v. Raich, 545 U.S. 1, 13-14 (2005) ("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 preapproved research study."). There is no "medical necessity" exception for marijuana use under federal law. See U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 490-495 (2001).

While defendants would not be directly engaged in the illegal manufacture, distribution or possession of marijuana, they fear that financing such activities could be construed as aiding or abetting. Under federal law, those who aid, abet, counsel, command, induce, or procure the commission of a crime are punishable as principals. 18 U.S.C. § 2. Presumably, therefore, if defendants paid for claimant's marijuana and claimant was later charged criminally for the possession of that marijuana, defendants could be charged as if they were in direct possession. Or, if defendants paid for an appointment in which Dr. Pla disbursed marijuana and Dr. Pla was later criminally charged for doing so, defendants could be charged as if they were directly engaged in its distribution.

While it may not be dispositive in this case, the exclusionary provision for insurers in the Illinois Compassionate Use of Medical Cannabis Pilot Program Act discussed above is illustrative of these legality concerns. Illinois is not alone; many states in which medical marijuana is legal have enacted similar exclusionary provisions to protect business owners and insurers concerned about violating federal law. See, e.g., Alaska Stat. Ann. § 17.37.040(c); Ariz. Rev. Stat. § 36-2814(A)(1); Cal. Health and

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[1] Claimant argues this provision does not mandate exemption based on the legislature's use of the word "may" instead of "shall." He also argues that even if deemed mandatory, the provision only exempted insurer's from paying for the actual cannabis itself—not the treatment associated with the acquisition of the cannabis.

Safety Code § 11362.785(d); Colo. Const. art. XVIII, § 14(10)(a); Del. Code tit. 16 § 4907A(a)(1); Fla. Stat. § 381.986; Mich. Comp. Laws § 333.26427(c)(1); Mont. Code § 39-71-407(6)(c); N.J. Stat.§ 24:6I-14; N.D. Code § 19-24.1-34; Or. Rev. Stat. § 475B.413(1); R.I. Gen. Laws § 21-28.6-7(b)(1); Vt. Stat. tit. 18 § 4474c(b); Wash. Rev. Code § 69.51A.060(2). If this list is any indication, defendants' fears are shared, widespread, well-founded.

Claimant does not dispute that defendants risk aiding and abetting under 18 U.S.C. section 2 if they are ordered to pay for claimant's requested care; instead, claimant argues that the risk of prosecution in such a scenario is extremely small. He points to other states in which marijuana cultivation and use is rampant and flaunted and suggests those states would be targeted first, if such prosecution ever actually occurs. Even assuming claimant's assertion is true,[2] it does not change the fact that claimant is asking this agency to order defendants to engage in activity that he concedes is likely illegal under federal law. Because defendants risk violating federal law if they pay for claimant's requested treatment, it is found that defendants' refusal to authorize the referral to Dr. Pla is reasonable.

Defendants have parallel concerns about Iowa law. Iowa law mirrors federal law by classifying marijuana as a "Schedule I" controlled substance.[3] Iowa Code § 124.204(4)(m) (2017). Like under federal law, Iowa law makes it illegal to manufacture, deliver or possess[4] marijuana. Id. at § 124.401(1), (5). The Iowa Supreme Court, like the United States Supreme Court, has refused to recognize a medical necessity defense to the use of marijuana. See State v. Bonjour, 694 N.W.2d 511 (Iowa 2005). Iowa also has an aiding and abetting statute similar to the federal statute. It states, "All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried

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[2] It should be noted that the United States Attorney General, as recently as January 4, 2018, urged federal prosecutors to enforce the prohibition of marijuana cultivation, distribution, and possession pursuant to the CSA. See Memo. from Jefferson B. Sessions, United States Attorney General, Marijuana Enforcement (Jan. 4, 2018). He referred to "marijuana activity" as a "serious crime." Id.

[3] The Iowa Code contains an exception for marijuana as a Schedule I controlled substance as "provided by rules of the board for medicinal purposes." Iowa Code § 124.204(4)(m) (2017). Marijuana is also classified as a Schedule II drug "when used for medicinal purposes pursuant to the rules of the board," but this "dual scheduling" was in response to the legislature's passage of the Medical Cannabidiol Act. See id. at § 124.206(7)(a); Olsen v. Iowa Board of Pharmacy, 908 N.W.2d 539, 2017 WL 3283296 at *2 (Iowa Ct. App. 2017) (table). To date the board has only recognized that cannabidiol more appropriately fits in Schedule II; the board has declined to make a broader exception or to remove marijuana as a whole from Schedule I. See Olsen, 908 N.W.2d 539, 2017 WL 3283296 at *2.

[4] Iowa Code section 124.401 makes it "unlawful for any person . . . to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner." Iowa Code § 124.401(5). "Practitioner" is limited to individuals "licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to, or to administer" marijuana "*in this state*." Id. at § 124.101 (emphasis added). Thus, claimant would not be protected from prosecution in Iowa even with a valid order from an Illinois doctor.

and punished as principals." Iowa Code § 703.1. Presumably, therefore, if claimant crossed state lines into Iowa while possessing marijuana that was financed by defendants, defendants could be charged as if they were in direct possession. Because defendants risk violating Iowa law if they pay for claimant's requested treatment, it is found that defendants' refusal to authorize the referral to Dr. Pla is reasonable.

Even assuming defendants were protected from prosecution under federal and/or state law, defendants' refusal to authorize the requested care is reasonable because the treatment sought is illegal under federal and Iowa law. As explained above, possession of marijuana—which is ultimately what claimant seeks—is presently illegal in Iowa and under federal law, even when the possession is for medical purposes. See 21 U.S.C. §§ 823, 841(a)(1); Iowa Code § 124.401(5); see also Oakland Cannabis Buyers' Co-op., 532 U.S. at 490-495; Bonjour, 694 N.W.2d at 514-15. For all practical purposes, therefore, claimant is asking this agency to usurp upon the determinations of Congress and the Iowa legislature by ordering payment for—and in turn essentially ignoring the illegality of—medical marijuana, and the undersigned declines that invitation.

Importantly, both the United States Supreme Court and the Iowa Supreme Court have previously declined similar invitations. In U.S. v. Oakland Cannabis Buyers' Co-op., the U.S. Supreme Court determined it was clear under the terms of the CSA that "Congress has made a determination that marijuana has no medical benefits worthy of an exception." 532 U.S. at 493. As a result, the Court was unwilling and unable "to override a legislative determination manifest in a statute" by recognizing a legal defense to marijuana use. Id. at 493-94. The Iowa Supreme Court came to the same conclusion in State v. Bonjour. 694 N.W.2d at 513. The court explained that the "[u]se of marijuana is a public-policy issue best suited for the legislature because it is driven by legal, moral, philosophical, and medical concerns that are ill-suited" for the court. Id. at 514. For this reason, the court was unwilling to "leapfrog the legislature" by recognizing the legality of marijuana use through a medical necessity exception. Id. at 514-15.

The courts' rationale in these cases is equally applicable here. This specific claimant's symptoms may very well be diminished or even alleviated by marijuana use, but Congress and the Iowa legislature have weighed the broader importance of enforcement of the marijuana ban against its potential medical value and have so far declined to adopt any rules or modify any laws that would make marijuana use legal. See id. at 513. Because Congress and the legislature are the appropriate bodies to make public-policy decisions with respect to the legality of marijuana, it would be inappropriate for this agency to order defendants to pay for treatment that those bodies have deemed illegal. As such, it is found that defendants' refusal to pay for the referral to Dr. Pla (which, again, is for the sole purpose of obtaining medical marijuana) is reasonable.

Finally, defendants' refusal to authorize the appointment with Dr. Pla is reasonable because under both federal and Iowa law, marijuana is void of any accepted medical use. 21 U.S.C. § 812(b)(1)(a) (noting Schedule I drugs have "no currently

accepted medical use in treatment in the United States"); Iowa Code § 124.203(1)(b) (noting Schedule I drugs have "no accepted medical use in treatment in the United States"). If Congress and the Iowa legislature have determined that marijuana has no accepted medical use, then it certainly cannot be regarded as reasonable treatment by this agency.

In Iowa, marijuana is currently considered a Schedule I drug that has "no accepted use" "except as otherwise provided by rules of the board for medicinal purposes." Iowa Code §§ 124.203(1)(b), 124.204(4)(m). In recent years, after passage of the Medical Cannabidiol Act in Iowa, the board determined cannabidiol met the criteria for a substance in Schedule II, but the board "declined to 'make the broader recommendation' to remove the entire category of marijuana from Schedule I." See Olsen v. Iowa Board of Pharmacy, 908 N.W.2d 539, 2017 WL 3283296 at *2 (Iowa Ct. App. 2017) (table).

Ultimately, the Iowa legislature has decided to "defer to the Board of Pharmacy Examiners . . . to make critical decisions regarding the medical effectiveness of marijuana use and the conditions, if any, it may be used to treat." Bonjour, 694 N.W.2d at 514. The board has recently indicated it is not inclined to remove marijuana from Schedule I. Olsen, 908 N.W.2d 539, 2017 WL 3283296 at *2. Thus, it would be inappropriate for this agency to leapfrog "the Board of Pharmacy Examiners by simply recognizing the medicinal value . . . of marijuana use." Bonjour, 694 N.W.2d at 514.

For the same reasons, it would be inappropriate for this agency to leapfrog Congress' determination that marijuana has no accepted medical use. It is therefore found that defendants' refusal to pay for the referral to Dr. Pla for the sole purpose of obtaining medical marijuana is reasonable.

REASONING AND CONCLUSIONS OF LAW

Iowa Code section 85.27(4) provides, in relevant part:

> For purposes of this section, the employer is obliged to furnish reasonable services and supplies to treat an injured employee, and has the right to choose the care. . . . The treatment must be offered promptly and be reasonably suited to treat the injury without undue inconvenience to the employee. If the employee has reason to be dissatisfied with the care offered, the employee should communicate the basis of such dissatisfaction to the employer, in writing if requested, following which the employer and the employee may agree to alternate care reasonably suited to treat the injury. If the employer and employee cannot agree on such alternate care, the commissioner may, upon application and reasonable proofs of the necessity therefor, allow and order other care.

Iowa Code § 85.27(4).

"Defendants' obligation under the statute is confined to *reasonable* care for the diagnosis and treatment of work-related injuries." Long v. Roberts Dairy Co., 528 N.W.2d 122, 124 (Iowa 1995) (emphasis in original). In other words, the "obligation turns on the question of reasonable necessity, not desirability." Id.

By challenging the employer's choice of treatment – and seeking alternate care – claimant assumes the burden of proving the authorized care is unreasonable. See Iowa R. App. P. 14(f)(5); Long, 528 N.W.2d at 123.

Based on the above findings of fact, specifically that defendants' refusal to authorize an appointment with Dr. Pla is reasonable, defendants have satisfied their legal obligation under Iowa Code section 85.27(4). Given claimant's assertion that marijuana helps temper the symptoms from his work-related injury, it is understandable that claimant desires defendants to pay for it; however, defendants' obligation is grounded in reasonableness—not desirability. Dr. Short continues to be the authorized treating physician, and claimant has made no assertion that his treatment, such as nasal spray or nerve blocks, is unreasonable. Claimant has thus failed to satisfy his burden to prove that the care provided by defendants is unreasonable.

The undersigned acknowledges this agency has long held that an employer's right to select medical providers does not include the right to determine how an injured worker should be diagnosed, evaluated, treated, or other matters of professional medical judgment. See Assmann v. Blue Star Foods, File No. 866389 (Declaratory Ruling, May 19, 1988). It is a well-established principle that defendants are not entitled to interfere with the medical judgment of their own treating physician. See Pote v. Mickow Corp., File No. 694639 (Review-Reopening, June 17, 1986).

It is safe to assume, however, that these tenets were formed under more conventional circumstances. This case is hardly the routine scenario, and as such, this decision is limited to the specific facts of this case and should not be read in any way as a degradation of these long-held principles. Under the specific facts of this case, defendants' decision to refuse to authorize the appointment with Dr. Pla is reasonable and is not interference or a substitution of their own judgement.

The undersigned also acknowledges that in 2002, a deputy workers' compensation commissioner ordered defendants to pay for costs associated with the use of medical marijuana based on these same principles. In McKinney v. Labor Ready, File No. 5005302 (Alt. Care, November 14, 2002), the claimant's authorized treating physician recommended the use of medical marijuana in Oregon. The deputy held:

> This agency has frequently been called upon in alternate medical care claims to require employers and insurance carriers to honor the treatment recommendations of their own authorized physicians. Orders granting

> such relief have been routinely forthcoming. This case is no different except that the treatment modality recommended is not readily available in the state of Iowa.

Id.

With respect to the deputy who authored the decision in McKinney, this case *is* different. Not only is the treatment modality not readily available in the state of Iowa, it is illegal under Iowa and federal law, and both Iowa and federal law have determined that it has no accepted medical use. Thus, this case is distinguishable from the run-of-the-mill scenario in which the agency is frequently called upon, meaning the standard tenets do not carry their usual weight.

Additionally, the deputy in McKinney did not have the benefit of reviewing the Iowa Supreme Court's guidance in the Bonjour decision or the Iowa Board of Pharmacy Examiners' position in Olsen. See Bonjour, 694 N.W.2d at 514; Olsen, 908 N.W.2d 539, 2017 WL 3283296 at *2. Attorney General Sessions' recent memorandum directing stricter enforcement of the CSA also represents a significant shift in direction from the time McKinney was authored. See Memo. from Jefferson B. Sessions, United States Attorney General, Marijuana Enforcement (Jan. 4, 2018). Thus, because of subsequent guidance and a shift in the legal landscape, the decision in McKinney does not control the outcome of this case.

Because it is found that defendants' refusal to authorize the appointment with Dr. Pla is reasonable, their obligation under pursuant to Iowa Code section 85.27(4) is satisfied, and claimant's request for alternate medical care must be denied.

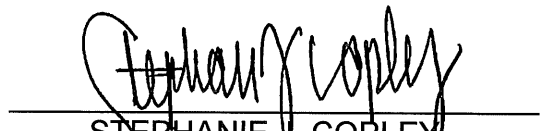
ORDER

THEREFORE IT IS ORDERED:

The claimant's petition for alternate medical care is denied.

Defendants have authorized treatment with Dr. Short, and this decision does not interfere with the other recommendations made by Dr. Short.

Signed and filed this 24th day of April, 2018.



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