THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2017-0469

Appeal of Andrew Panaggio

Rule 10 Appeal from the New Hampshire Compensation Appeals Board

BRIEF OF APPELLANT ANDREW PANAGGIO

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1. The claimant has a work-related spine injury. He is lawfully prescribed therapeutic cannabis to alleviate the chronic pain caused by this injury. The Compensation Appeals Board unanimously held this treatment to be reasonable and medically necessary. Was it error for the Board to refuse to order the workers' compensation insurance carrier to reimburse Mr. Panaggio for his incurred costs obtaining this reasonable, medically necessary treatment?

PRESERVED: *Claimant's Motion for Rehearing, CERTIFIED RECORD (C.R.) 10*.

2. The plain language of New Hampshire's therapeutic cannabis statute, RSA 126-X:3,III, provides "[n]othing in *this chapter* shall be construed to require" reimbursement for cannabis treatment, leaving undisturbed the carrier's statutory obligation to pay for related medical care under RSA 281-A:23. Did the Board err as a matter of law by interpreting RSA 126-X:3,III as voiding the carrier's affirmative obligation to pay for treatment under RSA 281-A:23?

PRESERVED: *Claimant's Motion for Rehearing, CERTIFIED RECORD (C.R.) 10*.

3. RSA 126-X:3,III(a) reads: "[n]othing in this chapter shall be construed to require any *health insurance provider* … to be liable for any claim for reimbursement for the therapeutic use of cannabis." The statute does not enumerate workers' compensation or casualty insurers. Did the Board err as matter of law by reading "health insurance provider" to include workers' compensation carriers?

PRESERVED: *Claimant's Motion for Rehearing, CERTIFIED RECORD (C.R.) 10*.

4. Lawful possession of therapeutic cannabis within New Hampshire borders nevertheless runs afoul of the Federal Controlled Substances Act. Was it error for the Board to base its holding, in part, on such concerns where neither the Board nor the carrier established any genuine threat of prosecution nor any provision of Federal law the carrier itself would violate by complying with an order to reimburse?

PRESERVED: *Claimant's Motion for Rehearing, CERTIFIED RECORD (C.R.) 10*.

GOVERNING STATUTES

RSA 281-A:23 Medical, Hospital, and Remedial Care.

I. An employer subject to this chapter, or the employer's insurance carrier, shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital services, remedial care, nursing, medicines, and mechanical and surgical aids for such period as the nature of the injury may require. The injured employee shall have the right to select his or her own physician.

[Paragraphs II -VIII elided as irrelevant to this appeal.]

Source. 1988, 194:2. 1990, 254:14. 1994, 268:1. 1995, 205:1. 1996, 51:1. 2003, 269:3. 2005, 85:7, eff. June 7, 2005. 2010, 84:1, eff. July 1, 2010. 2013, 95:1, 131:1, eff. Jan. 1, 2014.

RSA 126-X:3 Prohibitions and Limitations on the Therapeutic Use of Cannabis.

I. A qualifying patient may use cannabis on privately-owned real property only with written permission of the property owner or, in the case of leased property, with the permission of the tenant in possession of the property, except that a tenant shall not allow a qualifying patient to smoke cannabis on rented property if smoking on the property violates the lease or the lessor's rental policies that apply to all tenants at the property. However, a tenant may permit a qualifying patient to use cannabis on leased property by ingestion or inhalation through vaporization even if smoking is prohibited by the lease or rental policies. For purposes of this chapter, vaporization shall mean the inhalation of cannabis without the combustion of the cannabis.

II. Nothing in this chapter shall exempt any person from arrest or prosecution for:

(a) Being under the influence of cannabis while:

(1) Operating a motor vehicle, commercial vehicle, boat, vessel, or any other vehicle propelled or drawn by power other than muscular power; or

(2) In his or her place of employment, without the written permission of the employer; or

(3) Operating heavy machinery or handling a dangerous instrumentality.

(b) The use or possession of cannabis by a qualifying patient or designated caregiver for purposes other than for therapeutic use as permitted by this chapter;

(c) The smoking or vaporization of cannabis in any public place, including:

(1) A public bus or other public vehicle; or

(2) Any public park, public beach, or public field.

(d) The possession of cannabis in any of the following:

(1) The building and grounds of any preschool, elementary, or secondary school, which are located in an area designated as a drug free zone; or

(2) A place of employment, without the written permission of the employer; or

(3) Any correctional facility; or

(4) Any public recreation center or youth center; or

(5) Any law enforcement facility.

III. Nothing in this chapter shall be construed to require:

(a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis; or

(b) Any individual or entity in lawful possession of property to allow a guest, client, customer, or other visitor to use cannabis on or in that property; or

(c) Any accommodation of the therapeutic use of cannabis on the property or premises of any place of employment or on the property or premises of any residential care facility, nursing home, hospital or hospice house, jail, correctional facility, or other type of penal institution where prisoners reside or persons under arrest are detained. This chapter shall in no way limit an employer's ability to discipline an employee for ingesting cannabis in the workplace or for working while under the influence of cannabis.

IV. Any person who makes a fraudulent representation to a law enforcement official of any fact or circumstance relating to the therapeutic use of cannabis to avoid arrest or prosecution shall be guilty of a violation and may be fined $500, which shall be in addition to any other penalties that may apply for making a false statement to a law enforcement officer or for the use of cannabis other than use undertaken pursuant to this chapter.

V. A qualifying patient or designated caregiver who is found to be in possession of cannabis outside of his or her home and is not in possession of his or her registry identification card may be subject to a fine of up to $100.

VI. Any qualifying patient or designated caregiver who sells cannabis to another person who is not a qualifying patient or designated caregiver under this chapter shall be subject to the penalties specified in RSA 318-B:26, IX-a, shall have his or her registry identification card revoked, and shall be subject to other penalties as provided in RSA 318-B:26.

VII. The department may revoke the registry identification card of a qualifying patient or designated caregiver for violation of rules adopted by the department or for violation of any other provision of this chapter, and the qualifying patient or designated caregiver shall be subject to any other penalties established in law for the violation.

VIII. A facility caregiver shall treat cannabis in a manner similar to medications with respect to its storage, security, and administration when assisting qualifying patients with the therapeutic use of cannabis.

Source. 2013, 242:1, eff. July 23, 2013. 2016, 247:5, 6, eff. June 10, 2016.

STATEMENT OF THE FACTS AND THE CASE

Andrew Panaggio suffered a work-related spine injury in July of 1991 while in the course of his employment with W.R. Grace & Company. *CERTIFIED RECORD* (*C.R.*)[1] *14*. His claim was deemed compensable after a Labor Department hearing, *see C.R. 37*, and by 1992 treatment of his injury required a lumbar fusion at L4-5. The fusion ultimately did not hold. Mr. Panaggio needed refusion with pedicle screw instrumentation, bone grafts and rods in 1994, after which he suffered permanent low back and mechanical right leg pain increasing with activity. *C.R. 32*.

Mr. Panaggio settled his workers' compensation claim in 1997. *Appendix* (*App.*)[2] *41*. Like all such settlements under New Hampshire law, the workers' compensation insurer remained forever liable under RSA 281-A:23 to pay for all related medical treatment, whether curative or palliative. *App. 45*.

Mr. Panaggio has remained permanently disabled from gainful employment as a consequence of his work injury. It was understood as early as 1995 that "it would be highly improbable that Mr. Panaggio would benefit from a vocational rehabilitation plan with the goal of returning him to competitive employment." *App. 43*. He remains on Social Security Disability Insurance benefits, and until recently, has struggled with various pain management regimens to address the chronic pain caused by his permanent post-surgical condition. He had been prescribed opiates

[1] The Certified Record transmitted by the Compensation Appeals Board to this Court includes the appealed-from decision and pleadings of the parties. Because the entire Certified Record is comprised of only 40 pages and the Board only physically transfers a single copy to the Court, the Certified Record is reproduced in its entirety and appended to this brief for the Court's convenience.

[2] The Board did not transmit in the Certified Record a copy of the medical records and other documentary evidence submitted at the May 12, 2017 hearing. These records are not strictly necessary to dispose of this appeal, because there is no challenge to the Board's unanimous decision that Mr. Panaggio's use of therapeutic cannabis is reasonable, medically necessary and related to his work injury. However, because select medical records and other evidence are referenced here as background, they are appended following the Certified Record. They are numbered sequentially to the Certified Record for ease of reference.

for the pain in the past, but in addition to the now well-known hazards of such medication, Mr. Panaggio presented particular challenges to the safe use of long-term opiates. He is separately diagnosed with diverticulitis, and regular opiate use is known to wreak havoc with even healthy individuals' gastrointestinal tracts. *See C.R. 14-15*.

By September 2015, he consulted with his primary care provider, Laurie Jorgensen, APRN ("Jorgensen"), to review his diagnoses of abdominal and back pain. The abdominal pain was associated with his history of unrelated diverticulitis, but the work-related back pain had begun worsening, radiating into both of his upper legs. He found himself unable to exercise due to his symptoms and accordingly had begun gaining weight, further increasing the stress on his back. *App. 46*.

In the meanwhile, New Hampshire had passed its comprehensive therapeutic cannabis statute, RSA 126-X. The first "alternative treatment center" authorized by the statute completed its years-long regulatory compliance under RSA 126-X:7 and opened its doors to the public in April 2016. *App. 64*.

By May 2016, Mr. Panaggio asked his primary care provider about the possibility of obtaining a therapeutic cannabis card to address his chronic pain. *App. 51*. As his diagnosis of back pain with radiculopathy was unchanged, Jorgenson "advised patient to go onto the medical marijuana website and complete application then give to me and I will complete my part." *App. 53*.

He did so, and on June 7, 2016, he scheduled an office visit specifically to discuss therapeutic cannabis. *App. 54*. The medical note from that visit describes the meeting in relevant part:

> History: Disabled since a work-related back injury on 7/9/91.
> Diagnosed with bilateral spondylosis L4 and L4-5 disc herniation.
> [status post] back surgery x2 with Jurgen Piper, M.D. February 1992

> lumbar fusion L4-L5 and 7/27/94 refusion transverse process L4-5 with pedicle screw fixation and augologous iliac bone graft, bilateral decompression of L4-L5 nerve roots, harvesting iliac bone graft from left iliac crest.
>
> Always has pain across his lower back, sometimes has radiation into right or left leg but is associated with tingling and numbness, has his good days and bad days depending on his activity but his pain is never completely gone, pain is worse with walking, twisting, lifting, forward bending and kneeling, improved with lying down and resting, using ice or heating pad.
>
> When he does household chores or works in his garden then is unable to do anything for 2-3 days. Has taken Percocet and Vicodin in the past and wants to keep away from narcotics, also takes muscle relaxants, ibuprofen or aleve as needed. Smoking marijuana also helps and Andrew is here to discuss the use of medical cannabis for his pain management.
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> *App. 54-55*.

Jorgensen then filled out the State of New Hampshire's written certification for the therapeutic use of cannabis, where she checked off "spinal cord injury or disease" as Mr. Panaggio's qualifying condition, and that he suffered from "moderate to severe pain on a daily basis" since his injury in 1991. *App. 56-57, 59*. She further certified in accordance with He-C 401.06(b)(2) that she completed a full assessment of Mr. Panaggio's medical history and current medical condition made in the course of the patient/provider relationship that she had sustained with him since 2005. *App. 60*.

She signed the certifying provider document, affirming her status as an Advanced Practiced Registered Nurse licensed in New Hampshire to prescribe drugs to humans under RSA 326-B:18, and who possesses an active registration from the

U.S. Drug Enforcement Administration to prescribe controlled substances. This was signed on June 7, 2016. *App. 60*.

The paperwork was duly submitted to the New Hampshire Department of Health and Human Services, which approved Mr. Panaggio's application to register as a qualifying patient in the Therapeutic Cannabis Program via notice dated July 21, 2016. *App. 61*. The State assigned Mr. Panaggio a Patient ID number and issued a N.H. Cannabis registry identification card valid through July 31, 2017. *App. 62-63*.

Attached to the State's notice of approval was notice of the opening of Alternative Treatments Centers at which therapeutic cannabis could be lawfully purchased within the state. *App. 64*. On the State's Department of Health and Human Service's letterhead, Mr. Panaggio was informed:

> The Therapeutic Cannabis Program (Program) is pleased to notify you that the first of New Hampshire's Alternative Treatment Centers (ATC) is nearly ready to open for dispensing cannabis to qualifying patients and their designated caregivers. [RSA 126-X] creates an exemption from criminal penalties for the therapeutic use of cannabis provided its use remains in compliance with RSA 126-X. State law does not exempt a person from federal criminal penalties for the possession of cannabis.
>
> The current federal administration has declared its intention not to pursue or target patients and their caregivers who possess or use small amounts of cannabis for therapeutic use that is part of and compliant with a well-regulated state therapeutic cannabis program. However, federal law does not allow for the medical or therapeutic use of cannabis and the federal government can enforce federal cannabis laws anywhere in the United States including in states that allow the therapeutic use of cannabis. Federal criminal penalties for the possession of cannabis in any amount range from misdemeanors to felonies and may include incarceration and fines.
>
> To decrease the risk of any federal law enforcement action, patients and caregivers should know and abide by New Hampshire law with regard to the possession and use of therapeutic cannabis at all times.

App. 65.

Mr. Panaggio then purchased 14 grams of therapeutic cannabis at Sanctuary ATC in Plymouth, New Hampshire on July 27, 2016 for $170. The bill for same, along with the documentation qualifying Mr. Panaggio as a patient in New Hampshire's Therapeutic Cannabis Program, was forwarded to the workers' compensation insurance carrier in this matter by letter dated August 4, 2016 along with a request for reimbursement. *App. 66*.

The insurer denied the claim on the grounds that "medical marijuana is not reasonable/necessary or causally related to your injury 7/9/91." *App. 67*.

Mr. Panaggio unsuccessfully challenged the denial at the Department of Labor, *C.R. 31*, then took a de novo appeal of that decision to the Compensation Appeals Board. *C.R. 30*.

The Board unanimously held that Mr. Panaggio's use of therapeutic cannabis is reasonable, medically necessary, and causally related to his work injury. *C.R. 18-19*. The insurer has not challenged that finding on appeal.

Instead, a 2-1 majority of the Board declined to order reimbursement due to concerns about the Controlled Substances Act, and the majority's interpretation of RSA 126-X [the Therapeutic Cannabis Act] as overriding the carrier's obligation to reimburse created by RSA 281-A:23 [the Workers' Compensation Act]. *C.R. 16-17*.

In a move highly unusual for the Compensation Appeals Board, there was a written dissent from the majority's decision to deny the claimant's request for reimbursement. *C.R. 19-20*. A timely motion for rehearing was filed, *C.R. 10*, objected to, *C.R. 2*, and ultimately denied by order dated July 18, 2017. *C.R. 1*. This appeal timely followed.

SUMMARY OF ARGUMENT

This is a workers' compensation case. Mr. Panaggio was prescribed therapeutic cannabis to treat the pain caused by his work-related spine injury, and paid out of his own pocket for it. When the employer's insurance carrier refused to reimburse him, the Board unanimously held his treatment to be reasonable, medically necessary, and related to his work injury. This created a legal obligation under RSA 281-A:23 for the carrier to reimburse him. In any other circumstance, an order to reimburse would issue, and that would be the end of the matter.

But here, the Board looked outside the workers' compensation statute to deny Mr. Panaggio the medical treatment he is entitled to under RSA 281-A:23. The Board observed that Mr. Panaggio's therapeutic cannabis is scheduled as a prohibited substance by the Controlled Substances Act, but the insurer presented no evidence to demonstrate it faced any legitimate threat of prosecution by complying with an order to reimburse. Liability is too speculative to be of genuine concern, as the U.S. Department of Justice has expressly declined to prosecute state-regulated marijuana markets for nearly a decade.

The current U.S. Department of Justice has recently revisited the previous Administration's hands-off policy, but its discretion remains cabined by Congress. For four years now, and again as recently as February 9, 2018, Congress has explicitly refused to appropriate federal funds for any DOJ interference with state-approved medicinal use of marijuana. A federal circuit Court of Appeals has enjoined indictments on exactly this ground, and the current Attorney General concedes the DOJ remains bound by that decision.

A majority of the Board also erred in holding that New Hampshire's therapeutic cannabis statute (RSA 126-X) supersedes the legal obligations created by

the workers' compensation statute (RSA 281-A). There is no indication that the Legislature intended to carve an exception into an insurer's affirmative, preexisting obligation under RSA 281-A:23 to pay for an injured worker's medical treatment. The plain language of 126-X simply declines to create any new or independent right of reimbursement.

But even if RSA 126-X is construed to affirmatively limit reimbursement claims, the statute addresses health insurance providers only. Workers compensation carriers are casualty insurers, and are not an enumerated entity in RSA 126-X. Other states that affirmatively prohibit reimbursement for therapeutic cannabis in the workers' compensation context do so explicitly. New Hampshire has not. The injured worker's right to reasonable, medically related treatment should remain unabridged.

ARGUMENT

I. Standard of Review

This appeal presents questions of law ruled upon by the Compensation Appeals Board. This Court shows no deference to the Board on appellate review of such administrative decisions, and when interpreting the Workers' Compensation Law, this Court construes any ambiguities in the statute in favor of the injured worker:

> "Our standard of review is set forth by statute: [A]ll findings of the [Board] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. RSA 541:13 (2007). Thus, we review the factual findings of the CAB deferentially. Appeal of N.H. Dep't of Corrections, 162 N.H. 750, 753 (2011). We review its statutory interpretation *de novo.* Id.
>
> On questions of statutory interpretation, we are the final arbiters of the intent of the legislature as expressed in the words of a statute considered as a whole. Id. We first examine the language of the statute and ascribe the plain and ordinary meanings to the words used. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Appeal of Gamas, 158 N.H. 646, 648 (2009). We construe the Workers' Compensation Law liberally to give the broadest reasonable effect to its remedial purpose. Id. Thus, when construing it, we resolve all reasonable doubts in favor of the injured worker. Id."

Appeal of Phillips, 165 N.H. 226, 229-230 (2013).

II. New Hampshire's Workers' Compensation Law requires the Board to issue an order to reimburse Mr. Panaggio for medical expenses.

New Hampshire was among the first American states to adopt a valid Workers' Compensation Act. Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 201 (1921). The 1911 Act struck what is commonly described as a "grand bargain" between employers and employees, a radical departure from the common law tradition that established a no-fault system eliminating an employee's common law tort remedies for personal injuries sustained at work.

In exchange for the gift of blanket immunity bestowed on employers, and to compensate for the loss of an injured worker's right to a jury trial, the statutory workers' compensation benefits have from their inception been construed as "highly remedial, in that they offer to the employee as a substitute for the common–law action a certain and sure remedy applicable to all cases of injury not due to his willful misconduct. Nor are they burdensome to the employer, since his present liability is limited to a fractional part of the loss of earnings of the employee for a limited period and the ultimate burden is transferred to those who enjoy the product of the industry. The statute, being remedial, is to be construed liberally in order to fully and adequately effectuate the purpose of its enactment." Mulhall, 80 N.H. at 199.

A typical feature of every state's workers' compensation act is that the employer is bound to pay for all hospital, medical, and rehabilitation expenses made necessary by the work injury. *Vol. 1*, Larson, LARSON'S WORKERS' COMPENSATION, DESK EDITION § 1.01 (Matthew Bender, Rev. Ed). In New Hampshire, that obligation is found in RSA 281-A:23,I, providing that "[a]n employer subject to this chapter ... shall furnish or cause to be furnished to an injured employee reasonable medical, surgical, and hospital services, [and] remedial care ... for such period as the nature

of the injury may require." An employer "thus has a continuing obligation to provide or to pay for medical, hospital, and remedial care for as long as is required by an injured employee's condition." Hudson v. Wynott, 128 N.H. 478, 480–81 (1986).

As can be seen in this case, the employer's statutory obligation to provide or pay for medical care "as long as is required" might well prove indefinite. And there is also no question that reimbursable medical care includes the kind of long term pain management treatment at issue here. "It is well settled that the fact that a patient has reached a "medical endpoint" is not conclusive as to whether the treatments have extended beyond the period required by the nature of the injury. Reimbursable medical care may include treatments that are both curative and palliative in nature. While determination of a "medical endpoint" may indicate that the curative value of further treatments is nil, it does not establish that there would be no palliative benefits to be reaped from further medical care." Appeal of Lalime, 141 N.H. 534, 538 (1996)(internal citation and quotation elided).

It was the unanimous judgment of the Board that Mr. Panaggio's palliative treatment with therapeutic cannabis is reasonable, medically necessary, and causally related to his work injury. That is the cornerstone of this case. It means that the insurance carrier has a statutory obligation under RSA 281-A:23 to reimburse Mr. Panaggio, full stop. Absent crystal clear instruction from the New Hampshire Legislature to do otherwise, the Board was therefore required to order the insurer to pay. No contrary instruction is found anywhere in the Workers' Compensation statute itself. Sources outside the Worker's Compensation statute fail to override that requirement, or are, at best, ambiguous. And where the law is ambiguous, the outcome is to be construed liberally to effectuate the remedial purpose of the Workers' Compensation statute.

III. The existence of the Controlled Substances Act does not undo the Workers' Compensation Law's requirement to reimburse.

a. An order to reimburse will not make the carrier "possess, manufacture or distribute" a scheduled substance.

The Controlled Substances Act of 1970, 21 U.S.C. § 801 et. seq. (the CSA) makes it "unlawful to manufacture, distribute, dispense, or possess" any controlled substance except as authorized by the CSA. 21 U.S.C. § 841(a)(1), § 844(a). Marijuana[3] is designated as a Schedule 1 substance under the CSA. 21 U.S.C. § 812. The Schedule itself does not designate marijuana as illegal per se; the findings required to list a substance in Schedule 1 are the following: The drug "has a high potential for abuse", "has no currently accepted medical use in treatment in the United States", and "there is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1)(A)-(C).

Reimbursement of the cost of therapeutic cannabis to a patient otherwise qualified under New Hampshire law to possess it is not an offense identified in the Controlled Substances Act. While there is no dispute that therapeutic cannabis is a Schedule I substance under the CSA, neither the insurer in this case nor the Board itself identified any federal law that the carrier would be in violation of by complying with an order to reimburse an injured worker.

[3] New Hampshire uses the term "cannabis" in authorizing its use for medicinal purposes under RSA 126-X, defined as "all parts of any plant of the Cannabis genus of plants, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, salt, derivative, mixture, or preparation of such plant, its seeds, or resin." § X:1,III. The CSA itself actually uses the term "marihuana"; other states and agencies often refer to "medical marijuana". Although the terms may differ slightly, and there are in fact some states that draw distinctions among marijuana, cannabis, and certain chemical derivatives of same, they are not relevant to this appeal. This brief mainly refers to "therapeutic cannabis" in deference to New Hampshire's law, but where "medical marijuana" appears, the Court may consider the terms interchangeable. The substance scheduled by the CSA, authorized for therapeutic purposes by the State, and prescribed by the claimant's medical provider is the same.

The Board's analysis was itself remarkably thin on this point. It began by stating the uncontested, unremarkable proposition that "possession of marijuana is still a federal crime." *C.R. 16*; see also Gonzales v. Raich, 545 U.S. 1 (2005) (affirming Congress's power under the Interstate Commerce Clause to make criminal an individual's possession and use of state-authorized medical marijuana).

The Board then went on to note the Obama Administration's hands-off policy regarding enforcement of the CSA against therapeutic cannabis users, and Congress's refusal to fund prosecutions for same (about which, more will be said below), but the Board implied that it could not order reimbursement because these facts could change. *C.R.16.* Having only identified that the claimant's possession and use is a federal crime, the Board did not explain why it necessarily follows that the carrier may not separately be ordered to comply with its own independent state law obligation to reimburse claimants for related medical treatment.

Other courts have been more explicit about enforcing state law and respecting the judgment of state legislatures in accord with a medical consensus that has outrun the pace of federal policy. Last summer, the Massachusetts Supreme Judicial Court addressed an analogous claim brought by Cristina Barbuto, a woman who suffers from the debilitating gastrointestinal condition known as Crohn's disease. Ms. Barbuto is prescribed therapeutic cannabis in full compliance with Massachusetts law, and the drug enables her to maintain a healthy weight.

Ms. Barbuto notified her prospective employer of her cannabis use, and although she was initially told it "should not be a problem", she was terminated shortly after her hire date for failing a drug test. She did not use cannabis on the job or report to work intoxicated. Rather, her employer used the same conclusory

logic the insurer and the Board alluded to here: "we follow federal law, not state law." Barbuto v. Advantage Sales and Marketing, LLC, 78 N.E.3d 37, 41 (2017).

The Barbuto case addresses Massachusetts-specific statutory claims of workplace discrimination and wrongful termination that are not directly relevant to this appeal. But what is notable about the case is the Court's rejection of the employer's argument that "the only accommodation [Ms. Barbuto] sought—her continued use of medical marijuana—is a Federal crime, and therefore is facially unreasonable." Id. at 44.

Instead, the Barbuto Court held that the plaintiff stated a claim which survives a motion to dismiss, reasoning in relevant part as follows:

> The fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation. **The only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee.** An employer would not be in joint possession of medical marijuana or aid and abet its possession simply by permitting an employee to continue his or her off-site use.
>
> Nor are we convinced that, as a matter of public policy, we should declare such an accommodation to be per se unreasonable solely out of respect for the Federal law prohibiting the possession of marijuana even where lawfully prescribed by a physician. Since 1970 when Congress determined that marijuana was a Schedule I controlled substance that, in contrast with a Schedule II, III, IV, or V controlled substance, "has no currently accepted medical use in treatment in the United States," nearly ninety per cent of the States have enacted laws regarding medical marijuana that reflect their determination that marijuana, where lawfully prescribed by a physician, has a currently accepted medical use in treatment. See 21 U.S.C. § 812(b)(1)(B). To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.
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> Id. at 46 (emphasis added).

The same should be true here. Please note, too, that although the carrier in the instant case argued to the Board that the Food and Drug Administration's failure to approve cannabis for any medical use was sufficient reason to deny reimbursement, the Board held the argument to be "specious…Mr. Panaggio's use is reasonable and medically necessary, notwithstanding the FDA's self-serving [publication describing its failure to find cannabis safe or effective to treat any condition]". *C.R. 15-16*.

The carrier has not appealed that finding, so there is no debate presented in this appeal about the "accepted medical use" of cannabis. Its effectiveness as medical treatment for pain relief may be taken as established. It is equally important to recognize the considered judgment of the New Hampshire Legislature, expressed in RSA 126-X, that cannabis may be validly prescribed for therapeutic purposes by authorized medical providers to patients with qualifying medical conditions.[4] Furthermore, the New Hampshire statute's initial enactment and subsequent amendments have been bipartisan; originally signed into law by Governor Hassan in 2013 with enumerated qualifying conditions that included cancer, HIV, muscular dystrophy, multiple sclerosis and spinal cord injury, the scope of qualifying conditions has since only expanded. Epilepsy, lupus, and Parkinson's disease were added in 2015, ulcerative colitis was added in 2016, and under Governor Sununu, the list was recently broadened further to include "moderate or severe post-traumatic stress disorder". RSA 126-X:1,IX(a)(2)(C) (eff. July 11, 2017).

[4] As of February 15, 2018, fully 29 states, the District of Columbia, Guam and Puerto Rico have each authorized the use of medical marijuana; an additional 17 states allow low-THC, high-cannabidiol products for medical use. See NATIONAL CONFERENCE OF STATE LEGISLATURES, State Medical Marijuana Laws, Tables 1 & 2, *available at* http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

But even if medical considerations are set aside, the mere fact of therapeutic cannabis' status as a Schedule 1 substance has been held insufficient for carriers to avoid their state law obligation to reimburse injured workers who are prescribed it.

b. An order to reimburse is appropriate where the carrier fails to point the Board to any specific federal statute that imposes criminal liability .

Administrative agencies and mid-tier appellate courts of at least three states have ordered reimbursement for therapeutic cannabis where the objecting carrier raises only a handwaving concern about criminal liability, but fails to articulate a specific, credible theory of prosecution grounded in a federal statute.

Closest to home, the Appellate Division of Maine's Workers' Compensation Board has concluded that since no identified provision of federal law would preclude requiring an insurance carrier to reimburse an injured employee for the costs associated, and because it found the expressions of public policy in federal law to be, at best, equivocal, they upheld an order to reimburse. Noll v. LePage Bakeries, Inc., Me. W.C.B. No. 16-25 (App. Div. en banc Aug 23, 2016); Bourgoin v. Twin Rivers Paper Co., L.L.C., Me. W.C.B. No. 16-26 (App. Div. en banc Aug 23, 2016)(same, relying on the reasoning articulated in Noll);[5] see also Petrini v. Marcus Dairy, Inc., Conn. C.R.B. No. 7-15-7 (May 12, 2016) *available at* http://wcc.state.ct.us/crb/2016/6021crb.htm (Connecticut Workers' Compensation

[5] These administrative decisions *available at* http://www.maine.gov/wcb/Departments/appellate/2016decisions/16-25_Noll_v._Lepage_Bakeries_8-23-16_corr_8-26.pdf, and http://www.maine.gov/wcb/Departments/appellate/2016decisions/16-26_Bourgoin_v._Twin_Rivers_8-23-16.pdf. The latter decision is pending appeal before the Maine Supreme Judicial Court, presenting issues that are broader than, but include those virtually identical to, the ones presented by this case. Bourgoin v. Twin Rivers Paper Co., L.L.C. and Sedgwick CMS, Law Docket No. WCB-16-433. Oral argument was held before the full court on September 13, 2017; as of February 20, 2018, no decision has yet been published.

Commission ordering reimbursement for medical marijuana over carrier's concerns about potential criminal penalties).

In reaching this conclusion, the Maine Appellate Division primarily relied upon a New Mexico intermediate appellate court decision from 2014 which appears to have been the first reported decision nationwide to specifically order reimbursement of payment for therapeutic cannabis in a workers' compensation case. Vialpando v. Ben's Automotive Services, 331 P.3d 975, 980 (N.M. Ct. App. 2014), *writ denied*, 331 P.3d 924 (N.M. 2014); *Vol. 2*, Larson, LARSON'S WORKERS' COMPENSATION, DESK EDITION § 94.06 (Matthew Bender, Rev. Ed.)(2017).

Presented with arguments virtually identical to the ones presented by this case, the Vialpando Court held:

> Employer asserts that, because marijuana remains a controlled substance under federal law, the order to reimburse Worker for money spent purchasing a course of medical marijuana "essentially requires" Employer to commit a federal crime. However, Employer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute. See Headley v. Morgan Mgmt. Corp., 2005–NMCA–045, ¶ 15, 137 N.M. 339, 110 P.3d 1076 ("We will not review unclear arguments, or guess at what [a party's] arguments might be.").

331 P.3d at 980.

The Court went on to observe that "New Mexico public policy is clear. Our State Legislature passed the Lynn and Erin Compassionate Use Act to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments", and so upheld the lower agency's order to reimburse. Id. (internal quotation elided). This clear state policy was contrasted with federal policy that was far less than clear; on the one hand is the fact of the CSA, and on the other was the Department of Justice's official policy of non-enforcement of the CSA regarding medical marijuana.

Id. at 980. This latter issue has recently become a moving target, so a bit of background is in order.

c. For nearly a decade, the U.S. Department of Justice has declined to prosecute state-regulated marijuana markets, both recreational and medical.

In 2013, then-Deputy Attorney General James M. Cole issued a formal memorandum to all U.S. Attorneys providing "Guidance Regarding Marijuana Enforcement" ("Cole Memorandum"). This was published in response to state-level initiatives to legalize outright small amounts of marijuana for possession and regulate its production and sale. *App. 71*. The Cole Memorandum marked an expansion of the Department's similar guidance in October 2009 introducing a lenient prosecutorial stance toward states' medical marijuana-only initiatives. *App. 68*. In attempting to balance Congress's judgment as reflected in the CSA that marijuana remains a Schedule 1 substance with the growing march of the states toward approval of marijuana for both medical and recreational purposes, the Cole Memorandum instructed local U.S. Attorneys to focus their limited resources on the following enforcement priorities:

> (1) Preventing the distribution of marijuana to minors;
>
> (2) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
>
> (3) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
>
> (4) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
>
> (5) Preventing violence and the use of firearms in the cultivation and distribution of marijuana;

> (6) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
>
> (7) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands;
>
> (8) Preventing marijuana possession or use on federal property.

Cole Memorandum, August 29, 2013, *App. 71-72*.

In doing so, the Department reaffirmed the position it publically held since 2009 that it is "likely not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers." Id., *App. 72*. Moving forward, the Department recognized that a strong and well-regulated state marijuana legalization scheme (whether for medical or recreational purposes) would not be likely to threaten these enforcement priorities, and that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." Id., *App. 72*.

As noted earlier, this hands-off approach to enforcement of federal law – one that appropriately focuses prosecutorial resources on large-scale criminal cartels – gave states the space to experiment with Compassionate Use Acts and decriminalization of marijuana throughout the country, and they responded at speed. Forty-six states, the District of Columbia and two U.S. territories now permit some degree of medicinal use of cannabis or its derivatives. *Supra* at 14n.4.

The Cole Memorandum's continued federal assurance of non-prosecution has been cited as among the reasons to discount the formal threat of criminal penalty presented by the CSA, and to order reimbursement for therapeutic cannabis in the workers' compensation context. The most direct example of such reliance also comes from New Mexico, following on the heels of Vialpando. The case considered a workers' compensation insurance carrier's attempt to remedy the fault of the

Vialpando carrier who (like the carrier in this case) had simply failed to cite to the Board any specific federal statute it would violate by complying with an order to reimburse. Lewis v. American General Media, 355 P.3d 850 (2015).

In Lewis, the carrier specified some of the federal criminal statutes that would arguably be implicated by an order compelling reimbursement for therapeutic cannabis purchases. The Court nevertheless rejected the argument as raising too remote a threat to be of any legitimate concern:

> According to Employer, if it were to follow the WCJ's order, and despite the Department of Justice's memoranda, it would be civilly responsible for violation of the CSA by way of conspiracy or aiding and abetting. As distinguished from Vialpando, Employer cites the federal statutes it believes would implicate him, 21 U.S.C. § 841A(a) (prohibiting a person from knowingly possessing a controlled substance as defined by federal law and in an amount specified by the United States Attorney General); 21 U.S.C. § 846 (prohibiting a person from attempting or conspiring to commit a violation of federal law related to controlled substances under 21 U.S.C., Chapter 13, Subchapter 1); 18 U.S.C. § 2(a) (2012) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.").
>
> However, Employer's argument raises only speculation in view of existing Department of Justice and federal policy. Nothing in the Department of Justice's second memorandum alters its position regarding the areas of enforcement set forth in the initial memorandum. Medical marijuana is not within the list.
>
> 355 P.3d at 858.

This decision was issued in 2015. Although there has been a change in leadership at the U.S. Department of Justice following the general election of 2016, the Cole Memorandum remained the official policy of the DOJ until very recently. On January 4, 2018, the current U.S. Attorney General issued a new memorandum addressing "Marijuana Enforcement." *App. 78.* This memorandum deems "previous nationwide guidance specific to marijuana enforcement… unnecessary…" and "rescind[s the Cole Memorandum] effective immediately." Id.

On its face and by its own terms, this new "Sessions Memorandum" does not direct U.S. Attorneys to take any particular action with regard to marijuana prosecutions. It simply withdraws the Cole guidance and permits individual U.S. Attorneys to follow pre-existing federal guidelines when marshalling their limited resources to prosecute the federal crimes they deem worthy of their attention. Id. The practical effect of this change in policy, if any, is yet to be determined. But if it is to have any effect at all on federal prosecutions involving marijuana, it can only serve to increase the risk to entities participating in state-authorized markets in *recreational* marijuana.

Medical marijuana remains a protected class of its own, for reasons identified by the Lewis Court that remain in force today, and which serve as grounds to disregard the specter of federal prosecution raised by workers' compensation carriers. Regardless of the status of the Department of Justice's forbearance in any given state's recreational marijuana market, Congress itself has specifically prohibited the use of any federal funds to enforce the CSA against entities acting within a state-authorized medical marijuana market.

d. Even a theoretical threat of prosecution remains prohibited by Congressional restrictions on DOJ funding, maintaining a judicially-enforced safe harbor for states that have approved and regulate medical marijuana.

If there is any concern presented with the withdrawal of the Cole Memorandum, it is only present in states that have legalized marijuana for recreational use. States that have authorized the use of medical marijuana continue to enjoy an independent bulwark of protection against federal interference that is independent of any vicissitudes of attitude at the U.S. Department of Justice.

Beginning with an amendment to the federal budget in December 2014, Congress has consistently prohibited the Department of Justice from using any federal funds for medical marijuana prosecutions in states that regulate it. The language drafted in "The Consolidated and Further Appropriations Act of 2015 to Fund the Operations of the Federal Government" (known at the time as the Rohrabacher-Barr Amendment, in current form as the Rohrabacher-Blumenthal Amendment) and reapproved without interruption since, has only expanded over time to increase the list of states and territories to which it applies. Its purpose is unequivocal:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Consolidated Appropriations Act, 2017, § 537, Public Law No: 115-31, H.R. 244 (05/05/2017)(emphasis added).

This Congressional refusal to fund medical marijuana prosecutions is no technicality; it has been enforced against the DOJ by a recent decision of the Ninth Circuit Court of Appeals. U.S. v. McIntosh, 833 F.3d 1163 (2016). In McIntosh, ten separate interlocutory appeals and petitions for writs of mandamus arising from criminal indictments in California and Washington were consolidated; defendants who were charged with federal marijuana offenses each moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of

Justice was barred by the Rohrabacher-Blumenthal Amendment from spending funds to prosecute them. Id. at1168-69.

The Circuit Court of Appeals read the Amendment's funding limitation on the DOJ's power to prosecute to be strictly limited to the kinds of activity around medical marijuana that were specifically enumerated – but the limitation is very real.

> [W]e conclude that [the appropriations rider] prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate [the appropriations rider].

833 F.3d 1163, 1178 (2016).

McIntosh remanded to the district court for a further evidentiary hearing that would assess whether the claimants' conduct was indeed fully and completely authorized by state law, in which case their indictments would remain enjoined. See id. at 1179. While the court recognized that funding to the DOJ for such prosecutions could in theory be restored at any time, it also noted that the lack of funding "could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills." Id. (also instructing the district court on remand to consider how this lingering lack of funds affected the Appellant's Sixth Amendment right to a speedy trial). That withholding of funds has continued to date.

Not only has this been the consistent policy of Congress since 2015, the current Congress has notably kept the policy in force despite the direct request of Attorney General Sessions in an open letter to the House and Senate Majority and

Minority leaders, imploring them not to strip the Department of Justice of any funding that would "in any way inhibit its authority to enforce the Controlled Substances Act." *Sessions letter*, 5/1/17, *C.R. 4*. In that letter, Attorney General Sessions concedes that the DOJ remains bound by the Ninth Circuit's McIntosh decision not to prosecute individuals or organizations that are "in compliance with state medical marijuana law." He simply reiterates his own personal "belief" that it would be "unwise for Congress to restrict the discretion of the Department to fund particular prosecutions", and closes the letter by again beseeching Congress to "oppose" any such limitation "in Department appropriations." *C.R. 5*.

Attorney General Sessions published this letter on May 1, 2017. *C.R. 4*.

Congress promptly rejected his plea, and stripped federal funding for DOJ prosecutions of state-approved medical marijuana by a vote held in the House on May 3, 2017, then approved by the Senate on May 4, 2017. *C.R. 8*. The Consolidated Appropriations Act of 2017, H.R. 244, Sec. 537, limiting exactly such prosecutions, was signed into law by the President on May 5, 2017. *C.R. 8*.

Congress's swift, unequivocal rebuke to the DOJ, and reaffirmation of this commitment to protect states which regulate medical marijuana and the individuals and entities acting in compliance with those state laws, has remained in force. Although Congress has recently been funding the federal government piecemeal with repeated short-term Continuing Resolutions, it is notable that Congress has taken care to extend the safe harbor provided by the Rohrabacher-Blumenthal amendment each and every time.[6]

[6] Appropriations for this Amendment (and for the federal government writ large) was scheduled to expire on September 30, 2017, but was renewed on September 8 by the "Continuing Appropriations Act, 2018" Pub.L. 115-56, H.R. 601; and again through a pair of stopgap spending bills on December 8 with the "Further Continuing Appropriations Act, 2018" Pub.L. 115-90, and December 22 with the "Further Additional Continuing

Any and all legislation is potentially subject to change, of course. But neither the carrier nor the Board in this case has pointed to any evidence of any actual criminal conviction in any court nationwide suffered by any insurance carrier who has complied with an administrative order to reimburse an injured worker for the purchase of medically necessary, causally related treatment with state-approved therapeutic cannabis. "Evaluated in terms of practical effect, a criminal statute which is wholly ignored [or, in this case, Congressionally estopped from enforcement] is the same as no statute at all." Fort v. Fort, 425 N.E.2d 754, 759 (Mass. App. Ct. 1981). The facts as they exist today, and as they have existed for nearly a decade, is that there is no genuine threat of criminal liability that would excuse the carrier from fulfilling its clear statutory obligation to provide for the injured worker's medical care under RSA 281-A:23. The carrier should be ordered to comply.

IV. RSA 126-X does not undo the carrier's independent statutory obligation under RSA 281-A:23 to reimburse an injured worker for medical treatment.

RSA 126-X:3,III states that "Nothing in this chapter shall be construed to require: (a) any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis." The Board interpreted this language as a blanket prohibition on orders for reimbursement generally. This reading is far too broad.

Appropriations Act, 2018", Pub.L. 115-96, H.R. 1370. The amendment, like the rest of nonessential federal government spending, lapsed for two days during the government shutdown beginning January 20, 2018, but was retroactively renewed on January 22 by the "Extension of Continuing Appropriations Act, 2018", Pub.L 115-120, H.R. 195, as part of a further stopgap spending bill through February 8, 2018. On February 9 the amendment was renewed yet again, by the "Continuing Appropriations Amendments Act", Pub.L. 115-124, H.R. 1301, that maintains current spending through March 23, 2018.

a. "[N]othing in this chapter shall be construed to require" simply declines to create a new obligation to reimburse, and does not affect other independent statutory obligations established by RSA 281-A:23.

The language "nothing in *this chapter* shall be construed to require…any claim for reimbursement" means exactly what it says. I.e., "this chapter", RSA 126-X, does not newly create an affirmative statutory obligation for any enumerated entity to reimburse any patient for money spent on therapeutic cannabis. Crucially, neither does this language explicitly prohibit such obligations.

The Legislature knows how to issue a blanket prohibition for all manner of reimbursement claims when that is its true aim. The language is simple, direct, and unambiguous. "No reimbursement shall be made unless the person consulting a referral agency was referred by the court or approved by the commissioner, as provided herein, and no reimbursement shall be made after 4 consultations." RSA 167-B:4 (regarding reimbursement for marriage counseling referral services)(emphasis added). "Claimants…may be reimbursed for the costs of removing the [human trafficking] tattoo with an identifying mark. No reimbursement shall be paid unless the claimant has incurred reimbursable expenses of at least $100." RSA 21-M:8-h,V (regarding reimbursement of expenses under the N.H. Department of Justice's Victim's Assistance Program)(emphasis added). "The Commonwealth of Massachusetts and the state of Connecticut each agrees to pay its respective share in reimbursement, as determined by the commission under the procedure following, for economic losses and damages occurring by reason of ownership of property by the United States for construction and operation of a flood control dam and reservoir at any site specified in Article IV, and for any other flood control dam and reservoir constructed hereafter by the United States in the Connecticut River Valley; provided, however, that no reimbursement shall be made

for speculative losses and damages or losses or damages for which the United States is liable." RSA 484:1, Article V (Connecticut River Flood Control Compact)(emphasis added).

The plain language of these statutes leave no confusion about whether and under what terms a claim for reimbursement will be allowed. By contrast, where RSA 126-X:3,III provides that "nothing in this chapter shall be construed to require…any claim for reimbursement", it leaves space within the four corners of the Therapeutic Cannabis Act for health insurance carriers – if they wish – to privately contract for reimbursement, and does not disturb preexisting, separate statutory obligations to provide for reimbursement, such as that found in section A:23 of the Workers' Compensation Act.

Such a reading is also consistent with the approach taken by this Court in assessing similar language in RSA 329-B:26, codifying the psychologist-patient privilege. N.C. v. N.H. Bd. of Psychologists, 169 N.H. 361 (2016). The case centered on the Board of Psychologists' investigation into a psychologist's relationship with a minor patient, and addressed a dispute about whether the psychologist was required to disclose her minor patient's counseling records to the Board in response to a subpoena *duces tecum*. 169 N.H. at 364-65.

The Board took the position that it had statutory authority to issue a subpoena at will if the Board itself determined that just cause exists, citing as authority RSA 329-B:22,VI. "[The Board] "may, with just cause, at any time subpoena psychological records from its licensees and from hospitals and other health care providers licensed in this state." (emphasis added),

The psychologist objected, arguing that a separate provision within the same chapter served to check this apparent grant of broad discretion by requiring court

approval. “The confidential relations and communications between any person licensed under provisions of this chapter and such licensee's client or patient are placed on the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communications to be disclosed, unless such disclosure is required by a court order.” RSA 329-B:26 (emphasis added).

This Court held this plain language to mean what it says: that despite the authority given the Board by §22 to subpoena psychological records from its licensees “at any time”, §26’s admonition that “nothing in this chapter shall be construed to require” disclosure “unless…required by a court order” was controlling. “To adopt the Board's position would require us to ignore the language of RSA 329–B:26, which we decline to do.” 169 N.H. at 368.

The same plain reading should control here, cabining the effect of statutory construction to “this chapter” only. But unlike RSA 329-B:26, there is no “unless” caveat in RSA 126-X:3 to the instruction to this Court regarding how to construe the statute. In the Therapeutic Cannabis Act, the plain language of RSA 126-X:3,III that “nothing in this chapter shall be construed to require [any enumerated entity] to be liable for any claim for reimbursement for the therapeutic use of cannabis” therefore reads as agnostic: it neither creates, nor extinguishes, an obligation to reimburse.

It is particularly important to recognize it *could* have. In fact, this is how a number of states that sanction the prescription and possession of therapeutic cannabis have dealt with the workers compensation reimbursement question presented here.

b. States that bar reimbursement of medical marijuana specifically for injured workers, rather than for all purposes, have done so explicitly.

At least 13 states have enacted statutes that, to varying degrees, bar claims for reimbursement of costs associated with the use of medical marijuana in general. *Vol. 2*, Larson, LARSON'S WORKERS' COMPENSATION, DESK EDITION § 94.06 (Matthew Bender, Rev. Ed).[7] However, there is variation in the degree to which it is clear that the prohibition extends specifically to override the statutory obligation to reimburse created by that state's workers compensation statute, rather than simply shielding private health insurers for non-work-related claims.

For example, Michigan in 2012 made the following amendment to its own Worker's Disability Compensation Act:

> **§418.315a Medical marihuana treatment; reimbursement by employer not required.**
>
> Notwithstanding the requirements in section 315 [to pay for all reasonable and related medical treatment], an employer is not required to reimburse or cause to be reimbursed charges for medical marihuana treatment.
>
> (Emphasis added.)

That is definitive. *That* is what it looks like to prohibit reimbursement for therapeutic cannabis in the workers compensation context. The New Hampshire Legislature has made no such change, or indeed any change, to an employer or insurer's obligations under RSA 281-A to "furnish or cause to be furnished to an injured employee reasonable medical …services [and] medicines … for such period as the nature of the injury shall require." RSA 281-A:23,I. New Hampshire has left the medical obligations in its Workers' Compensation Act undisturbed.

[7] These are currently Alaska, Arizona, Delaware, D.C. Illinois, Massachusetts, Michigan, Montana, New Jersey, Oregon, Rhode Island, Vermont, and Washington. Id.

It is also possible, of course, for a state to prohibit reimbursement to workers' compensation carriers without directly amending its Workers' Compensation Act. All it need do is make its intentions clear in the medical marijuana statute itself. This was the approach taken by Arizona in 2015, which included specific language prohibiting work-related reimbursement claims when enacting its "Medical Marijuana Act":

> Nothing in this chapter requires: A government medical assistance program, a private health insurer or a workers' compensation carrier or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana.

AZ Rev. Stat. § 36-2814(A)(1) (2015)(emphasis added).

A similar approach was also taken by Florida: "Marijuana, as defined in this section, is not reimbursable under chapter 440 [Florida's Workers' Compensation Law]." Fla. Stat. § 381.986(15)(2017).

As seen above, New Hampshire did nothing as explicit as Arizona or Florida in its own therapeutic cannabis enabling statute to except workers' compensation carriers from their obligation to pay for injured workers' treatment.

Where there is no question in this case that the Board unanimously found the treatment related and reimbursable under RSA 281-A:23, the only question is whether RSA 126-X:3,III actively conflicts with that statutory obligation. The ambiguous language of Section X:3 of the Therapeutic Cannabis Act should not be read to create an affirmative defense to the carrier's Section A:23 obligation under the Workers' Compensation Act where a reasonable alternative reading exists. RSA 126-X:3, III can and should be interpreted as agnostic on the question of reimbursement, therefore leaving the insurer's statutory obligation to provide such reasonable and necessary care under RSA 281-A:23 undisturbed.

c. Even if RSA 126-X:3 does prohibit reimbursement, it does so only as to "health insurance" providers and similar entities, and does not extend to casualty insurers like workers compensation carriers.

Even if RSA 126-X:3,III can be construed to prohibit claims for reimbursement for the therapeutic use of cannabis, any such prohibition is statutorily confined to claims made to a list of enumerated providers. Those providers are: "any health insurance provider, health care plan, or medical assistance program." These terms are not further defined by the statute (see "Definition" section, RSA 126-X:1), but the majority of the Board read these terms to include workers compensation carriers. This was error.

By including workers' compensation carriers within the list of exempt providers, the majority impermissibly added language to the statute. As the dissent from the majority decision accurately pointed out, workers compensation carriers are regulated by the New Hampshire Insurance Department as casualty companies. *C.R. 19*. Workers' compensation insurance is universally regarded as a subset of property and casualty insurance. See, e.g., "Regulation of forms and rates for property and casualty insurance" under RSA 412:2, II, distinguishing "all types of casualty insurance", including workers compensation, from accident and health insurance, life insurance, title insurance, and others. See also BLACK'S LAW DICTIONARY, 4th Ed., p.1781, "Workmen's Compensation: Name commonly used to designate the method and means created by statutes for giving greater protection and security to the workman and his dependents against injury and death occurring in the course of employment. It is not health insurance…" (emphasis added).

This distinction between workers' compensation insurers and other kinds of providers which may pay for health care is recognized in federal law as well. The HIPAA Privacy Rule also recognizes this difference, and exempts from its own definition of "health plan" any policy, plan or program to the extent it provides or pays for the cost of certain non-medical benefits; these include workers' compensation insurers, long and short-term disability insurers, and automobile liability plans that include coverage for medical payments. See 42 U.S.C. 300gg-91(c)(1).

And though the majority of the Board treats this casualty/health insurance divide as a "distinction without a difference", doing so greatly broadens the scope of what the legislature actually intended in RSA 126-X:3, III when explicitly listing only health insurance plans or programs. Not only are casualty and disability insurers absent from the list, but government providers are as well. Notably, government programs did appear as an exempt entity in an early draft of RSA 126-X. Introduced in the 2013 legislative session, the language which became 126-X:3 was then designated as 126-W:5,III, and provided: "Nothing in this chapter shall be construed to require [a] governmental, private, or other health insurance provider, health care plan, or medical assistance program to be liable for any claim of reimbursement for the medical use of marijuana." HB 573, *available at* http://www.gencourt.state.nh.us/legislation/2013/HB0573_i.html. The fact that "government" no longer appears in the legislation as enacted confirms that the Legislature kept the scope of entities which would be shielded from any reimbursement claim deliberately narrow.

Other states that affirmatively prohibit reimbursement for therapeutic cannabis in the workers' compensation context do so explicitly. If the Legislature

intended to exclude workers' compensation payments, it could and would have said so. New Hampshire has not.

CONCLUSION

An injured worker's right to have reasonable, medically necessary, and causally related medical treatment paid for has existed in New Hampshire for over a century without interruption, exception or limitation. It is no small matter to disrupt the integrity of the *quid pro quo* struck in 1911 between employers and labor. Thompson v. Forest, 136 N.H. 215, 218–19 (1992)(this Court is required "to consider the totality of benefits, not just those benefits received at the time the right was statutorily abridged, when evaluating whether the relinquishment of the right to a remedy has been adequately offset by workers' compensation benefits. Our inquiry is driven by analysis of the fairness of the compensation scheme as a whole").

This concern is particularly acute for a right as foundational as medical care, a right that has existed since the Workers Compensation Law's inception. The showing has not been made to justify interference with, or amendment of, that right.

For the reasons stated above, Mr. Panaggio asks this Court to hold that the Board erred as a matter of law, and therefore to remand with instructions to order reimbursement to the claimant.

Respectfully submitted by:
Andrew Panaggio
By his attorney
SHAHEEN & GORDON, P.A.

Dated: February 20, 2018

By: _____

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STATEMENT REGARDING ORAL ARGUMENT

By order dated September 28, 2017, this appeal was assigned for argument before the full court. Mr. Panaggio's argument will be presented by Attorney Jared O'Connor.

SUPREME COURT RULE 16(3)(i) CERTIFICATION

The written decision appealed from begins at page 14 of the Certified Record, which is reproduced and appended to this brief.

CERTIFICATE OF SERVICE

In recognition of the fact that this brief was hand-delivered to the Court on this date, an electronic (PDF) copy has been emailed this date to James O'Sullivan, Esq., counsel for the insurer. Hard copies will follow by U.S. Mail.

Dated: February 20, 2018

_____
Jared O'Connor
NH Bar ID No. 15868

APPENDIX
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