COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 014647-12**

Gene A. St. Pierre	Employee
T. E. Greenwood Construction	Employer
Workers' Compensation Trust Fund	Insurer

REVIEWING BOARD DECISION
(Judges Long, Harpin and Calliotte)

This case was heard by Administrative Judge Poulter.

APPEARANCES
Charles R. Casartello, Jr., Esq., for the employee
Janice Lenczycki Toole, Esq., for the Trust Fund

LONG, J. The Workers' Compensation Trust Fund ("Trust Fund"), appeals from a hearing decision ordering it to reimburse the employee, a Vermont resident, for the costs associated with medical marijuana, authorized and obtained in Vermont to treat the employee's chronic pain and post-traumatic stress disorder causally related to his May 2, 2002, Massachusetts industrial injury. We reverse the decision.

The employee's claim, brought pursuant to §§ 13 and 30 for reimbursement of his payments for medical marijuana, was the subject of a § 10A conference on April 2, 2015. The administrative judge ordered the Trust Fund to reimburse the employee for purchases of medical marijuana that his physicians had authorized. Following the timely appeal of the Trust Fund, a de novo hearing was held on October 16, 2015. In her decision, the judge again ordered the Trust Fund to reimburse the employee for all of his past, current and continuing medical marijuana expenses. (Dec. 7.)

The Trust Fund appeals, alleging that the decision is arbitrary, capricious, and contrary to law, because the Massachusetts Act for Humanitarian Medical Use of

Marijuana[1] ("Massachusetts Act") explicitly states that an insurer cannot be required to reimburse for medical marijuana, and also because the use or distribution of medical marijuana is a federal crime under the Controlled Substances Act[2] ("CSA"), which, it

[1] In Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017), the Massachusetts Supreme Judicial Court addressed "whether a qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana has a civil remedy against her employer." Id. at 457. In concluding that the plaintiff's remedy was through a claim of handicap discrimination in violation of G.L. c. 151B, the court addressed various provisions of the Massachusetts Act:

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

Barbuto, supra at 457, 459-460.

The Massachusetts Act, St. 2012, c. 369, was repealed on July 28, 2017 and re-enacted on that date as G.L. c. 94I, see St. 2017, c. 55, §44, to take effect upon the execution of a transfer agreement between the department of public health and the Massachusetts cannabis control commission, or on December 31, 2018, whichever occurs first. See St. 2017, c. 55, § 82. Both the Barbuto decision and this decision interpret the provisions of the original Massachusetts Act, St. 2012, c. 369.

[2] In Gonzalez v. Raich, 545 U.S. 1, 12 (2005), the Supreme Court explained:

> The main objectives of the CSA were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances. Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels.

argues, preempts the Massachusetts Act. (Trust Fund br. 3.) The Trust Fund also argues that the adequacy and reasonableness of medical marijuana cannot be determined because the Department of Industrial Accidents cannot review the adequacy of a medical dispensary in Vermont, and cannot determine the reasonableness of the medication since no rate has been set for reimbursement under Massachusetts law. (Trust Fund br. 13.) Additionally, the Trust Fund argues:

> [T]he Medical Marijuana Act is specifically limited to patients, physicians and dispensaries located in Massachusetts. See 105 Code Mass. Regs. § 725.004 (A "Qualifying Patient" is a "Massachusetts resident 18 years or older who has been diagnosed by a Massachusetts licensed certifying physician …"); 105 Code Mass. Regs. § 725.005 (A Certifying Physician must have at least one established place of practice in Massachusetts); 105 Code Mass. Regs. § 725.015 (A)(1) (To obtain a registration card, the patient must submit a statement indicating that his or her primary residence is in Massachusetts); 105 Code Mass. Regs. § 725.425 (B)(1) (It can be a sole ground for revocation of a registration card if the qualifying patient is "no longer a resident of the Commonwealth"); 105 CMR 725.440 (B)(2)(A registration card is void when the qualifying patient is "no longer a resident of Massachusetts.)" In the instant case, Mr. St. Pierre, his physician, and his

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To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§ 841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. § 812. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. §§ 811, 812. Each schedule is associated with a distinct set of controls regarding the manufacture, distribution and use of the substances listed therein. §§ 821-830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. Ibid. 21 CFR § 1301 et seq. (2004).

In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway." Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2).

dispensary all reside or are located in Vermont.[3]

(Trust Fund br. 12.)

Because we find the Trust Fund's residency and situs arguments dispositive, we need not reach the merits of its other arguments.

The facts of this claim are essentially undisputed, courtesy of an extensive stipulation of facts introduced as Exhibit 5 at the hearing, as follows:

1. Gene St. Pierre, now age 62, was a carpenter for the uninsured Employer, Thomas Greenwood or T.E. Greenwood Construction.
2. Mr. St. Pierre sustained a severe injury to his left hand when he was cut by a table saw on May 2, 2012.
3. He sustained serious laceration and amputation injuries which required several surgeries.
4. Following the incident, the Employee was prescribed narcotic pain medication and other medication for pain.
5. Narcotic pain medication was reasonable, necessary and causally related to the Employee's injuries sustained on May 2, 2012.
6. Mr. St. Pierre has had pain in the left hand and fingers since May 2, 2012.
7. Mr. St. Pierre developed posttraumatic stress disorder as a result of the incident of May 2, 2012.
8. Mr. St. Pierre was prescribed medication for symptoms of posttraumatic stress disorder.
9. Mr. St. Pierre was referred for treatment for posttraumatic stress disorder.
10. Dr. Cherry, Mr. St. Pierre's former primary care physician, approved Mr. St. Pierre's use of medical marijuana as a way to […] effectively control his pain from the work related injury of May 2, 2012.
11. Dr. Park, Mr. St. Pierre's current primary care physician, approves Mr. St. Pierre's use of medical marijuana as a way to […] effectively control pain from the work related injury of May 2, 2012. Dr. Park stated that the use of medical marijuana is a reasonable and necessary treatment of Mr. St. Pierre's post amputation pain.

[3] 2012 Mass. Acts 369, § 1-13 provides:

> Within 120 days of the effective date of this law, the department [of public health] shall issue regulations for the implementation of Sections 9 through 12 of this law.

Sections 9 through 12 address the registration of nonprofit medical marijuana treatment centers; registration of medical treatment center dispensary agents; hardship cultivation registrations and medical marijuana registration cards for qualifying patients and designated caregivers.

12. Mr. St. Pierre is a registered patient through the Vermont Medical Marijuana Registry with a valid registration and obtains medical marijuana from an authorized dispensary of Rutland County Organics, all pursuant to the laws of the State of Vermont.
13. Pursuant to his valid registration, Mr. St. Pierre obtains medical marijuana through Rutland County Organics, a regulated dispensary, under the laws of the State of Vermont.
14. Mr. St. Pierre's former use of narcotic pain medication provided sub-optimal relief of pain, but was occasioned by other undesirable effects.
15. Mr. St. Pierre has experienced greater and more effective pain control through the use of medical marijuana.
16. Mr. St. Pierre has not experienced undesirable effects from the use of medical marijuana.
17. Mr. St. Pierre has experienced positive effects on his posttraumatic stress disorder symptomatology through the use of medical marijuana.
18. The employee and the Workers' Compensation Trust Fund reached a lump sum settlement agreement, which was approved by an Administrative Judge on February 25, 2014. In such agreement, the Workers' Compensation Trust Fund accepted liability for the Employee's diagnosis of "severe laceration and amputation, left hand; PTSD."

(Ex. 5; see Dec. 1; Tr. 27.)

In her hearing decision, the judge made the following findings of fact and rulings of law:

> The Employee, Gene St. Pierre, was 62 at the time of trial. He resides in Bennington County, Vermont.
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> . . . .
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> Mr. St. Pierre was originally prescribed medical marijuana in Massachusetts. He is currently a registered patient through the Vermont Medical Marijuana Registry with a valid registration and obtains medical marijuana from an authorized dispensary, Rutland County Organics *pursuant to the laws of Vermont*.

(Dec. 3-4; emphasis added.)

As noted above, the Trust Fund convincingly argues that "the Medical Marijuana Act is specifically limited to patients, physicians and dispensaries located in Massachusetts. . . . In the instant case, Mr. St. Pierre, his physician, and his dispensary all reside or are located in Vermont." (Trust Fund br. 12.) Although the Trust Fund

relies primarily on the regulations,[4] the statute itself makes it clear that the Massachusetts Act applies to "qualifying patient[s]" who have obtained a "registration card" issued by the Massachusetts Department of Public Health to obtain medical marijuana at a "Medical marijuana treatment center … as defined by Massachusetts law only, registered under this law." St. 2012, c. 369, § 2(A), (D), (H), (K), (L). Here, the parties stipulated that the Employee is a registered patient through the Vermont Medical Marijuana Registry with a valid registration, and that he obtains medical marijuana from an authorized dispensary, all pursuant to the laws of the State of Vermont. (Dec. 4; Ex. 5.) Accordingly, we agree with the Trust Fund and hold that the Massachusetts Act and its statutorily prescribed regulations are specifically limited to "qualifying patients" who are Massachusetts residents with registration cards issued by the Massachusetts Department of Public Health, and to physicians[5] and dispensaries located in Massachusetts. Thus, the judge erred by invoking the terms of the Massachusetts Act to order the Trust Fund to

[4] The statutorily mandated regulations were initially issued as required (most recently amended on December 1, 2017) and are found at 105 Code Mass. Regs. § 725. The employee does not dispute the validity of the subject regulations, nor does the employee address this aspect of the Trust Fund's argument in his brief. The requirement of Massachusetts residency is found in 105 Code of Mass. Reg. § 725.004: "Qualifying Patient means a Massachusetts resident 18 years of age or older . . . ." The statute does not limit its scope only to Massachusetts residents: " 'Qualifying patient' shall mean a person who has been diagnosed by a licensed physician as having a debilitating medical condition." St. 2012, c. 369, § (K). However, when determining the scope of a statute, we must examine not only the language as enacted, but the relevant regulations. Ivey v. Commissioner of Correction, 88 Mass. App. Ct. 18, 23 (2015) ("a properly promulgated regulation has the force of law … and must be accorded all the deference due to a statute").

[5] The judge did not make findings as to the location of the offices of the two physicians who, at various times, authorized medical marijuana for his treatment. However, the employee testified that Dr. Steven Cherry, the original physician who authorized his use of medical marijuana, was located in North Adams, Massachusetts, (Tr. 79), but that he applied for and received approval to receive medical marijuana from the Vermont Department of Safety on December 15, 2012. (Tr. 41-42.) He further testified that Dr. Peter Park, who authorized his use of medical marijuana at the time of hearing, is in Vermont. (Tr. 63-64, 65, 79.) The employee's claim was filed with a September 4, 2014, letter from Dr. Park stating that his use of medical marijuana "has been approved by his previous doctor through which he received the initial medical marijuana registry card and I plan on renewing this when it is due in December of 2014." Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.2 (2002) (reviewing board may take judicial notice of

reimburse the employee for his medical marijuana, where the employee resides in Vermont, his physician and marijuana dispensary are located in Vermont and his registration card is issued through the Vermont Medical Marijuana Registry. The judge's use of the Massachusetts Act in justification of her order of reimbursement was contrary to law, since the employee could not legally comply with the Massachusetts Act due to the deficiencies noted above. The employee's inability to meet the requirements of the Massachusetts Act, and its duly promulgated regulations, precludes him from deriving any additional rights or privileges that may be recognized under the Massachusetts Act.[6]

Accordingly, we reverse the decision.

So ordered.

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Martin J. Long
Administrative Law Judge

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documents in board file). Even though the employee's initial certification for medical marijuana appears to have been by a Massachusetts physician, the employee was, "a Vermont resident, registered and qualified to be a medical marijuana recipient pursuant to the Vermont Therapeutic Use of Cannabis program. . . . [,] purchasing and using medical marijuana from a Vermont dispensary . . . ." (Employee br. 3.)

[6] We note that Vermont has enacted legislation limiting the ability of its medical marijuana statute to require reimbursement from certain entities for medical marijuana. The statute provides in pertinent part:

> § 18 Vermont Statutes Annotated §4474c. Prohibitions, restrictions, and limitations regarding the use of marijuana for symptom relief.
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> ….
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> (b) This chapter shall not be construed to require that coverage or reimbursement for the use of marijuana for symptom relief be provided by:
> (1) a health insurer as defined by section 9402 of this title, or any insurance company regulated under Title 8;
> (2) Medicaid or any other public health care assistance program;
> (3) an employer; or
> (4) for purposes of workers' compensation, an employer as defined in 21 V.S.A. § 601(3).

William C. Harpin
Administrative Law Judge

Carol Calliotte
Administrative Law Judge

Filed: **April 11, 2018**