

NEW JERSEY DEPARTMENT OF LABOR  
AND WORK FORCE DEVELOPMENT  
DIVISION OF WORKERS' COMPENSATION  
TRENTON DISTRICT OFFICE

ANDREW WATSON, :  
PETITIONER, :

Claim Petition No. 2009-15740

:  
Reserved Decision on  
Motion to Enforce

vs.

84 LUMBER, :  
RESPONDENT, :

BY HON. INGRID L. FRENCH, A.S.J.W.C.

This is a case wherein a Petitioner seeks a Court order requiring the Respondent to reimburse him for the costs associated with his participation in New Jersey's Medical Marijuana Program; specifically, the costs of medical evaluations performed as a pre-requisite to his acceptance and continuing in the program and the cost of filling his prescriptions for marijuana.

The parties do not dispute the facts leading up to the Petitioner's certification for the use of medicinal marijuana. The Respondent, however, disputes the reasonableness and necessity of the Petitioner's prescription for medicinal marijuana and the authorization of the prescribing physician.

Factual Background

On April 18, 2012 an Order Approving Settlement (OAS) was entered, awarding the Petitioner 33 & 1/3% partial total disability for the injuries he had suffered as a result of a work-related accident on November 6, 2008. The Petitioner's award was apportioned as follows: 50% of the statutory left hand and 12.5% for the neurological residuals of a complex regional pain syndrome. The settlement order stated that the Petitioner had "intractable pain from RSD/CRPS" and memorialized the Respondent's agreement to continue to authorize Dr. Peter Corda for pain management.

Thereafter, pursuant to the terms of the settlement, Dr. Corda began managing Petitioner's ongoing pain. According to the medical records, Dr. Corda had been prescribing either Endocet or Oxycodone-Acetaminophen 5-325 through January 18, 2012 and on February 8, 2012, he had increased the Petitioner's dosages to 10-325. The medical and pharmaceutical records confirm that the Petitioner was getting his prescription filled on a monthly basis; and in accord with each prescription, he received 120 Endocet/Oxycodone tablets. The records also evidence Dr. Corda prescribing Ibuprofen 800mg, bi-monthly, beginning in May of 2013 and the Petitioner, occasionally, filling a prescription for Lidocaine 5% patches. In the later part of 2013, the Petitioner consulted with Dr. Corda regarding New Jersey's medicinal marijuana program and pursuant to that consultation, Dr. Corda referred the Petitioner to his

partner, Dr. Jeffrey Drew Polcer,<sup>1</sup> who had the requisite credentials to perform Medical Marijuana Evaluations.

The Petitioner's first examination by Dr. Polcer took place on November 19, 2013. The Petitioner was complaining of a burning pain and swelling in his left hand and, functionally, he reported limited ability to make a fist with his left hand and he was experiencing extreme sensitivity to light touch. The Petitioner advised Dr. Polcer that the medications were not providing him with sufficient relief from his chronic pain. He then admitted to Dr. Polcer that, on his own, he had experimented with recreational marijuana in order to try to relieve his symptoms and the marijuana had provided him with a significant reduction in pain for, approximately, three to four hours.

Dr. Polcer's clinical examination of the Petitioner's left hand was consistent with the Petitioner's subjective complaints. He was sensitive to touch, he had limited ability to make a fist and there was shiny atrophy noted in the right first finger. Dr. Polcer noted mild cyanosis and swelling. Dr. Polcer opined that the Petitioner was suffering from a neuropathic and complex regional pain syndrome of the left hand. He concluded that the Petitioner did appear to be a candidate for medical marijuana. Therein, he states:

"he has neuropathic pain for which there is literature to show that marijuana can be helpful for. Neuropathic pain, in fact, is one of the better indications for use of medical marijuana. If this is ultimately chosen as a modality, then it would also be reasonable to lower his Percocet dosage concomitantly."

Following a review of the Petitioner's medical records and three follow-up examinations, Dr. Polcer opined that based upon the Petitioner's diagnoses, his continued pain symptomatology and his, then current, medication regimen, the Petitioner was a reasonable candidate for the medicinal use of marijuana. He also opined that, if the Petitioner's medical marijuana certificate was granted, the Petitioner would not be able to totally eliminate the use of oral narcotic pain medications. During Dr. Polcer final pre-certification evaluation of the Petitioner he discussed his conclusions with the Petitioner. He advised the Petitioner that the literature supported the use of medical marijuana for neuropathic pain and he had found nothing to contra-indicate his recommendation for the Petitioner's medicinal use of marijuana. In accord with his obligations under New Jersey's Compassionate Use Medical Marijuana Act, Dr. Polcer expounded upon the medicinal use of marijuana to the Petitioner and specifically cautioned him about driving under the influence. He also encouraged the Petitioner to attempt to, concomitantly, decrease his use of oral narcotic pain medications.

On February 28, 2014, pursuant to Dr. Polcer's certifying statements, the New Jersey Department of Health issued an Attending Physician Statement to the Petitioner which authorized the Petitioner to register for the MMP and purchase one (1) ounce of marijuana per month for three (3) consecutive

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<sup>1</sup> In order to participate in the Medical Marijuana Program (hereinafter MMP) a patient must be assessed by a licensed physician in good standing with the State of New Jersey, who has a current Controlled Dangerous Substance (CDS) license, who will certify that he or she is suffering from a debilitating medical condition that qualifies for participation in the New Jersey MMP and is defined in N.J.A.C. 8:64 et seq. Dr. Polcer and Dr. Corda are colleagues/partners at Professional Pain Management Associates in New Jersey. At the time of Petitioner's initial referral, only Dr. Polcer had the requisite CDS license to certify him for the MMP. At this time, however, Dr. Corda has procured his license, as well.

months. (See Petitioner's Exhibit B) The three 30-day periods enunciated on the official document began on February 28, 2014 and ended on May 28, 2014. The document instructed the Petitioner to go to the NJ MMP website, click on patient registration and follow the directions. The Petitioner followed the instructions and on March 17, 2014, he was issued his first Patient Registration Card for New Jersey's Medical Marijuana Program. (A copy of the Petitioner's registration card was attached to his motion as Exhibit C) The Registration card bears an expiration date of March 31, 2016. Then, over the course of the following three (3) months, the Petitioner used his registration card to purchase two and a quarter ounces of medical marijuana from one of New Jersey's authorized dispensaries. He did not make his first purchase until March 28, 2014 and he purchased his last quarter ounce of marijuana on May 21, 2014. (See Petitioner's Exhibit D).

When the Petitioner submitted the invoices and proof of cash payments for the marijuana to the Respondent/Carrier for reimbursement, the Respondent/Carrier denied reimbursement. In response thereto, on May 15, 2014, the Petitioner filed an Emergent Motion to Enforce the terms of the Order Approving Settlement that had been placed on the record on April 18, 2012.

At the outset, the Respondent disputed the "emergent" posture of Petitioner's motion.<sup>2</sup> The Respondent also disputes Dr. Polcer's authorization and indicated therein that they had not been provided with any updated medical records to substantiate the basis for Dr. Corda's referral to Dr. Polcer. In furtherance of their investigation, the Respondent withdrew their authorization of Dr. Corda as the Petitioner's primary treating physician and authorized Dr. Morris Antebi<sup>3</sup> to perform an Independent Medical Examination of the Petitioner. Dr. Antebi was specifically asked to provide his medical opinion as to whether medicinal marijuana is an appropriate pain management modality; given the Petitioner's injury and diagnoses. Dr. Antebi examined the Petitioner on June 30, 2014 and his report was attached to Respondent's answer. The Respondent asserted therein that they were prepared to present the testimony of Dr. Antebi in defense of Petitioner's request for authorization of the medical marijuana and they encouraged the Petitioner to present Dr. Polcer, on his own behalf.

On October 30, 2014, based upon the proofs submitted with the Petitioner's moving papers and the Respondent's answer thereto, this Court entered an order requiring the Respondent/Carrier to reinstate its authorization of Dr. Peter Corda for Pain Management. At that time, however, it was agreed that the resolution of the more complex legal issue regarding the marijuana would abide pending further discovery, a submission of a Stipulation of Facts by the parties, the testimony of the Petitioner and each party's respective medical expert(s).

#### Evidentiary Issues

The treating records of Dr. Polcer and Dr. Corda were entered into evidence without objection. However, the Petitioner objected to three (3) letters authored by Dr. Corda dated July 16, 2014, December 3, 2014 and September 8, 2015 being admitted into evidence. The letters were each written to the Respondent

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<sup>2</sup> The parties agreed that the motion was, in fact, not emergent.

<sup>3</sup> Dr. Morris Antebi is a State of New Jersey, licensed physician who is Board Certified in Pain Management. He is the Medical Director of Pain Specialists, P.A. Dr. Antebi has also procured his CDS license in New Jersey and is qualified to certify a patient's participation in the MMP.

In response to Respondent's request for an explanation of the circumstances leading to the Petitioner's having been certified for the MMP. The Court opined that, unlike the treating records, which were clearly admissible under the business records exception to the Hearsay Rules of Evidence, Dr. Corda's letters were written under extraordinary circumstances. They are not business records and the medical opinions expressed in the letters are not reliable. The Court would, however, allow Dr. Corda to provide those same opinions under sworn testimony and be subjected to cross examination. But, both Dr. Corda and Dr. Polcer have refused to submit to the Court's jurisdiction for testimony.

The Court does find that the letters, when compared to the treating records, are indicative of Dr. Corda's state of mind. Specifically, both Dr. Corda and Dr. Polcer have an ongoing business relationship with the Respondent. When the Respondent withdrew Dr. Corda's authorization for Petitioner's pain management treatment, that business relationship was placed in jeopardy. Professional Pain Management Associates is a well-respected pain management group with significant relationships with Respondent/Carriers throughout the greater South Jersey area. It is not unreasonable to conclude that each explanatory letter was written with a legitimate fear that the Respondent would either discontinue the use of their pain management services or significantly reduce the use of their pain management services, if *Pain Management Associates* reiterated the opinions expressed in their treating records. The Court finds that the letters written by Dr. Corda in response to the Respondent's inquiries were clearly indicative of an effort to protect his business relationship with this Respondent.

The Court will not allow the medical opinions expressed in the three (3) letters to contradict the medical opinion expressed in the contemporaneously authored treating records by the same doctor(s). The Petitioner's objection to the submission of the explanatory letters written by Dr. Corda is hereby sustained in part, and overruled, in part. This Court will use the letters to show motive, intent or, in essence, the state of mind of Dr. Corda.

Since Dr. Polcer refused to testify on behalf of either party, the Petitioner offered the testimony of Dr. Edward H. Tobe, on his own behalf. Dr. Tobe is a licensed physician in the State of New Jersey and Board Certified in Neurology and Psychiatry. He had examined the Petitioner on August 1, 2011 and September 7, 2011 to assess neurological and psychiatric permanent disability. Then, as a result of Dr. Polcer's refusal to testify, he examined the Petitioner on July 25, 2016 in order to assess Petitioner's condition and comment upon Dr. Polcer's recommendations for the use of medical marijuana.<sup>4</sup> Dr. Tobe issued three (3) reports bearing dates corresponding to the dates of his examinations. All three (3) reports were entered into evidence without objection.

At the request of the Respondent, Dr. Antebi performed an independent medical examination of the Petitioner on June 30, 2014. His report supported the Respondent's position denying the reimbursement of Petitioner's costs associated with his participation in the MMP. Dr. Antebi refused to testify on behalf of the Respondent and, as a result, the Court must exclude his report, as inadmissible hearsay.

As a consequence of the aforementioned evidentiary findings, the Respondent has failed to present any credible evidence showing that Dr. Corda's referral to Dr. Polcer and Dr. Polcer's treatment

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<sup>4</sup> Dr. Tobe also has a State of New Jersey CDS license. He testified that he obtained his license for the MMP in order to facilitate the pain management needs of a couple of his patients.

recommendations were not reasonable and necessary to relieve the Petitioner's neuropathic pain symptomatology.

Legal Analysis and Conclusions

Under N.J.S.A. 34:15-15:

The employer shall furnish to the injured worker such medical, surgical and other treatment, and hospital service as shall be necessary to cure and relieve the worker of the effects of the injury and to restore the functions of the injured member or organ where such restoration is possible;....

It is well-established that under New Jersey's Workers' Compensation Act the Respondent has the right to direct and control medical treatment. When the Respondent authorizes a physician to treat an injured worker, that authorization presumes that the Respondent will respect and abide the expert medical opinion of that physician. When an authorized treating doctor opines that an injured worker requires medical services beyond his or her specialty that medical opinion is within the scope of the authorized doctor's expertise. The question of whether the Respondent's right to direct and control treatment is abrogated by an authorized doctor's referral to another doctor is an issue which comes before our courts on innumerable occasions. Likewise, Petitioner's often challenge a Respondent's right to direct them to alternative doctors for second opinions. Whether it is a second opinion directed by a Respondent/Carrier or a referral to an alternative specialty directed by an authorized doctor, this Court interprets the statutory language as requiring an analysis that focuses on whether the referral is in the best interest of the injured worker.

In this case, an authorized treating doctor did not have the requisite license to prescribe a pain management modality which he opined could be beneficial in treating the Petitioner's pain. The treating records outline Dr. Corda's discussion with the Petitioner about marijuana as an alternative pain management modality and his referral to his partner, Dr. Polcer. Although Dr. Corda's failure to review and discuss his recommendation with the respondent/carrier may have been contrary to an implied protocol; it was, nonetheless, based upon his expert medical opinion. The Court does not interpret the Respondent's right to direct and control treatment as a statutory right to subject a medical expert to an imperious or intrusive "pre-approval process." Medical experts must be given sufficient latitude in directing the care of an injured worker. Here, the Court will not allow the Respondent to deny authorization of a treatment, which has now proven to be beneficial to the Petitioner, simply because the doctor did not allow the Respondent an opportunity to second guess his medical opinion.

The only remaining issue to be resolved by the Court is whether Dr. Polcer's prescription for medicinal marijuana was necessary to cure and relieve the Petitioner of the effects of his injury.

Under the New Jersey Compassionate Use Medical Marijuana Act, N.J.S.A. 24:61-2, medical marijuana may be prescribed for treatment of debilitating conditions which are defined as follows: **"Debilitating medical condition" means:**

- (1) One of the following conditions, if resistant to conventional medical therapy: seizure disorder, including epilepsy; intractable skeletal muscular spasticity; or glaucoma;
- (2) One of the following conditions, if severe or chronic pain, severe nausea or vomiting, cachexia, or wasting syndrome results from the condition or treatment thereof: positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or cancer;
- (3) Amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy, or inflammatory bowel disease, including Crohn's disease;
- (4) Terminal illness, if the physician has determined a prognosis of less than 12 months of life; or
- (5) Any other medical condition or its treatment that is approved by the department by regulation.

In accord with the requirements under New Jersey's MMP, Dr. Polcer certified that he had a bona fide and ongoing relationship with the Petitioner, as his patient, as defined by N.J.A.C. 8:64 et seq. Dr. Polcer completed the comprehensive history and physical examination required under the MMP and documented an assessment and treatment plan. Dr. Polcer certified that based upon his examination of the Petitioner and his review of his medical records, the Petitioner, as his patient, may benefit from the use of medical marijuana. Dr. Polcer certified that he would continue to follow the Petitioner, as his patient, at a minimum of every three months and he would reassess the Petitioner's debilitating medical condition and his response to treatment.

Pursuant to Dr. Polcer's certifications, the Petitioner registered for the MMP and in accord with his prescription, he began integrating medicinal marijuana into his pain management regimen. According to the Petitioner's testimony, he, at first, had to determine which "strand" of the marijuana worked best for his personal pain management and functional needs. He testified that the effects of the marijuana, in many ways, is not as debilitating as the effects of the Percocet.<sup>5</sup> The pharmacy records show that, ultimately, the Petitioner was able to reduce his use of oral narcotic medication. The Petitioner testified that his injury has motivated him to work in the service industry and, as a result of his improved pain management, he has achieved a greater level of functionality. The Court found the Petitioner's testimony credible. In fact, the Court found that the Petitioner's approach to his pain management needs has been cautious, mature and overall, he is exceptionally conscientious in managing his pain.

#### Expert Testimony

Dr. Tobe was the only medical expert who testified in these proceedings. His clinical examination of the Petitioner was consistent with the clinical examinations done by Dr. Corda, Dr. Polcer and Dr. Antebi. Dr. Tobe opined that Dr. Polcer's plan to start the Petitioner on a regimen of using medical marijuana, in combination with his opiate prescription was both clinically supported and medically appropriate. He opined that Dr. Polcer's plan to try to reduce the Petitioner's opiate treatment was perfectly appropriate. He provided the Court with testimony which explained the difference between the marijuana and the Percocet. According to Dr. Tobe's testimony:

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<sup>5</sup> The Petitioner's prescriptions are for either Endocet or Oxycodone 10-325. He generally refers to his oral narcotics as Percocet and for purposes of clarity the Court will generally refer to them as Percocet, as well.

*"cannabinoids<sup>6</sup> provide a different approach to pain and muscle spasticity relief. The opioid may still be necessary, but it cannot surpass what the marijuana can do...opiates have receptor sites in the mid-brain...that will make a difference [in the risks] because opiates can shut down breathing [whereas] marijuana cannabinoids won't [do that].."*

*"marijuana does not affect the mid-brain. The mid-brain is critical in controlling respiration..heart rate, many of the life preserving elements [that we need to survive are controlled by the] mid-brain. Cannabinoids don't have receptor sites in the mid-brain..it has a different distribution and function...."*

*"Percocet is a mixture [of] Tylenol acetaminophen. Acetaminophen, in and of itself [can be] problematic in terms of kidney and liver function. The Percocet is Oxycodone...Narcotics effect all areas of the brain...they impact alertness, concentration, memory, basic cognitive functions are effected....and they can cause emotional detachment, withdrawal and disengagement.....Opiates also cause dry mouth (which often leads to losing teeth), blurred vision, constipation, urinary retention and cardiac problems ...."*

When Dr. Tobe was asked to discuss the side effects of marijuana, he pointed out that it is still too early to make any reliable conclusions regarding long term use of marijuana that is produced in a quality-controlled manner. He noted that most of us have formed our conclusions about marijuana based upon studies involving [persons] who smoked marijuana produced for illegal sale and consumption on the street and popular movies such as "Reefer Madness." The studies done in the past and the Hollywood portrayal of "side-effects" have all been predicated on reactions to marijuana that was tainted with phencyclidine, which is more commonly called "angel dust."

According to Dr. Tobe, when the State of New Jersey grows marijuana [for medicinal use] it is a different marijuana; i.e. not tainted with contaminants. When the quality of the marijuana is controlled, users are "less-likely to have the cravings commonly caused by the street-contaminated product. He also pointed out that the common belief that marijuana is a "gateway drug to stronger drugs" has not been associated with the quality-controlled samples. Lastly, he pointed out that, to date, there have not been any studies which associate liver or kidney dysfunction or heart problems with "clean" marijuana.

Dr. Tobe did admit that marijuana can have some of the same troubling side-effects as opiates; such as becoming withdrawn, disengaged, having impaired concentration and memory and experiencing a euphoria; but, in his words, *"any drug can make someone psychotic...marijuana, yes, opiate, yes."*

He determined that the Petitioner's experience in trying to select the appropriate "strand" of marijuana for his pain relief was actually him noticing the subtle differences in how much tetrahydrocannabinol versus how much cannabinoid is in the marijuana. According to Dr. Tobe, once the Petitioner has found the appropriate agent with the right subtlety of weight, and he combines it with his opiate use, the combination will enable him to achieve better function.

Dr. Tobe agreed with Dr. Corda's referral to Dr. Polcer and Dr. Polcer's certification of the Petitioner for participation in the MMP. He acknowledged that while the scientific community has not wholly embraced

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<sup>6</sup> Cannabinoid is phytocannabinoid tetrahydrocannabinol (commonly called THC). It is the primary psychoactive compound in cannabis.

medicinal marijuana as an accepted pain management modality, it is offering promising options. The fact that Dr. Corda, Dr. Polcer and Dr. Antebi have all procured their respective CDS license in New Jersey is confirmation for the Court that the use of medicinal marijuana as an alternative pain management modality is, at the least, becoming a subject which those who specialize in "pain management" must become more knowledgeable; despite any controversy over its legality.<sup>7</sup> According to Dr. Tobe, we must allow more time for collection of data on the use of "clean" marijuana because, in his opinion, the scientifically grown marijuana plant is a vastly different end-product. But, at this juncture, he is confident that the Petitioner's doctors have made a very competent decision to introduce marijuana and reduce his use of opiates.

The Court finds that the evidence presented in these proceedings show that the Petitioner's "trial" use of medicinal marijuana has been successful. While the Court is sensitive to the controversy surrounding the medicinal use of marijuana, whether or not it should be prescribed for a patient in a state where it legal to prescribe it, is a medical decision that is within the boundaries of the laws in the State of New Jersey. In this case, there is no dispute that all of the credible evidence presented confirms that this Petitioner is an appropriate candidate for New Jersey's medical marijuana program. Thus, in accord with N.J.S.A. 34:15-15, the Court finds that the Petitioner's participation in New Jersey's Medical Marijuana Program is reasonable and necessary for the relief of the intractable neuropathic pain caused by his work-related injury.

The Respondent is hereby ordered to authorize either Dr. Corda or Dr. Polcer for the Petitioner's ongoing participation in New Jersey's Medical Marijuana Program.

The Respondent is ordered to reimburse the Petitioner for the cost of his medical evaluations for the MMP and his purchases of marijuana through the New Jersey MMP.

Respondent shall pay \$150.00 stenographic fee to John Trainer, Inc. for one half day of testimony and \$150.00 stenographic fee to Guy Renzi & Assoc. for one half day of testimony.

The Petitioner's counsel is ordered to submit proof of the Petitioner's expenses to date to the Respondent within 10 days of the day of this decision.

An Order consistent with this decision is attached hereto. The Petitioner's Attorney's Fee shall abide .

DATE: \_\_\_\_\_

12/15/16

  
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Hon. Ingrid L. French, A.S.J.W.C.

FOR THE PETITIONER  
Faccenda Law Firm, LLC  
By Phil Faccenda, Esq.

FOR THE RESPONDENT  
Cipriani & Werner  
By John Carvelli, Esq.

<sup>7</sup> Parenthetically, it can be noted, that the Petitioner testified that Dr. Polcer had cautioned him that the insurance company may not reimburse him for the cost of his participation in the MMP.