STATE OF MINNESOTA

WORKERS' COMPENSATION COURT OF APPEALS

No. WC19-6314

Daniel Bierbach, Respondent,	Sommerer & Schultz PLLC Michael G. Schultz 300 Second Avenue South Suite 100 Minneapolis, Minnesota 55401
v.	
Digger's Polaris and State Auto/United Fire & Casualty Group, Appellants.	Arthur, Chapman, Kettering Smetek & Pikala, P.A. Susan K.H. Conley Jeffrey M. Markowitz 500 Young Quinlan Building 81 South Ninth Street Minneapolis, Minnesota 55402-3214

The employer and insurer's appeal, filed September 13, 2019, from the Findings and Order of Compensation Judge William J. Marshall, served and filed August 23, 2019, was heard on August 14, 2020, pursuant to due notice, before Judge Deborah K. Sundquist, Chief Judge Patricia J. Milun, Judge David A. Stofferahn, Judge Gary M. Hall, and Judge Sean M. Quinn, of the Workers' Compensation Court of Appeals.

Based on the pleadings in the case, the transcript of evidence taken before the compensation judge, the exhibits admitted into evidence, and the briefs and arguments of counsel, the court is of the opinion that the Findings and Order of the compensation judge are in accord with the evidence and law in the case.

NOW, THEREFORE, this court AFFIRMS the Findings and Order of Compensation Judge William J. Marshall, served and filed August 23, 2019.

This court further ORDERS that the employer and insurer pay $3,900.00 to the employee's attorney as and for attorney fees on appeal.

BY THE COURT:

FOR

DEBORAH K. SUNDQUIST, Judge

OPINION

DEBORAH K. SUNDQUIST, Judge

The employer and insurer appeal the compensation judge's award of reimbursement for costs incurred by the employee for medical cannabis used to treat his work-related injury. We affirm.

BACKGROUND

In 2004, Daniel Bierbach, the employee, was at work for his employer, Digger's Polaris, when an ATV he was operating rolled, landing on his ankle. The employer and its insurer admitted liability. The employee sought care with J. Chris Coetzee, M.D., an orthopedic surgeon with a sub-specialty in foot and ankle surgery, who diagnosed fractures of the distal tibial pilon and fibula. A few weeks after the injury, the employee underwent surgery. A year post surgery, the employee continued to walk with a limp and had significant swelling of his ankle.

Physical therapy was prescribed, and the employee incorporated its recommended exercises in his regular gym routine and wore an ankle brace. By 2007, he reported a return to his normal activity level but continued to experience intermittent pain and swelling. Three years later, his symptoms worsened, and he again saw Dr. Coetzee, who noted the need for an ankle fusion. Due to the employee's young age, however, Dr. Coetzee wanted to postpone ankle fusion surgery for as long as possible.

In April 2013, the employee filed a claim petition alleging a consequential neck and back injury. In 2014, the parties settled the employee's claims for workers' compensation benefits and closed out some medical expenses, which included opioids/narcotic therapy, psychiatric and psychological treatment, mental health, health clubs, implantable stimulators, and future chronic pain management. (Ex. 33.)

The employee underwent a series of injections in 2017, but by 2018, he had developed progressive degenerative changes in the left ankle and was limited in his activities of daily living. He continued to gain weight due to his inability to exercise. On June 13, 2018, Dr. Coetzee opined that the employee was a candidate for medical cannabis to help with his intractable pain and to wean him off narcotic pain medication.

The employee's application for the Minnesota medical cannabis registry[1] was submitted to and accepted by the Minnesota Department of Health (MDH). The employee was referred to Leafline, a manufacturer of medical cannabis, for evaluation and distribution of medical

[1] See Minn. Stat. § 152.27.

cannabis. A registered pharmacist with Leafline recommended two types of medical cannabis oil, "tangerine" for nighttime use due to the employee's pain at night and "cobalt" for day to day activity. The employee placed the oil in a device allowing him to inhale the oil as a vapor. The employee met with a Leafline professional to discuss his mental and physical response and to refill his medical cannabis. Dr. Coetzee reported that the treatment appeared to be effective in reducing the employee's complaints of intractable pain. He opined that, within a reasonable degree of medical certainty, medical cannabis was an appropriate treatment for the employee's condition.

Chris Meyer, M.D., examined the employee on behalf of the employer and insurer. He reviewed medical records, took a history from the employee, and conducted a physical examination. In his narrative report of December 10, 2018, Dr. Meyer opined that the work injury was a substantial contributing factor to the employee's chronic pain. Based on the medical literature, Dr. Meyer stated that he was "not a believer in the use of medical cannabis for chronic pain," but noted that "there is a reasonable degree of certainty that medical marijuana is a safer alternative to opioid use." (Ex. 1.) Because the employee had not undergone a pain clinic program in the past, Dr. Meyer recommended a pain clinic for the employee's chronic pain.

In 2018, the employee was hired by a new employer as a professional sales associate. The job required him to be on his feet 90 percent of the day. He generally worked over 60 hours a week. He testified that, due to the medical cannabis, his quality of life improved and he was able to continue working at his job.

The employee had a prior history of drug use. He admitted that he had used recreational marijuana for years. He had also taken narcotic medication after the work injury, but he did not like the effects of narcotics and weaned off them in 2004. Since admitted into the medical cannabis program in 2018, the employee's medical cannabis dosage has doubled. At the time of hearing, the monthly cost for his medical cannabis was $1,863.71.

On June 29, 2018, the employee filed a claim petition seeking reimbursement for out-of-pocket costs incurred for medical cannabis used to treat his work-related injury.

The matter was heard before a compensation judge on May 14, 2019. The issues presented included whether the compensation judge had jurisdiction under Minn. Stat. §§ 152.22-.37 (2018) to order reimbursement of costs incurred for medical cannabis and whether the employee's medical cannabis was reasonable, necessary and causally related to the work injury. The compensation judge awarded reimbursement, concluding that he had authority to order reimbursement of such costs, and that the employee's use of medical cannabis was reasonable and necessary medical treatment and causally related to the work injury. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993), summarily aff'd (Minn. June 3, 1993).

DECISION

On appeal, the employer and insurer ask this court to reverse the compensation judge's award of reimbursement for out-of-pocket costs related to the employee's use of medical cannabis. The appellants raise four issues on appeal: whether the compensation judge improperly relied upon medical opinions which lacked foundation, whether the judge erred in finding that the use of medical cannabis was reasonable and necessary to cure or relieve the effects of the employee's injury, whether the compensation judge had jurisdiction to order the employer and insurer to finance the employee's medical cannabis use, and whether the federal law making it illegal to possess, distribute or manufacturer cannabis preempts the state's medical cannabis law, making it a crime for the employer and insurer to reimburse out-of-pocket costs of the employee for state-authorized use of medical cannabis.

Foundation and Medical Expertise

The employer and insurer argue that the judge erred in adopting the medical opinion of Dr. Coetzee because that opinion lacked foundation. Specifically, they argue that Dr. Coetzee's opinion that the employee was a good candidate for medical cannabis is based on faulty information that the employee was taking narcotic medication and that he had no history of substance abuse. They argue that Dr. Coetzee was not an expert in pain medicine and cited no meaningful literature, and therefore lacked the necessary expertise to render an opinion on the employee's use of medical cannabis. Moreover, they argue that Dr. Meyer's opinion was more

persuasive because he questioned the use of cannabis as medically controversial and questioned its effectiveness. We are not persuaded that Dr. Coetzee lacked either the necessary foundation or expertise.

In weighing the evidence, a compensation judge has discretion as the trier of fact to choose between competing and conflicting medical opinions. Gianotti v. Indep. Sch. Dist. 152, 889 N.W.2d 796, 803, 77 W.C.D. 117, 126 (Minn. 2017). This assessment of the weight to be given to conflicting opinions is upheld on appeal, absent an abuse of discretion. Mattick v. HyVee Food Stores, 898 N.W.2d 616, 77 W.C.D. 617 (Minn. 2017). The opinion need only be based on enough facts to form a reasonable opinion that is not based on speculation or conjecture. Gianotti, 889 N.W.2d at 802, 77 W.C.D. at 124.

As the employee's physician since 2004, Dr. Coetzee was familiar with the employee's history and treatment. He had recommended medications, injections, surgery and physical therapy, but all failed to relieve the employee's pain. Dr. Coetzee did not prescribe[2] medical cannabis, but instead diagnosed the employee with intractable pain which is a qualifying condition for medical cannabis registration and certification. Minn. Stat. § 152.27, subd. 2(b); Medical Cannabis and Intractable Pain, Op. Off. of Medical Cannabis, Minn. Dep't of Health (Dec. 2, 2015). Dr. Coetzee did not set the cannabis dose, which was regulated through Leafline, one of only two Minnesota medical cannabis dispensaries registered under Minn. Stat. § 152.25. Having years of a doctor-patient relationship with the employee, Dr. Coetzee observed the employee's condition both before and during the employee's use of medical cannabis and opined that the employee had responded well to that treatment. The employee testified that the medical cannabis improved his pain and functioning so he could continue full-time work in sales while spending much of the workday on his feet. Even Dr. Meyer agreed that medical cannabis was a safer alternative to opioid use. While there is a discrepancy between Dr. Coetzee's 2018 statement that the employee needed to wean off narcotics and the employee's testimony that he had not used narcotics since 2004, we conclude the compensation judge could reasonably reconcile this discrepancy as the trier of fact. The compensation judge did not err by accepting Dr. Coetzee's adequately founded opinion that the treatment was an appropriate modality to address the employee's intractable pain and a better option than chronic use of opioid medication.

Reasonable and Necessary Medical Treatment

The employer and insurer argue that medical cannabis is not reasonable and necessary treatment because it is not currently accepted for medical treatment use, the employee

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[2] In Finding 17, the compensation judge indicates that "The preponderance of the evidence shows that this Compensation Judge has authority to order reimbursement of the employee's payments and costs associated with his medical cannabis prescription." Although the term "prescription" is used here, there is no evidence in the record that Dr. Coetzee "prescribed" or wrote a script for medical cannabis.

is a poor candidate due to his history of substance abuse, Dr. Coetzee did not manage the employee's medical cannabis treatment, the treatment parameters do not support the use of medical cannabis as a reasonable treatment, and as cannabis is an illegal substance, medical cannabis cannot be considered a reasonable treatment. This issue raises questions of fact and law, and we begin with an analysis of the legal issue, which we review de novo.

In 2014, the Minnesota legislature passed the Medical Cannabis Therapeutic Research Act (MCTRA), which established a patient registry and allowed qualifying Minnesotans to possess and use cannabis to treat significant medical conditions. Minn. Stat. §§ 152.22-.37. Regulated by MDH, the law provides rules for the registration, certification, dispensation and use of medical cannabis. The statute presumes that a patient enrolled in the registry program is engaged in the state-authorized use of medical cannabis. Minn. Stat. § 152.32, subd. 1.

Noticeably absent in MCTRA is language requiring payment by health insurers or workers' compensation insurers. Minn. Stat. § 152.23 provides that "nothing in sections 152.22 to 152.37 require the medical assistance and MinnesotaCare programs to reimburse an enrollee or a provider for costs associated with the medical use of cannabis," but does not include the same language for health insurers or workers' compensation insurers. The Minnesota Workers' Compensation Act requires an employer to provide "any" medical treatment as may reasonably be required at the time of the injury and any time thereafter to cure and relieve the effects of the injury. Minn. Stat. § 176.135, subd. 1. That the Minnesota Department of Labor & Industry has not promulgated rules under the treatment parameters for guided use of medical cannabis does not render ineffective the plain language of section 176.135. Moreover, the treatment parameters unequivocally state that medical cannabis permitted under the medical cannabis program is not an illegal substance. Minn. R. 5221.6040, subp. 7a.

Dr. Coetzee diagnosed the employee with intractable pain, which is a qualifying condition for registration. The employee sent an application to MDH, which issued a registry verification to the employee, to Dr. Coetzee, and to Leafline. The employee obtained medical cannabis from Leafline, and Dr. Coetzee continued to see employee for visits related to intractable pain. Under the MCTRA, both Dr. Coetzee and Leafline would then report to MDH, which then submits research findings to the legislature. Given the facts of this case and the requirements under the MCTRA, we see nothing unreasonable about the employee's use of medical cannabis to treat his intractable pain caused by his work injury.

The compensation judge's determination that the employee's use of medical cannabis was reasonable and necessary treatment is supported by substantial evidence. Over the course of 15 years, the employee underwent numerous treatments for his work injury. He tried narcotic medication, physical therapy and cortisone injections, but continued to have intractable pain. Surgery was performed within weeks of the injury, but the employee will need fusion surgery in the future. Because fusion surgery is not presently indicated due to the employee's young age, the employee has been left with chronic pain and limited means of relieving it. The 2014

settlement closed out pain management and opioid/narcotic therapy. In determining that medical cannabis was reasonable and necessary, the compensation judge was persuaded by the employee's testimony that the use of medical cannabis decreased his pain and increased his functional ability. The judge adopted the opinion of Dr. Coetzee, and not the opinion of Dr. Meyer. In weighing the evidence, a compensation judge has discretion as the trier of fact to choose between competing and conflicting medical opinions. The judge's assessment of the weight to be given to the conflicting opinions is upheld on appeal, absent an abuse of discretion. Mattick, 898 N.W.2d at 621, 77 W.C.D. 624. Substantial evidence supports the compensation judge's award of reimbursement to the employee and we affirm.

Subject Matter Jurisdiction

The employer and insurer argue that the compensation judge lacked subject matter jurisdiction to award reimbursement of the employee's out-of-pocket expenses for medical cannabis. They argue that because medical cannabis is an illegal substance under federal law, a compensation judge does not have jurisdiction to address the use of medical cannabis. We agree that a compensation judge does not have jurisdiction to decide issues of federal criminal law. However, a compensation judge does have jurisdiction to adjudicate issues which fall under the Workers' Compensation Act. Hale v. Viking Trucking Co., 654 N.W.2d, 119, 62 W.C.D. 701 (Minn. 2002); Hagen v. Venem, 366 N.W.2d 280, 37 W.C.D. 674 (Minn. 1985). The determination of the compensability of a particular medical treatment for a work-related injury is squarely within a compensation judge's jurisdiction. Minn. Stat. § 176.135. This includes the use of medical cannabis under the MCTRA.

Federal Preemption

Finally, the employer and insurer argue that a "positive conflict" exists between the Controlled Substances Act, 21 U.S.C. 801, et seq., a federal law which makes any use of cannabis a criminal act, and the MCTRA, which allows cannabis to be restricted to use in a medical setting. Due to federal preemption, they argue that they cannot be ordered to violate federal law by reimbursing out-of-pocket costs incurred by the employee for state-authorized use of medical cannabis.

The WCCA has statewide jurisdiction and, except for matters appealed to the supreme court, has the sole, exclusive, and final authority to hear and determine all questions of law and fact arising under the workers' compensation laws of this state in those cases that have been appealed to our court. Minn. Stat. § 175A.01, subd. 5. We have no jurisdiction in "any case that does not arise under the workers' compensation laws" or "in any criminal case." Id. As such, we decline to address the employer and insurer's argument that the Controlled Substances Act preempts our state medical cannabis law.