STATE OF MAINE
WORKERS' COMPENSATION BOARD

APPELLATE DIVISION
Case No. App. Div. 15-0022
Decision No. 16-26

GAETAN H. BOURGOIN
(Appellee)

v.

TWIN RIVERS PAPER CO., LLC,
(Appellant)

and

SEDGWICK CMS,

Oral Argument: December 9, 2015
Decided: August 23, 2016

PANEL MEMBERS: Administrative Law Judges Jerome, Elwin, and Stovall
By: Administrative Law Judge Jerome

[¶1] Twin Rivers Paper Co. appeals from a decision of a Workers' Compensation Board administrative law judge (*Pelletier, ALJ*) granting Gaeton H. Bourgoin's Petition for Payment of Medical and Related Services regarding a March 3, 1989, work injury. The ALJ, rejecting the medical findings of an independent medical examiner (IME) appointed pursuant to 39-A M.R.S.A. § 312 (Supp. 2015), concluded that in this case, the use of medical marijuana constituted reasonable and proper medical treatment under 39-A M.R.S.A. § 206 (Supp. 2015),[1] and ordered Twin Rivers to reimburse Mr. Bourgoin for costs associated with its use.

[1] Title 39-A M.R.S.A. § 206 provides that "[a]n employee sustaining a personal injury arising out of and in the course of employment or disabled by occupational disease is entitled to reasonable and proper medical, surgical and hospital services, nursing, medicines, and mechanical, surgical aids, as needed, paid for by the employer."

[¶2] Twin Rivers contends the ALJ erred because (1) the use of marijuana contravenes the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq*; (2) the order violates the restriction barring private health insurers from paying for medical marijuana set forth in the Maine Medical Use of Marijuana Act (MMUMA), 22 M.R.S.A. § 2426(2)(A) (Supp. 2015); and (3) there is insufficient clear and convincing evidence to contradict the IME's medical findings. We affirm the ALJ's decision.

I. BACKGROUND

[¶3] Gaeton Bourgoin began working at Twin Rivers' paper mill (formerly owned by Fraser Paper) in Madawaska in 1980. On March 3, 1989, he suffered a work-related back injury. He went out of work in 1989 or early 1990, and has received total incapacity benefits from that time forward. Since 1993, Mr. Bourgoin has suffered from severe chronic pain syndrome. He experiences pain and muscle spasms in his back, legs, arms, and chest. He was diagnosed in the early 1990s with reflex sympathetic dystrophy (RSD), which causes him burning pain, mostly in his legs. He also suffers from psychological sequela of his back injury and related RSD.

[¶4] Through the years, Mr. Bourgoin has tried many different treatments for his pain. He has traveled to the New England Medical Center in Boston, the Yale New Haven Pain Clinic in Connecticut, the Mayo Clinic in Minnesota, and to

a neurologist in Florida. He is not a suitable candidate for surgery. He has been to pain management specialists and has tried numerous medications, including narcotics. He developed dependence on narcotic medications in the early 1990s.

[¶5] For the last several years, Mr. Bourgoin has been treated for pain management by Dr. Sirdorczuk, a local general practitioner. Dr. Sirdorczuk, in consultation with Dr. Herland, a Bangor pain management specialist, prescribed a series of combinations of narcotic pain medications, none of which worked for Mr. Bourgoin, and caused side effects that included abdominal pain, nausea, and problems with sleep and urination. Dr. Sirdorczuk then prescribed non-narcotic medications, including suboxone, which were less effective for his pain and also caused side effects. Mr. Bourgoin was subsequently admitted to a psychiatric facility for chronic pain with insomnia and suicidal ideation.

[¶6] After Mr. Bourgoin's hospitalization, Dr. Sirdorczuk, in consultation with Mr. Bourgoin's psychiatrist, recommended a trial of medical marijuana consistent with the MMUMA.[2] In January of 2012, Mr. Bourgoin obtained a medical marijuana program physician certification from Dr. Joseph Starkman, who works in the practice known as Integr8 Health, LLC, with Dr. Dustin Sulak in Falmouth, Maine. Such a certification contains a statement that in the physician's medical opinion, the medical marijuana will be used to treat "a patient's

[2] The Legislature enacted MMUMA to permit, conditionally, the use, possession, cultivation, and furnishing of marijuana for medicinal purposes, specifically for the purpose of treating a patient's debilitating medical condition, including chronic pain. 22 M.R.S.A. §§ 2423-A, 2423-B.

debilitating medical condition." 22 M.R.S.A. § 2423-B.

[¶7] Mr. Bourgoin has been using medical marijuana for his pain since that time. He testified that his quality of life has improved, that he experiences significantly less pain, and he sleeps better. He no longer takes opioid pain medications or other narcotic drugs.

[¶8] Mr. Bourgoin filed his Petition for Payment of Medical and Related Services, seeking reimbursement for costs associated with his use of medical marijuana. Twin Rivers argued that (1) treatment with medical marijuana cannot be considered reasonable and proper under section 206 because marijuana use is punishable by federal law; and (2) the board cannot require it to pay for medical marijuana pursuant to section 2426(2)(A) of MMUMA. Mr. Bourgoin underwent an independent medical examination with Dr. Renato Medrano. 39-A M.R.S.A. § 312. Dr. Medrano opined that medical marijuana is not a reasonable and proper medical treatment under section 206 of the Workers' Compensation Act.

[¶9] The ALJ considered and rejected Twin Rivers' arguments, found clear and convincing evidence in the record to contradict the IME's medical findings, and granted Mr. Bourgoin's petition. Twin Rivers filed a Motion for Additional Findings of Fact and Conclusions of Law, which the ALJ denied. Twin Rivers then filed this appeal.

II. DISCUSSION

I. Does Reimbursement for Medical Marijuana Violate the Federal Controlled Substances Act or Maine Medical Use of Marijuana Act?

[¶10] Twin Rivers contends that the ALJ's decision is inconsistent with (1) the federal Controlled Substances Act, 21 U.S.C. § 801 *et seq*, which classifies marijuana as a Schedule I drug and makes the manufacturing, possession, distribution, and dispensing of marijuana a federal crime; and (2) section 2426(2)(A) of the MMUMA, which authorizes the use, possession, cultivation, and furnishing of marijuana for medicinal purposes, but protects public insurance programs and private health insurers from being required to pay for medical marijuana. For the reasons set forth in *Noll v. Lepage Bakeries*, Me. W.C.B. No. 16-25 (App. Div. en banc 2016), we reject Twin Rivers' arguments on these issues and affirm the ALJ's decision.[3]

[3] Twin Rivers also asserts that ordering reimbursement for medical marijuana is not reasonable and proper because, due to the nature of medical marijuana dispensaries, receipts are not required to appear on the same billing forms as other treatments compensable under the Act. Thus, it contends, there can be no control or oversight over the billing, and the system lacks accountability and is ripe for fraud.

The ALJ ordered that Twin Rivers reimburse Mr. Bourgoin "for his out of pocket expenses to obtain medical marijuana as shown by proper receipts for purchases from a dispensary duly licensed by the State of Maine." There have been no allegations of fraudulent billing practices in this case and we decline to speculate regarding that possibility. Moreover, board rules clearly require employers to reimburse employees for medications upon receipt. *See* W.C.B. Rule, Ch. 5, § 1.10(3). The ALJ's order is consistent with this rule.

II. Does the Record Contain Clear and Convincing Evidence to Support the ALJ's Determination that Medical Marijuana is Reasonable and Proper Medical Treatment?

[¶11] Twin Rivers next contends that the ALJ's decision rejecting the IME's medical findings is not supported by clear and convincing evidence. We disagree.

[¶12] In the course of this litigation, Mr. Bourgoin underwent an independent medical examination performed by Dr. Medrano. Dr. Medrano opined that treatment with marijuana is not reasonable and proper because marijuana is a Schedule I drug with no currently accepted medical use and a high potential for abuse. He also opined that there is no medical consensus regarding marijuana use, and there is inadequate scientific and medical research supporting the use of marijuana for medical purposes. He recommended continued use of strong narcotic medications for Mr. Bourgoin.

[¶13] An administrative law judge is required to adopt the medical findings of an IME absent clear and convincing evidence to the contrary in the record.[4] 39-A M.R.S.A. § 312(7). "For purposes of section 312, this means that we determine whether the [ALJ] could have been reasonably persuaded by the

[4] Title 39-A M.R.S.A. §312(7) provides:

> The board shall adopt the medical findings of the independent medical examiner unless there is clear and convincing evidence to the contrary in the record that does not support the medical findings. Contrary evidence does not include medical evidence not considered by the independent medical examiner. The board shall state in writing the reasons for not accepting the findings of the independent medical examiner.

contrary medical evidence that it was highly probable that the record did not support the IME's medical findings." *Dubois v. Madison Paper Co*., 2002 ME 1, ¶ 14, 795 A.2d 696.

[¶14] The ALJ rejected Dr. Medrano's opinion based on evidence that included medical records showing that Dr. Medrano's suggestion that "strong narcotic medications" be utilized to treat Mr. Bourgoin's pain had already been tried and had failed "miserably." The ALJ also relied upon evidence establishing that Mr. Bourgoin had been found to be dependent on or addicted to narcotics as far back as the early 1990's, and that previous efforts to stop the opioids had resulted in side effects followed by psychiatric hospitalization with suicidal ideation. Further, he cited to evidence that treatment with other non-narcotic pain medications, such as suboxone, had either caused side effects which were problematic, or were inadequate to control his pain.

[¶15] In addition, the ALJ relied on Dr. Sulak's testimony that opioid medications, while useful for acute or post-surgical pain, are not nearly as useful in treating chronic pain because of issues of tolerance, sensitization, and the need for dose escalation, as well as the potentially lethal side effects of large doses of narcotics. The ALJ also cited Dr. Sulak's testimony regarding the analgesic effects of marijuana, and medical records supporting Mr. Bourgoin's testimony that he had experienced significant benefit from using medical marijuana while treatment

with opioids had been a failure.[5]

[¶16] The evidence explicitly relied on by the ALJ shows that after a long history of unsuccessful treatment for pain with conventional pain control methods, medical marijuana has provided Mr. Bourgoin with some relief. Based on that evidence, the ALJ could have been reasonably persuaded that it was highly probable that the record did not support Dr. Medrano's medical findings on the issue of whether the use of medical marijuana is reasonable, proper, and necessary medical treatment for Mr. Bourgoin under 39-A M.R.S.A. § 206.[6]

III. CONCLUSION

[¶17] We conclude that the ALJ's decision, ordering Twin Rivers to reimburse Mr. Bourgoin for the costs associated with medical marijuana use, does not contravene any identified provision of the Federal Controlled Substances Act

[5] Twin Rivers asserts that the ALJ improperly relied on Dr. Sulak's testimony as part of the clear and convincing evidentiary case against the IME's medical findings, because "[c]ontrary evidence [may] not include medical evidence not considered by the independent medical examiner." 39-A M.R.S.A. § 312(7). Dr. Sulak's deposition was taken after the IME issued his report pursuant to section 312. However, Dr. Medrano was given a copy of Dr. Sulak's deposition transcript and reviewed that transcript before his own deposition; he was questioned about Dr. Sulak's medical opinion; and he articulated his points of disagreement with Dr. Sulak. Therefore, Dr. Sulak's testimony was considered by the IME, and the ALJ did not err when citing Dr. Sulak's testimony as part of the evidence required to meet the clear and convincing standard.

[6] Research has disclosed only three appellate decisions, all from New Mexico, in which the courts ruled that legislatively-authorized medical marijuana use could be considered "reasonable and necessary" medical care under that state's Workers' Compensation Act. *Lewis v. American General Media,* 355 P.3d 850 (N.M. App. 2015); *Mayez v. Riley Industrial,* 347 P.3d 732 (N.M App. 2015); *Vialpando v. Ben's Automotive Servs*., 331 P.3d 975 (N.M. App. 2014). Professor Larson suggests that these courts may have been disinclined to discontinue treatment that was providing some relief to the injured workers, who suffered from chronic pain and had been unsuccessfully treated with narcotic medications. 8 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 94.06 (Matthew Bender, Rev. Ed. 2016).

or section 2426(2) of the Maine Medical Use of Marijuana Act. We further conclude that the ALJ did not err in rejecting the IME's findings and concluding that the use of medical marijuana was reasonable, proper, and necessary medical treatment in this case.

The entry is:

The administrative law judge's decision is affirmed.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within twenty days of receipt of this decision and by filing a petition seeking appellate review within twenty days thereafter. 39-A M.R.S.A. § 322 (Supp. 2015).

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