CASE NO. 6021 CRB-7-15-7 : COMPENSATION REVIEW BOARD
CLAIM NO. 700150964

DAVID PETRINI : WORKERS' COMPENSATION
CLAIMANT-APPELLEE COMMISSION

v. : MAY 12, 2016

MARCUS DAIRY, INC.
EMPLOYER

and

GALLAGHER BASSETT SERVICE
INSURER
RESPONDENTS-APPELLANTS

APPEARANCES:

The claimant was represented by John Jowdy, Esq., Jowdy & Jowdy, 67 West Street, Danbury, CT 06810.

The respondents were represented by Nicholas W. Francis, Esq., Law Office of Jonathan M. Zajac, LLC, 152 Simsbury Road, P.O. Box 699, Avon, CT 06001.

This Petition for Review from the July 2, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District, was heard on December 18, 2015 before a Compensation Review Board panel consisting of Chairman John A. Mastropietro and Commissioners Ernie R. Walker and Stephen M. Morelli.

OPINION

JOHN A. MASTROPIETRO, CHAIRMAN. The respondents have petitioned for review from the July 2, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District. We find no error and accordingly affirm the decision of the trial commissioner.

The trial commissioner identified the following three issues for analysis: (1) whether the claimant's use of medical marijuana for pain management constitutes reasonable and necessary medical treatment; (2) whether mental health therapy to assist the claimant with pain management is reasonable and necessary medical treatment; and (3) whether the claimant is entitled to reimbursement of certain medical expenses. The trier made the following factual findings which are pertinent to our review. The claimant, whose date of birth is October 20, 1979, sustained a compensable low back injury on August 15, 2008. After unsuccessfully undergoing conservative treatment, the claimant underwent an L5-S1 discectomy with Frank Hermantin, MD, in December 2008. Following the discectomy, the claimant continued to experience pain in his low back and right lower extremity and, in April 2009, had a spinal cord stimulator permanently implanted. As of the date of the formal hearing, the spinal cord stimulator was not functioning.

The claimant's injuries have rendered him totally disabled and the respondents have been paying the claimant weekly temporary total disability benefits. As a result of his injuries, the claimant has been on various medications for more than six years, including but not limited to Nucynta, Methadone, Cyclobenzaprine, Clonazepam,

Oxycodone-APAP, Opana, Fentanyl, Lidoderm Patches, Alprazolam, Lexapro, Percocet, and Oxycontin. At trial, the claimant expressed misgivings regarding the medications, and testified as to the numerous side effects of the narcotics such as lethargy, possible tooth loss, nausea, irritability, weight gain, insomnia, and stress. Moreover, despite ingesting all of the above medications, he has not been able to adequately manage the significant pain associated with the injury. The claimant indicated that he feels medical marijuana, as a natural substance, is much easier for his body to tolerate and will provide him with greater longevity. He stated that since he began using medical marijuana, he is no longer taking six of his prior medications.

The claimant testified that prior to June 2014, he approached his treating physician, Daniel Southern, MD, for his opinion regarding replacing the narcotic prescriptions with medical prescribed marijuana, but the doctor "didn't seem overly enthused." January 14, 2015 Transcript, p. 14. On June 11, 2014, the claimant was examined by Judith Major, MD, one of three physicians licensed in Connecticut to dispense medical marijuana. Major diagnosed the claimant with damage to the spinal cord nerve tissue and, based on that diagnosis, issued to the claimant a Connecticut Registration Certificate for the Connecticut Medical Marijuana Program with an authorized amount of 2.5 ounces per month. In a report dated June 30, 2014, Southern indicated that the claimant, who had been brewing the marijuana as a tea, told him that the effects of the marijuana lasted six to eight hours and obviated the need for the Klonopin and Nucynta which the claimant had been using for breakthrough pain. The

claimant also reported that the marijuana had helped to ease the chronic constipation he experiences on his opiate regimen.

In correspondence dated January 9, 2015, Angela D'Amico of the Compassionate Care Center of CT, a licensed medical marijuana facility, reported that the monthly cost for 2.5 ounces (70 grams) of medical grade marijuana is $1,488.90, including tax. At trial, the claimant testified that he has been unable to afford the full 2.5 ounces of medical marijuana prescribed to him, and submitted receipts in the amount of $771.79 covering the period from September 24, 2014 to January 9, 2015.

In a report dated October 2, 2014, Southern reported that the claimant had also been cleared for the use of medical marijuana through his office and that the marijuana was "admirably" controlling the claimant's pain symptoms and had "dramatically" lessened the gastrointestinal side effects. Claimant's Exhibit A. Southern noted that the claimant was still taking two to three Methadone tablets daily but was titrating it down, and stated that "[j]udging by success to date, it is hopeful that David can be removed entirely from opiate medications relying on medical marijuana solely to control pain symptoms." Id. Southern also indicated that "there should be no question of the medical necessity in substituting medical marijuana for opiate medications." Id. In an office note dated December 31, 2014, Southern reported that the claimant was "rarely" using methadone anymore.

In 2009, prior to the spinal cord stimulator trial, Southern had referred the claimant to Robert McEvoy, Ph.D., a psychiatrist. In correspondence dated June 28, 2015, McEvoy reported that he saw the claimant on five occasions between

August 11, 2009 and October 23, 2012 for therapy focused on dealing with the claimant's pain, anxiety, depression and frustration associated with his injury and loss of function. On April 8, 2013, Southern again referred the claimant to McEvoy for depression. The claimant had an office visit on August 1, 2013; the respondents have declined to pay the outstanding invoice from August 1, 2013 or authorize the claimant to treat with McEvoy because the doctor has provided no notes or records to substantiate the services rendered. The claimant is currently seeking authorization to treat with McEvoy for mental health issues arising from his work-related injury.

At trial, the claimant testified that since he began using medical marijuana, he has been "up off the couch more" and is more engaged in his children's lives. January 14, 2015 Transcript, p. 20. He also has been better able to help with the cooking and housecleaning and was able to assist his son in crafting a leather journal as a gift for a family member. The claimant indicated that he is still experimenting with the various strains, strengths, and means of ingestion of marijuana as well as the amount needed to adequately control his pain. However, although he has not been able to afford to buy as much medical marijuana as Major prescribed, his use of medical marijuana thus far has been a great success. In addition, he testified that he was familiar with the regulations governing the use of medical marijuana, such as not using it in the presence of a person under the age of eighteen, and he had been careful about becoming too "foggy" or allowing his children to smell the marijuana. He also indicated that, as was the case when he was taking narcotic medications, he asks his wife to drive if necessary.

Based on the foregoing, the trial commissioner found the claimant credible and persuasive, and concluded that "the Claimant's use of medical marijuana has afforded him significantly greater energy and greater mobility" in that "[h]e is more actively engaged with his family…, less anxious, [and] more optimistic." Conclusion, ¶ B. As a result of using the medical marijuana, the claimant has also "experienced significant weight loss, improved his sleep and eliminated the significant side effects he has suffered as a result of the narcotic medications he was taking. In short, the use of medical marijuana has significantly increased his function, and is remedial in nature." Id. The trial commissioner noted that "[u]nder our law, reasonable or necessary medical care is that which is curative or remedial. Curative or remedial care is that which seeks to repair the damage to health care caused by the job even if not enough health is restored to enable the employee to return to work." Conclusion, ¶ C.

The trier also found credible Southern's opinions and reports, including Southern's opinion that there should be "no question" regarding the medical necessity for substituting medical marijuana for opiate medications. Conclusion, ¶ D. The trial commissioner determined that in light of the claimant's concerns about the effects of the narcotic medications, it was reasonable for him to seek out Major, and also found Major's opinion credible and persuasive, particularly with regard "to her diagnosis of the claimant and his qualification as a patient with a debilitating medical condition within the purview of C.G.S. Section 21a-408(2)(A)."[1] Conclusion, ¶ F. In addition, based on the totality of

[1] Section 21a-408(2)(A) C.G.S. [P.A. 12-55, § 1] (Rev. to 2013) defines "debilitating medical condition" as: "cancer, glaucoma, positive status for human immunodeficiency virus or acquired immune deficiency syndrome, Parkinson's disease, multiple sclerosis, damage to the nervous tissue of the spinal cord with

the circumstances, the trier authorized "Major as one of the Claimant's treating physicians, particularly for the purpose of certifying his entitlement to and his continued use of medical marijuana." Conclusion, ¶ E.

Noting that the claimant's use of medical marijuana has thus far been "judicious," Conclusion, ¶ H, the trial commissioner concluded:

> Based on the totality of the surrounding circumstances, including the fact that the Claimant's use of medical marijuana has been endorsed by his treating physicians; and considering this Claimant's age; his medical history; the fact that his prior treatment with narcotic medications and a spinal cord stimulator exposed him to harsh side effects and considerable anxiety; and considering that so far the use of medical marijuana has provided the Claimant with only positive results, which seem to have improved his health and his outlook on life, I find this Claimant's use of medical marijuana is reasonable and necessary, remedial medical treatment.

Conclusion, ¶ I.

The trial commissioner also found that the mental health therapy recommended by Southern was reasonable and necessary, but declined to authorize any additional treatment with McEvoy in light of that doctor's apparent lack of cooperation in providing contemporaneous medical reports with his bills.[2] The trier indicated that the parties needed to select a different mental health provider who would be more compliant in providing treatment records. The trier also ordered the respondents to pay for the cost of

---

objective neurological indication of intractable spasticity, epilepsy, cachexia, wasting syndrome, Crohn's disease, posttraumatic stress disorder, or (B) any medical condition, medical treatment or disease approved by the Department of Consumer Protection pursuant to regulations adopted under section 21a-408m."

[2] The trial commissioner also found that there was insufficient evidence to substantiate a bill purporting to be for services rendered at the office visit of August 1, 2013 with Robert McEvoy, Ph.D.

medical marijuana going forward as prescribed by the claimant's physicians and to reimburse the claimant for his out-of-pocket medical marijuana expenses.

The respondents filed a Motion to Correct, which was denied save for several corrections pertaining to the claimant's out-of-pocket costs, and a Motion to Submit Additional Evidence, which was also denied, and this appeal followed. On appeal, the respondents have raised a lengthy list of objections to the trier's findings. First, they contend that the trier erred in concluding that the claimant's use of medical marijuana was compensable because the claimant's medical condition does not meet the criteria for certification by the State. The respondents support this contention by pointing out that the claimant does not have an ongoing physician/patient relationship with the prescribing physician, i.e., Judith Major, MD, and post-laminectomy syndrome is not an approved "debilitating condition" for the use of medical marijuana. The respondents also contend that because the claimant's use of marijuana is palliative rather than curative, it does not constitute "reasonable or necessary" medical treatment as contemplated by the provisions of § 31-294d(a) C.G.S. [3] In addition, the respondents raise a number of general negative policy implications arising from the use of medical marijuana, such as the fact that (1) the improper use of medical marijuana could subject the claimant to criminal penalties; (2) the use of medical marijuana challenges an employer's right to a drug-free workplace; (3)

[3] Section 31-294d(a)(1) C.G.S. (Rev. to 2007) states: "The employer, as soon as the employer has knowledge of an injury, shall provide a competent physician or surgeon to attend the injured employee and, in addition, shall furnish any medical and surgical aid or hospital and nursing service, including medical rehabilitation services and prescription drugs, as the physician or surgeon deems reasonable or necessary. The employer, any insurer acting on behalf of the employer, or any other entity acting on behalf of the employer or insurer shall be responsible for paying the cost of such prescription drugs directly to the provider."

marijuana is still classified as a Schedule I substance and is illegal under federal law; (4) medical marijuana businesses cannot access banking services, which impacts insurers; and, (5) the use of medical marijuana is not approved by the FDA. Finally, the respondents claim as error the trier's refusal to grant all the proposed corrections in their Motion to Correct.[4]

The standard of deference we are obliged to apply to a trial commissioner's findings and legal conclusions is well-settled.

> … the role of this board on appeal is not to substitute its own findings for those of the trier of fact. Dengler v. Special Attention Health Services, Inc., 62 Conn. App. 440, 451 (2001). The trial commissioner's role as factfinder encompasses the authority to determine the credibility of the evidence, including the testimony of witnesses and the documents introduced into the record as exhibits. Burse v. American International Airways, Inc., 262 Conn. 31, 37 (2002); Tartaglino v. Dept. of Correction, 55 Conn. App. 190, 195 (1999), *cert. denied*, 251 Conn. 929 (1999). If there is evidence in the record to support the factual findings of the trial commissioner, the findings will be upheld on appeal. Duddy v. Filene's (May Department Stores Co.), 4484 CRB-7-02-1 (October 23, 2002); Phaiah v. Danielson Curtain (C.C. Industries), 4409 CRB-2-01-6 (June 7, 2002). This board may disturb only those findings that are found without evidence, and may also intervene where material facts that are admitted and undisputed have been omitted from the findings. Burse, supra; Duddy, supra. We will also overturn a trier's legal conclusions when they result from an incorrect application of the law to the subordinate facts, or where they are the product of an inference illegally or unreasonably drawn from the facts. Burse, supra; Pallotto v. Blakeslee Prestress, Inc., 3651 CRB-3-97-7 (July 17, 1998).

McMahon v. Emsar, Inc., 5049 CRB-4-06-1 (January 16, 2007).

[4] The Appellants have not appealed the trial commissioner's denial of their Motion to Submit Additional Evidence.

In commencing our analysis of this matter, we observe at the outset that the issue of whether a claimant's use of medical marijuana can constitute "reasonable or necessary" medical treatment pursuant to § 31-294d C.G.S. is one of first impression for this board. Our review of the enabling legislation for the medical marijuana program ([P.A. 12-55] §§ 21a-408 et. seq.) indicates that neither the Commissioner of the Department of Consumer Protection nor the members of the program's Board of Physicians have retained jurisdiction over claims arising from a patient's acceptance or exclusion into the medical marijuana program. See [P.A. 12-55, §§ 13, 14;] §§ 21a-408l/m C.G.S. (Rev. to 2013) We also note that while the legislation specifically excludes health insurance coverage for the palliative use of marijuana, the statute is silent with respect to workers' compensation insurance. See [P.A. 12-55 § 16] § 408o C.G.S. (Rev. to 2013) Thus, although neither of the parties in this appeal has challenged the subject matter jurisdiction of this Commission, we deem it worthy of mention that the enabling legislation does not appear to deprive this agency of the jurisdiction to hear the matter.

Turning to the merits of the appeal, we begin with the respondents' first claim that the trier erroneously concluded that the claimant's use of medical marijuana is compensable because the claimant's medical condition does not meet criteria for certification by the state. The respondents point out that "physicians who want to certify a patient must have a bona fide relationship with the patient in order to register them with the program," Appellants' Brief, p. 3, and a "bona fide relationship" is defined as "a relationship in which the physician has ***ongoing responsibility for the assessment, care,***

and treatment of a patient's debilitating medical condition or a symptom of the patient's debilitating medical condition." (Emphasis in the original.) Respondents' Exhibit 4, *quoting* information posted on the Department of Consumer Protection's web site relative to "Physician Requirements and Eligibility."

The respondents argue that the record does not support such an inference because the claimant testified that he will see Major only once a year, and "Major does not prescribe physical therapy, refer the claimant for diagnostic testing, or make determinations as to the claimant's work capacity." Id., 4. The respondents assert that the trier's designation of Major as "an authorized treating physician for the purpose of certifying the claimant's entitlement to and continued use of medical marijuana," Appellants' Brief, p. 4, fails to meet the Department of Consumer Protection's requirement that the physician/patient relationship be for "***actual*** debilitating condition." (Emphasis in the original). Id. We decline to read the Consumer Protection mandate so narrowly.

As discussed previously herein, the Department of Consumer Protection website states that physicians who wish to certify a patient for medical marijuana must, inter alia:

> have a bona fide relationship with the patient in order to register them with the program. A bona fide physician-patient relationship means a relationship in which the physician has ongoing responsibility for the assessment, care and treatment of a patient's debilitating medical condition or a symptom of the patient's debilitating medical condition whereby the physician has:
>
> * Completed a medically reasonable assessment of the patient's medical history and current medical condition;

* Diagnosed the patient as having a debilitating medical condition;

* Prescribed, or determined it is not in the best interest to prescribe, prescription drugs to address the symptoms or effects for which the certification is being issued;

* Concluded that, in the physician's medical opinion, the potential benefits of the palliative use of marijuana would likely outweigh the health risks to the patient; and

* Explained the potential risks and benefits of the palliative use of marijuana to the patient or, where the patient lacks legal capacity, to the parent, guardian or other person having legal custody of the patient.

In addition, the physician should be reasonably available to provide follow-up care and treatment for the patient, including any examinations necessary to determine the efficacy of marijuana for treating the patient's debilitating medical condition, or a symptom thereof. [5]

In the matter at bar, the record contains an office note dated January 13, 2015 signed by Major indicating that the claimant was seen in her office on June 11, 2014 and entered into the medical marijuana program on the basis of a diagnosis of "damage to nerve tissue of the spinal cord." Claimant's Exhibit E. In addition, the record contains a "Patient Medical Information" sheet indicating, inter alia, that the signing physician had diagnosed the claimant with "Damage to the Nervous Tissue of the Spinal Cord with Objective Neurological Indication of Intractable Spasticity" and answered "yes" to the question: "Is the patient under your care for the condition(s), or for a symptom of the condition(s), identified above?" The signing physician also answered "yes" to the question: "Do you have a bona fide physician-patient relationship with the above named

[5] See [P.A. 12-55, § 4] § 21a-408c C.G.S. (Rev. to 2013)

patient such that you are available to provide follow-up care for this patient?" Claimant's Exhibit D. We also note that the record contains a set of documents compiled by Major's office dated December 2, 2014 and entitled "Inventory for David Petrini" which includes the Danbury Hospital Operative Report dated April 30, 2009; the Wilton Surgery Center operative note of September 16, 2008; and a "Yearly Physical" report completed on June 11, 2014. Respondents' Exhibit 5.

Given the nature of the evidence submitted into the record on this issue, we concede that it is somewhat difficult to ascertain the exact parameters of the physician-patient relationship contemplated by either the claimant or Major. It should also be noted that the pertinent statutory provision does not appear to define "bona fide physician-patient relationship" with much specificity.[6] Nevertheless, the exhibits submitted into the record do suggest that the doctor clearly felt comfortable enough with the relationship to certify the claimant for the program. Moreover, in Southern's correspondence of October 2, 2014, the doctor stated that "there should be no question of the medical necessity in substituting medical marijuana for opiate medications." Claimant's Exhibit A. Given that the trier did not have the benefit of live testimony by Major, which might have addressed some of the concerns articulated by the respondents, it was within the trier's discretion to rely upon the evidentiary submissions in the record. We therefore find no basis for reversing the trial commissioner's conclusion that the claimant successfully established a bona fide relationship with Major such that the

[6] Section 21a-408c(c)(3) C.G.S. [P.A. 12-55, § 4] (Rev. to 2013) merely states that "[t]he written certification issued by the physician is based upon the physician's professional opinion after having completed a medically reasonable assessment of the qualifying patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship…."

claimant could be properly certified into the medical marijuana program in compliance with the Department of Consumer Protection's mandate.[7]

The respondents also contend that the trial commissioner erroneously concluded that the claimant's medical condition satisfied the requirements for entry into the medical marijuana program because he suffered from post-laminectomy syndrome, which is not an approved "debilitating condition" for the use of medical marijuana. The respondents argue that the reports relied upon by Major do not support her diagnosis of the claimant as suffering from "Damage to the Nervous Tissue of the Spinal Cord with Objective Neurological Indication of Intractable Spasticity." Claimant's Exhibit D. Thus, given that the medical reports relied upon by Major indicate that the claimant suffered from post-laminectomy syndrome, which "is not an approved condition for the use of medical marijuana, the claimant was incorrectly and improperly certified by Dr. Major." Appellants' Brief, p. 6.

We concede that the instant record does contain correspondence to the Medical Marijuana Program Board of Physicians at the Department of Consumer Protection in which a legislative analyst for the Marijuana Policy Project (based in Washington, D.C.) stated:

> Medical marijuana's use as a pain reliever and anti-inflammatory agent would be a significant and direct help for those suffering from severe psoriasis, and psoriatic arthritis, sickle cell disease, and post laminectomy syndrome…. We strongly urge the Board of

[7] We note that in Southern's correspondence of October 2, 2014, the doctor indicated that his office had also cleared the claimant for the use of medical marijuana. Claimant's Exhibit A. It is anticipated that Southern's involvement will alleviate any lingering concerns the respondents may have concerning the claimant's certification into the medical marijuana program on the basis of a bona fide physician-patient relationship.

> Physicians to recommend that the Department of Consumer Protection add these medical conditions to this list of qualifying medical conditions recognized by the State.

Respondents' Exhibit 6.

However, we also note that the current version of the "Qualification Requirements" page on the Consumer Protection website indicates that "Post Laminectomy Syndrome with Chronic Radiculopathy" has since been added to the list of qualified debilitating medical conditions. In addition, while the record does reflect that the claimant suffers from post-laminectomy syndrome, it also indicates that the claimant suffers from the following injuries:

* Severe L4-5 and L5 S-1 protrusions;
* Right L5/S1 radiculitis secondary to L4-L5 and L5-S-1 disk protrusions;
* Status post right L5-S-1 laminectomy (twice) with post laminectomy syndrome;
* Lumbar spondylosis L4-5;
* Facet arthropathy, lumbar spine;
* Nerve root stenosis;
* Acute cervicalgia;
* Low back pain;
* Bi-lateral leg pain;
* GI disturbance;
* Neck pain;
* Anxiety syndrome.

Appellee's Brief, p. 2.

At trial, the claimant testified regarding his current pain levels and the contrasts between the effects of the narcotics and medical marijuana on his pain management. The Consumer Protection website states that "the physician has ongoing responsibility for the assessment, care and treatment of a patient's debilitating medical condition *or a symptom of the patient's debilitating medical condition*." (Emphasis added.) As such, the trier

may have reasonably inferred that the pain management treatment contemplated by Major satisfied the program requirement because it was geared toward addressing a symptom of the claimant's medical condition. Moreover, the respondents have offered no medical evidence which would contradict Major's diagnosis. Thus, given the extensive evidence in the record regarding the claimant's injuries and seemingly intractable pain, we find that the medical reports relied upon by Major, combined with the claimant's narrative associated with his medical history and pain levels, provided a reasonable basis for the trier's inference that the claimant was properly certified into the medical marijuana program on the basis of Major's diagnosis that the claimant was suffering from "Damage to the Nervous Tissue of the Spinal Cord with Objective Neurological Indication of Intractable Spasticity." Claimant's Exhibit D.

The respondents also contend that the trial commissioner erroneously concluded that the claimant's use of medical marijuana is "reasonable or necessary" rather than merely palliative. The respondents assert that "[n]o evidence was presented that the use of marijuana would repair the damage caused by the claimant's work injury and, frankly, there is nothing to suggest the use of marijuana would, in fact, do so." Appellants' Brief, p. 7. The respondents also point out that "no probative evidence was presented that any alleged pain relieving effects from the marijuana would be sufficient enough to return the claimant to work." Id.

In Bowen v. Stanadyne, 2 Conn. Workers' Comp. Rev. Op. 60, 232 CRD-1-83 (June 19, 1984), we articulated the "reasonable or necessary standard" as follows:

> Reasonable or necessary medical care is that which is curative or remedial. *Curative or remedial care is that which seeks to repair the damage to health caused by the job even if not enough health is restored to enable the employee to return to work.* Any therapy designed to keep the employee at work or to return him to work is curative. Similarly, any therapy designed to eliminate pain so that the employee can work is curative. Finally, any therapy which is life prolonging is curative. (Emphasis added.)

Id., 64.

We concede that the evidentiary record before us does not support the inference that the claimant's current pain management regimen, regardless of the type of medication utilized, will supply sufficient pain relief such that the claimant will be able to return to work in the foreseeable future. We also recognize that historically, this board has generally been inclined to affirm findings reflecting that the medical treatment in question satisfied the "reasonable or necessary" standard because the treatment enabled a claimant to either maintain or return to employment. *See*, e.g., Zalutko v. Danbury Hospital, 4229 CRB-7-00-4 (May 23, 2001). However, we have on occasion also upheld findings indicating that the treatment in question satisfies the standard because it "seeks to repair the damage to health caused by the job…." Bowen, supra. *See also* Outlaw v. Pray Automotive of Greenwich, 3981 CRB-7-99-2 (March 23, 2000).

Ultimately, "[w]hether or not medical care satisfies the 'reasonable and necessary' standard of § 31-294d is a factual issue to be decided by the trial commissioner." Zalutko, supra, *citing* Cummings v. Twin Tool Mfg., 13 Conn. Workers' Comp. Rev. Op. 225, 228, 2008 CRB-1-94-4 (April 12, 1995), *appeal dismissed*, A.C. 14747 (June 29, 1995). In the matter at bar, both the claimant's testimony and the medical opinions contained in the record clearly attest to the necessity for an aggressive

pain management regimen in order to address the sequellae of the claimant's original low back injury. Under the facts in this matter, we find no basis for reversing the trial commissioner's conclusion that the claimant's participation in the medical marijuana program satisfies the standard for reasonable or necessary medical treatment as contemplated by § 31-294d(a) C.G.S. and Bowen, supra.[8]

The respondents have also put forward a number of public policy arguments militating against the use of medical marijuana, most of which are beyond the purview of this board to address. However, we note that with specific regard to the respondents' concerns regarding the potential criminal penalties which attach to the improper use of medical marijuana, we would point out that there are also significant criminal penalties associated with the misuse of prescription opioids. Similarly, relative to the respondents' concerns about an employer's "right to a drug free work place," Appellants' Brief, p. 10, and the observation that "[m]arijuana can impair mental and physical abilities and affect employee safety," id., there is little question that similar charges may easily be leveled against the use of prescription narcotics in the workplace or while operating a motor vehicle.[9]

---

[8] We acknowledge the accuracy of the appellants' observation that the Workers' Compensation Commission has not yet formulated protocols for the use of medical marijuana. However, given that the Connecticut Workers' Compensation Act was enacted in 1913, and the first medical protocols were not introduced until January 1, 1996, we decline to hold that the lack of protocols for medical marijuana automatically dictates that the treatment cannot be deemed reasonable or necessary.

[9] The appellants contend that because the monthly cost of the claimant's recommended marijuana dosage is more than three times the cost of his prescription medications, the use of medical marijuana is therefore neither reasonable nor necessary. While it might theoretically be possible for this board to sustain a finding that the cost of a proposed treatment in and of itself precludes the treatment from satisfying the "reasonable or necessary" standard, the appellants have provided us with no legal authority for determining why that might be the case in this matter.

The respondents also point out the use of medical marijuana has not been approved by the federal Food and Drug Administration. "Without the study of marijuana in clinical trials, the FDA cannot determine whether a drug product is safe and effective…. Moreover, there is no guarantee the marijuana meets appropriate quality standards as you would find with traditional prescriptive medications." Id., 13. We concede that the FDA has not approved medical marijuana. This board previously addressed the role of FDA certification in Vannoy-Joseph v. State/DMHAS, 5164 CRB-8-06-11 (January 29, 2008), wherein we observed that "[t]he FDA's mission is to promote public health by reviewing clinical research on the marketing of regulated products in order to ensure their safety and, in the case of drugs and medical devices, their effectiveness." Id., *citing* 21 U.S.C. § 393(b). An "off label" use for a medical device is "an accepted and necessary corollary of the FDA's mission to regulate in this area without directly interfering with the practice of medicine." Buckman Co. v. Plaintiff's Legal Committee, 531 U.S. 341, 350 (2001). In addition:

> A physician may prescribe a legal drug to serve any purpose that he or she deems appropriate, regardless of whether the drug has been approved for that use by the FDA…. Although the parties have differing views about the health risks and benefits of off-label uses, it is undisputed that the prescription of drugs for unapproved uses is commonplace in modern medical practice and ubiquitous in certain specialties. (Internal citation omitted.)

Washington Legal Found. v. Henney, 202 F.3d 331, 333 (D.C. Cir. 2000).

In light of the latitude afforded to physicians in utilizing FDA-approved medical devices and/or drugs for an off-label use, we concluded that "the absence of FDA approval for a physician's proposed 'off-label' use of a legally marketed device should

not be treated as a proxy for a factual determination that the 'off-label' use would be unreasonable…." Vannoy-Joseph, supra. We hold that this board's reasoning in Vannoy-Joseph is equally applicable to our considerations in the instant matter regarding the lack of FDA approval for medical marijuana.

> Evaluating the appropriateness of a proposed medical treatment is a delicate task. While respecting the complex diagnostic and outcome-predictive skill that is central to a physician's expertise, a workers' compensation commissioner must assess the credibility of the evidence supporting the various treatment options and decide which is the most reasonable under all of the circumstances.

Vannoy-Joseph, supra. *See also* Tartaglino v. State/Dept. of Correction, 3519 CRB-5-97-1 (June 15, 1998), *aff'd*, 55 Conn. App. 190 (1999), *cert. denied*, 251 Conn. 929 (1999).

Thus, in light of the testimonial and medical evidence presented in the proceedings below, we find no basis for concluding that the current lack of FDA approval for medical marijuana compelled the trial commissioner to find that the claimant's use of medical marijuana failed to satisfy the "necessary or reasonable" standard.

Finally, the respondents claim as error the trial commissioner's refusal to grant all of the corrections proposed in their Motion to Correct. Our review of the denied corrections indicates that the respondents were merely reiterating the arguments made at trial which ultimately proved unavailing. As such, we find no error in the trier's decision to deny those corrections. D'Amico v. Dept. of Correction, 73 Conn. App. 718, 728 (2002), *cert. denied*, 262 Conn. 933 (2003).

There is no error; the July 2, 2015 Findings and Orders of Randy L. Cohen, Commissioner acting for the Seventh District, is accordingly affirmed.

Commissioners Ernie R. Walker and Stephen M. Morelli concur in this opinion.