GARY A. NOLL
(Appellee)

v.

LEPAGE BAKERIES, INC.
(Appellant)

and

CANNON COCHRAN MANAGEMENT SERVICES, INC.

Argued: June 10, 2016
Decided: August 23, 2016

EN BANC PANEL MEMBERS: Administrative Law Judges Stovall, Collier, Elwin, Goodnough, Jerome, Knopf, and Pelletier

BY: Administrative Law Judge Jerome

[¶1] At issue in this case is whether an employer who is self-insured for purposes of workers' compensation may be ordered to reimburse an injured worker for costs associated with the reasonable and proper use of medicinal marijuana authorized by the Maine Medical Use of Marijuana Act. 22 M.R.S.A §§ 2421-2430-B (Supp. 2015) (MMUMA).

[¶2] Lepage Bakeries, Inc., appeals from a decision of a Workers' Compensation Board administrative law judge (*Hirtle, ALJ*) granting Gary A. Noll's Petition for Payment of Medical and Related Services regarding a February 9, 2012, work injury. The ALJ ordered Lepage to reimburse Mr. Noll the cost of obtaining a medical marijuana certificate, medical marijuana, and

a vaporizer to administer medical marijuana. Lepage contends that ordering it to reimburse Mr. Noll for medical marijuana and related expenses contravenes (1) federal law and puts it at risk of prosecution because the purchase, sale, and possession of marijuana, even for medical purposes, remains illegal under the Controlled Substances Act, 21 U.S.C.A. §§ 801-904; and (2) section 2426(2) of the MMUMA, which provides that a "private health insurer" cannot be required to reimburse a person for the costs associated with the medical use of marijuana. We affirm the ALJ's decision.

I. BACKGROUND

[¶3] This case was decided on stipulated facts, which are reproduced here in full:

> 1. The employee sustained a low back injury on February 9, 2012 while making a delivery for Lepage Bakeries, Inc.
>
> 2. The employer paid the employee's lost time and medical benefits on a voluntary basis through January 1, 2015, when it filed a Notice of Controversy.
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> 3. The January 2015 Notice of Controversy was filed to contest a specific medical treatment the employee requested reimbursement for: expenses associated with his use of medical marijuana.
>
> 4. The grounds for the employer's denial of the requested reimbursement are that medical marijuana is classified as a Schedule I drug under the Controlled Substances Act and is illegal under U.S. federal law.
>
> 5. The employee used prescription pain medications for his back pain, but had difficulty tolerating their side effects; whereupon

his treating physiatrist, Dr. Ross, recommended he obtain a medical marijuana assessment.

6. Kevin Kenerson, D.O. assessed the employee and found him qualified for use of medical marijuana and a vaporizer in late 2014.

7. The employer selected a doctor to examine the employee in early 2015. The employer's Section 207 medical examiner, Dr. Peter Esponnette, stated in his report that the employee is "one of the exceptionally few people who have noncancerous pain, non-Aids related pain, etc. for whom medical marijuana is an excellent choice." He further stated he strongly advocates for the employee to use medical marijuana to treat his low back pain, especially as he has been able to discontinue his use of three other medications through his use of marijuana.

8. Based on the clear conflict between the current federal and state law as to the legality of the use of marijuana, the employer has refused to grant the employee's request for reimbursement of his medical marijuana expenses.

[¶4] Based on these facts, the ALJ initially determined that despite Lepage's arguments, the risk of prosecution under federal law for reimbursing the employee was not sufficiently realistic to warrant denial of Mr. Noll's Petition for Payment of Medical and Related Services. Moreover, Lepage failed to identify any provision of the Controlled Substances Act that would render the conduct at issue illegal.

[¶5] Nonetheless, the ALJ denied the petition on the ground that Mr. Noll did not meet his burden to establish that a self-insured employer like Lepage is not a "private health insurer" within the meaning of the MMUMA, 22 M.R.S.A. § 2426(2), and is therefore subject to Mr. Noll's requested relief.

[¶6] Upon Mr. Noll's Motion for Additional Findings of Fact and Conclusions of Law, however, the ALJ granted the petition, determining that Lepage was not a private health insurer under the MMUMA and therefore could be required to reimburse Mr. Noll. The ALJ reasoned that the Workers' Compensation Act defines the term "employer" to include the self-insured employer, but excludes self-insured employers from the definitions of "insurance company," citing 39-A M.R.S.A. § 102(12), (14) (Supp. 2015). Thus, a self-insured employer is excluded from the meaning of "private health *insurer*." (Emphasis added.)

[¶7] The ALJ further reasoned:

> [T]he Workers' Compensation Act defines an "insurance company" as "any casualty insurance company" that otherwise meets the requirements under Title 39-A M.R.S.A. § 102(14). The Maine Insurance Code defines health insurance and casualty insurance differently and names coverage under the Workers' Compensation Act as "casualty insurance" distinct from "health insurance." 24-A M.R.S.A. §§ 704, 707. The distinction in Title 24-A is consistent with Title 39-A and the Workers' Compensation Act's definition [of] "insurance company" as "any casualty insurance company[.]" 39-A M.R.S.A. § 102(14). The definition of workers' compensation insurance as "casualty" instead of "health" insurance in multiple relevant sources excludes the Employer in this case from the meaning of a "private health insurer" as used in 22 M.R.S.A. § 2426(2)(A).

(Footnotes omitted.)

[¶8] Finding no federal or Maine statutory bar to ordering reimbursement, the ALJ concluded that under the stipulated facts, medical marijuana constitutes

"reasonable and proper" medical care for Mr. Noll pursuant to 39-A M.R.S.A. § 206, and granted the petition. Lepage filed this timely appeal. The executive director determined that the issues presented on appeal warranted consideration by the Appellate Division en banc. *See* Me. W.C.B. Rule, ch. 13, § 2(3).

II. DISCUSSION

A. Standard of Review

[¶9] The role of the Appellate Division is "limited to assuring that the [ALJ's] factual findings are supported by competent evidence, that [the] decision involved no misconception of applicable law and that the application of the law to the facts was neither arbitrary nor without rational foundation." *Pomerleau v. United Parcel Serv.*, 464 A.2d 206, 209 (Me. 1983) (quotation marks omitted).

[¶10] "When construing provisions of the Workers' Compensation Act, our purpose is to give effect to the Legislature's intent." *Hanson v. S.D. Warren Co.*, 2010 ME 51, ¶ 12, 997 A.2d 730. "In so doing, we first look to the plain meaning of the statutory language, and construe that language to avoid absurd, illogical, or inconsistent results." *Id.* We also consider "the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Davis v. Scott Paper Co.*, 507 A.2d 581, 583 (Me. 1986); *see also Graves v. Brockway Smith Co.*, 2012 ME 128, ¶ 9, 55 A.3d 456.

B. Reimbursement for Medical Marijuana and Associated Costs

[¶11] "An 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." 39-A M.R.S.A. § 206 (Supp. 2015). The Legislature enacted MMUMA to permit, conditionally, the use, possession, cultivation, and furnishing of marijuana for medicinal purposes, specifically, for the purpose of treating or alleviating a patient's debilitating medical condition, including intractable pain. 22 M.R.S.A. §§ 2422(2), 2423-A, 2423-B. The ALJ concluded, and the parties do not dispute on appeal, that Mr. Noll's use of medical marijuana constitutes reasonable and proper medical treatment, and reimbursement is not expressly prohibited by any provision of the Workers' Compensation Act.[1]

1. Conflict with Federal Law

[¶12] Although Maine law allows for the medicinal use of marijuana, federal law does not. Under the Controlled Substances Act, 21 U.S.C.A. § 812(c),

[1] Although it was not an issue in controversy in this case, we note that three New Mexico Court of Appeals panels have held, in similar cases in which the employee had first unsuccessfully sought relief from significant pain through traditional treatment with opioids, 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. 8 ARTHUR LARSON, LEX K. LARSON & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 94.06 (Matthew Bender, Rev. Ed. 2016).

marijuana remains classified as a Schedule I drug; manufacturing, possession, distribution, and dispensing of marijuana remain a federal crime. 21 U.S.C.A. § 841(a)(1); *see also Savage v. Me. Pretrial Servs.*, 2013 ME 9, ¶ 17, 58 A.3d 1138 (stating that MMUMA authorizes conduct that would be otherwise illegal under federal law). Because the federal government's authority to prosecute drug offenses supersedes state law authorizing use or possession of marijuana, *see Gonzales v. Raich*, 545 U.S. 1, 32-33 (2005), Lepage contends that requiring reimbursement would make it complicit in the commission of a federal crime. Moreover, Lepage contends that the risk of prosecution under federal law presents a strong policy reason militating against reimbursement.

[¶13] Research has disclosed only one appellate-level decision regarding payment for medical marijuana under workers' compensation laws that addresses the potential conflict with federal law, *Vialpando v. Ben's Automotive Servs*., 331 P.3d 975 (N.M. App. 2014), *cert denied,* 331 P.3d 924, (N.M. 2014).[2] In *Vialpando*, the employer challenged a Workers' Compensation Judge's order requiring an employer to reimburse an injured employee for costs associated with the medicinal use of marijuana obtained pursuant to that state's Compassionate

[2] In Maine, Workers' Compensation Board Administrative Law Judges have approved the reimbursement of injured employees for costs associated with medical marijuana use in three additional cases. *Crandall Univ. of Me. System*, W.C.B. No. 08-00-3314 (July 15, 2015); *Doten v. Domtar Inds., Inc.*, W.C.B. No. 09-02-37-96 (July 8, 2015); *Bourgoin v. Twin Rivers Paper Co.*, W.C.B. No. 89-01-36-55 (March 16, 2015).

Use Act, N.M. Stat. Ann. §§ 26-2B-1 to 2B-7 (2007). *Id.* at 976. The employer contended that compelling reimbursement would require it to violate the federal Controlled Substances Act and the public policy reflected therein. *Id.* at 979. The New Mexico Court of Appeals affirmed the Workers' Compensation Judge's decision based on the employer's failure to identify any particular provision of the Controlled Substances Act that would be violated by reimbursement, and it declined to search for such a statute. *Id.* at 979-80. Further, the court found the expressions of public policy in federal law to be equivocal at best, noting that although marijuana remains illegal under the Controlled Substances Act, the Justice Department has indicated that interfering with state medical marijuana laws is not one of its enforcement priorities. *Id.* at 980. The court finally noted that New Mexico's public policy is clear and embodied in its Compassionate Care Act: "to allow the beneficial use of cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." *Id.*

[¶14] Citing *Vialpando*, the ALJ rejected Lepage's arguments, reasoning that "[t]he language of the Controlled Substances Act relied upon by [Lepage] makes no mention of the facts presented in this case and [Lepage] cites no persuasive authority for its argument that reimbursing a medical marijuana patient falls within the conduct prohibited by federal law." The ALJ also cited to a Justice Department Memorandum articulating a policy of noninterference with states'

rights regarding medical marijuana, further weakening Lepage's argument that reimbursement would place it at risk of prosecution for violating federal law. *See* Memorandum, James M. Cole, Deputy Attorney General, United States Dep't of Justice, *Guidance Regarding Marijuana Enforcement* (August 29, 2013).[3]

[¶15] We agree with the ALJ's reasoning. The decision involved no misconception of applicable law or misapplication of the law to the facts, and it was neither arbitrary nor without rational foundation. *Pomerleau*, 464 A.2d at 209. We find no basis in federal law or policy identified by the parties that would

[3] Additionally, Professor Larson has observed:

> The federal government has signaled that it will continue to look the other way when it comes to the distribution and use of medical marijuana. On December 16, 2014, President Obama signed the Consolidated and Further Continuing Appropriations Act, [2015 H.R. 83] completing the budget process for fiscal year 2015 for most federal departments. The Hinchey-Rohrabacher Amendment to the $1.1 trillion spending bill blocks the use of Department of Justice funds to "prevent [medical marijuana states] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." [*Id.*] The effect of the legislation is that while marijuana use is still a violation of federal law, as long as it is used pursuant to state law, no federal funds can be expended to stop it.

8 ARTHUR LARSON, LEX K. LARSON, & THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION LAW § 94.06 (Matthew Bender, Rev. Ed. 2016). Congress has continued that appropriations measure through September 30, 2016. Consolidated Appropriations Act, 2016, Pub. L. No. 112-113, § 542, 129 Stat. 2242, 2332-33 (2015). The Ninth Circuit Court of Appeals very recently held that section 542 prohibits the Department of Justice from spending funds for the prosecution of individuals who engaged in conduct permitted by their state medical marijuana laws and who fully complied with those laws. *United States v. McIntosh*, Nos. 15-10117, 15-10122, 15-10127, 15-1-132, 15-10137, 15-30098 (9th Cir. Aug. 16, 2016), 2016 U.S. App. LEXIS 15029.

We understand that this policy may change with a new administration. However, according to the National Conference of State Legislatures, as of July 20, 2016, a total of 24 states, the District of Columbia, Puerto Rico, and Guam have enacted legislation allowing for the medical use of marijuana. An additional seventeen states allow the use of low THC, high cannabidiol (CBD) products for medical reasons in limited situations or as a legal defense. National Conference of State Legislatures (NCSL), State Medical Marijuana Laws, July 20, 2016, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last visited August 16, 2016). We view this trend as militating against Lepage's public policy and threat of prosecution arguments.

preclude a self-insured employer from reimbursing an injured employee for costs associated with medical marijuana use pursuant to the MMUMA and the Workers' Compensation Act.

2. Private Health Insurer

[¶16] We next decide whether section 2426(2)(A) of the MMUMA restricts the board from requiring Lepage to reimburse Mr. Noll for costs associated with medical use of marijuana. Title 22 M.R.S.A. § 2426(2)(A), provides:

> This chapter may not be construed to require:
>
> A. A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana[.]

[¶17] It is undisputed that Lepage is a self-insured employer for purposes of workers' compensation. Lepage contends that as such, it fits within the scope of the term "private health insurer" as that term is used in section 2426(2)(A). Lepage asserts that the ALJ's decision, resting on the Maine Insurance Code's distinction between casualty and health insurance (with workers' compensation being designated as casualty insurance) and the Workers' Compensation Act's definition of "insurance company," which does not specifically include the self-insured employer, fails to consider the overall purpose and practical application of the Act. It contends that the self-insured employer's obligation under the Workers' Compensation Act is the same as that of a private health insurer: when an

employee obtains medical services as a result of a work-related injury, it is the self-insured employer's duty to promptly pay for those services either directly or by reimbursing the employee. 39-A M.R.S.A. § 206(7).

[¶18] In support of its arguments, Lepage cites to *Nichols v. S.D. Warren/Sappi*, 2007 ME 103, 928 A.2d 732 (overruled in part by statute on other grounds). In that case, the Law Court had to decide whether a lump sum disability payment received by the employee pursuant to a permanent and total disability feature in an employer-funded life insurance policy constituted a payment "under a disability insurance policy," and was thus subject to offset under 39-A M.R.S.A. § 221(3)(A)(2). *Id.* ¶ 1. The Court allowed the offset, determining that the "plain meaning of the term 'disability insurance policy' includes a payment pursuant to a disability feature in a policy that provides multiple coverages." *Id.* ¶ 15. The Court reasoned that "[t]he definitions of different types of insurance coverage are not mutually exclusive, and 'the inclusion of such coverage within one definition shall not exclude it as to any other kind of insurance within the definition of which such coverage is likewise reasonably includable.' 24-A M.R.S. § 701 (2006)." *Id.* ¶ 12.

[¶19] We find the case of *Deabay v. St. Regis Paper Co.*, 442 A.2d 963 (Me. 1981), to be more closely on point. In *Deabay*, the Law Court held that payments made by a health insurer could not be construed as payments made by

the employer or its workers' compensation insurer for purposes of tolling the statute of limitations because the health insurer was not synonymous with the employer or the workers' compensation insurer. *Id.* at 964. The Court reasoned that the term "insurer" in the statute of limitations clearly contemplated workers' compensation carriers; payments made by the health insurer were not made pursuant to requirements of the Workers' Compensation Act; and the health insurer's liability was entirely independent from whatever liability the employer incurred under the Act. *Id.*

[¶20] Accordingly, despite Lepage's arguments, we conclude that the plain meaning of "private health insurer" in 22 M.R.S.A. § 2426(2)(A) does not include an employer who is self-insured for purposes of workers' compensation. "Private health insurer" is not defined in the MMUMA, nor elsewhere in Maine statutory law. As the ALJ noted, and looking at the broader statutory scheme, the Worker's Compensation Act includes "self-insurer" within the definition of "employer," not within the definition of "insurance company," 39-A M.R.S.A. § 102(12), (14); and Workers' Compensation insurance is characterized by statute as casualty insurance, not health insurance, *compare* 24-A M.R.S.A. § 707 *with* 24-A M.R.S.A. § 704.

[¶21] Moreover, although both private health insurers and workers' compensation carriers are required to provide coverage for medical treatment, the

Workers' Compensation Act is also a substitute for, and shields employers from, civil liability. 39-A M.R.S.A. §§ 103, 401 (2001 & Supp. 2015). As part of the "Grand Bargain," under the Act, employees lose their right to sue but gain the right to compensation for lost wages and reasonable and necessary medical care. In contrast, private health insurance is a benefit governed by a variety of state and federal laws. Those laws allow insurers and employers (within certain parameters) the right to limit medical treatment by excluding coverage for certain types of care and to require copayments or coinsurance. *See, e.g.*, 24-A M.R.S.A. §§ 4301-4320 (2015 & 2015 Supp.). The Workers' Compensation Act subjects employers and carriers to an entirely different set of legal and regulatory obligations with respect to liability for medical treatment. *See Deabay*, 442 A.2d at 964.

[¶22] Finally, had the Legislature intended, it could have explicitly exempted workers' compensation insurance carriers and self-insured employers from the obligation to reimburse injured employees for costs associated with medical marijuana claims under the Workers' Compensation Act.[4] It did not.

III. CONCLUSION

[¶23] We conclude that (1) no identified provision of federal law would preclude requiring a self-insured employer to reimburse an injured employee for the costs associated with the reasonable and proper medicinal use of marijuana

[4] As the ALJ noted, the Arizona Legislature has explicitly exempted workers' compensation carriers from reimbursing costs associated with the medical use of marijuana. Ariz. Rev. Stat. Ann.§ 36-2814(A)(1) (2015).

pursuant to the MMUMA or the Workers' Compensation Act; and, (2) consistent with the statute's plain meaning, section 2426(2)(A) of the MMUMA does not bar the board from requiring a self-insured employer to reimburse an injured employee for those costs.

The entry is:

The ALJ'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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