STATE OF MINNESOTA

IN SUPREME COURT

A20-1525

Workers' Compensation Court of Appeals

Daniel Bierbach,

Respondent,

vs.

Digger's Polaris,

and

State Auto/United Fire & Casualty Group,

Relators.

Anderson, J.
Concurring in part, dissenting in part,
Chutich, J.

Filed: October 13, 2021
Office of Appellate Courts

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S Y L L A B U S

1. Because resolving a claim asserting that a conflict exists between federal law that prohibits cannabis possession and state law that requires an employer to pay for an

injured employee's reasonable and necessary medical treatment would require the Workers Compensation Court of Appeals to interpret and apply federal law, that court lacks subject matter jurisdiction to decide the preemption issue presented by that claim.

2. The prohibition in the Controlled Substances Act, 21 U.S.C. §§ 801–971, on the possession of cannabis preempts an order made under Minnesota's workers' compensation law, Minn. Stat. § 176.135, subd. 1 (2020), that requires an employer to reimburse an injured employee for the cost of medical cannabis used to treat a work-related injury.

Reversed.

O P I N I O N

ANDERSON, Justice.

In 2004, respondent Daniel Bierbach suffered a work-related ankle injury while working for his employer, relator Digger's Polaris. Eventually, Bierbach was diagnosed with intractable pain and enrolled in Minnesota's medical cannabis research program. *See* Minn. Stat. §§ 152.21–.37 (2020). He then filed a claim petition, seeking reimbursement from his former employer for the cost of the medical cannabis. The compensation judge granted the petition. The Workers' Compensation Court of Appeals (WCCA) affirmed. *Bierbach v. Digger's Polaris*, No. WC19-6314, slip op. at 2 (Minn. WCCA Nov. 10, 2020).

On appeal to our court, relators Digger's Polaris and State Auto/United Fire & Casualty Group raise four issues. First, did the WCCA correctly conclude that it lacks subject matter jurisdiction to decide arguments that require interpreting federal law, including a question of preemption? Second, does the federal Controlled Substances Act

(CSA), 21 U.S.C. §§ 801–971, preempt the requirement in Minnesota law for an employer to reimburse an injured employee for the cost of medical treatment, Minn. Stat. § 176.135, subd. 1(a) (2020), when the treatment for which payment is sought is medical cannabis? Third, does the expert opinion relied on by the workers' compensation judge lack foundation? Fourth, is medical cannabis reasonable and necessary to treat Bierbach's pain?

We addressed the same questions of jurisdiction and preemption in a companion case, *Musta v. Mendota Heights Dental Center*, A20-1551 (Minn. Oct. 13, 2021). For the reasons stated in that opinion, we hold that the WCCA lacks jurisdiction to decide whether federal law preempts Minnesota law that requires an employer to furnish medical treatment when the treatment for which reimbursement is sought is medical cannabis. We also hold that the CSA preempts the compensation court's order mandating relators to pay for Bierbach's medical cannabis. Because these holdings resolve this dispute, we do not reach the remaining issues.

For the foregoing reasons, we reverse the decision of the Workers' Compensation Court of Appeals.

Reversed.

C O N C U R R E N C E & D I S S E N T

CHUTICH, Justice (concurring in part, dissenting in part).

For the reasons set forth in my concurrence and dissent in *Musta v. Mendota Heights Dental Center*, No. A20-1551, slip. op. at C/D-1 (Minn. Oct. 13, 2021) (Chutich, J., concurring in part, dissenting in part), I join in the court's decision that the Workers' Compensation Court of Appeals (WCCA) lacks subject matter jurisdiction to decide whether federal law preempts state workers' compensation law, Minn. Stat. § 176.135, subd. 1(a) (2020), to the extent that the state law requires an employer to reimburse an employee for the purchase of medical cannabis. But I respectfully dissent from the court's holding that the federal Controlled Substances Act, 21 U.S.C. §§ 801–971, preempts section 176.135 to the extent that this Minnesota law requires an employer to reimburse an employee for the purchase of medical cannabis.

Because I would hold that section 176.135 is *not* preempted by federal law, I would reach the remaining issues, which were not present in *Musta*.[1] I conclude that the opinion of respondent Daniel Bierbach's treating physician, Dr. Coetzee, has adequate foundation, and that substantial evidence supports the findings of the compensation judge—both that medical cannabis can be a reasonable and necessary treatment for intractable pain and that it was reasonable and necessary in Bierbach's case. Because the court's decision overextends the preemptive scope of the Controlled Substances Act and denies Bierbach

[1] In *Musta*, the parties stipulated that medical cannabis was reasonable and necessary to treat the employee's pain. *Musta*, slip op. at 4. Consequently, only the preliminary question of WCCA jurisdiction and the issue of preemption were before us in that case.

treatment that is reasonable, necessary, and crucial to keeping him meaningfully employed, I respectfully dissent.

I.

I begin with an overview of the state's medical cannabis program and then explain the facts giving rise to this dispute.

A.

The Legislature has established a research program to study the benefits of medical cannabis for people with certain painful conditions. Minn. Stat. § 152.21, subd. 1 (2020) ("The intent of this section is to establish an extensive research program to investigate and report on the therapeutic effects of THC under strictly controlled circumstances . . . ."). The statutes governing the program, Minn. Stat. §§ 152.21-.37 (2020), are called the THC Therapeutic Research Act (THC Act). Minn. Stat. § 152.21, subd. 7.

Patients who are enrolled in the state's program are permitted to obtain and use medical cannabis without criminal liability under state law. Minn. Stat. § 152.32. But medical cannabis possession and use remains prohibited under federal law. 21 U.S.C. § 812.

To enroll in the state's medical cannabis program, a patient must submit an application, signed disclosure, and application fee. Minn. Stat. § 152.27, subd. 6(a). The application must include a certification from the patient's health care provider that the patient is diagnosed with a qualifying medical condition. *Id.*, subd. 3(a)(4). Effective in 2016, the Commissioner of Health approved "intractable pain" as a qualifying condition.

45 Minn. Reg. 1299 (June 14, 2021); *see also* Minn. Stat. § 152.22, subd. 14(10) (permitting the commissioner to approve new qualifying conditions).

To remain enrolled in the program, a patient must submit a doctor's certification annually, Minn. Stat. § 152.27, subd. 3(b), and pay the annual fee. The patient may only obtain medical cannabis from one of two registered manufacturers, *see* Minn. Stat. § 152.25, subd. 1(a) (requiring the commissioner to register two in-state manufacturers).

B.

With that overview, I turn to the facts of the case. On April 7, 2004, respondent Daniel Bierbach suffered a work-related ankle injury when the ATV he was driving rolled over. At the time of the accident, he was 25 years old and employed by Digger's Polaris.[2]

Bierbach underwent surgery on his left ankle, performed by Dr. J. Chris Coetzee. After the surgery, he engaged in physical therapy. He also took opioids for a short time but weaned himself off them. Over the next 15 years, under the guidance of Dr. Coetzee and other health care professionals, Bierbach used various techniques to manage the pain as his ankle slowly deteriorated. Those treatments included an ankle brace, compression icing, cortisone ankle injections, an ankle boot, and over-the-counter anti-inflammatory medications. Dr. Coetzee has also stated that Bierbach would likely need an ankle replacement in the future, but that he is currently too young for such a procedure.

[2] The insurer for Digger's Polaris is United Auto/United Fire & Casualty Group, which is also a party to this appeal. Collectively, I refer to Digger's Polaris and United Auto as "Digger's Polaris."

In April 2018, Dr. Coetzee certified Bierbach as having intractable pain.[3] He was approved to participate in the state's medical cannabis program, and he began purchasing medical cannabis from one of the registered cannabis manufacturers. The manufacturer's records show that, between April 2018 and February 2019, Bierbach's dosage more than doubled. The dosage was increased to "reflect [his] current use," and to help him manage the pain from increased activity, including Bierbach's return to full-time work. According to those records, he was not able to afford as much medical cannabis as he needed and on at least one occasion, he had to wait several weeks after running out before purchasing a refill. Bierbach reported getting good daytime relief, completing more yardwork at home, and sleeping better. The total cost of his current dosage plan is about $1,860 per month.

The opinions of two experts were admitted as evidence. In his June 2018 letter, Dr. Coetzee stated that Bierbach continued to develop progressive degenerative changes in his ankle following his work injury; he was doing reasonably well, but not great, with the ankle injections. Dr. Coetzee observed that Bierbach's ankle continued to be very sore and swollen with or without activity, that he walked with a limp, and that he was limited in his daily activity and continued to gain weight because he could not exercise without pain. Consequently, Dr. Coetzee opined that Bierbach would be a great candidate for medical cannabis "to help with his intractable pain and wean off of narcotic pain medication."

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[3] Under the workers' compensation rules, "intractable pain" means "a pain state in which the cause of the pain cannot be removed or otherwise treated with the consent of the patient and in which, in the generally accepted course of medical practice, no relief or cure of the cause of the pain is possible, or none has been found after reasonable efforts." Minn. Stat. § 152.125, subd. 1; *see* Minn. R. 5221.6040, subp. 8a (2019) (incorporating the definition from section 152.125, subdivision 1).

In February 2019, Dr. Christopher Meyer issued an independent medical examination report. Dr. Meyer documented substantial swelling of Bierbach's left ankle and agreed that he had chronic left ankle pain related to his degenerative joint disease resulting from his work-related injury. In assessing whether medical cannabis was an appropriate treatment for Bierbach's pain, Dr. Meyer stated that the treatment of chronic pain is "under significant debate." He explained that classic treatments include "bracing, ice, as well as medications such as anti-inflammatories and has involved the use of narcotics." But he noted that the use of narcotics has come under "significant scrutiny." While acknowledging that medical cannabis is recognized as a safer alternative to opioid use, Dr. Meyer opined that the "medical objective data supporting" its use for chronic pain "continues to be controversial." Consequently, he stated that he was "not a believer in the use of medical cannabis for chronic pain," and Dr. Meyer recommended that Bierbach be evaluated for a chronic pain program.

In March 2019, Dr. Coetzee responded to Dr. Meyer's report. He stated that Bierbach suffered increased ongoing pain that was aggravated by physical activity, and he noted that Bierbach had already tried various treatments, including cortisone injections, a brace, and opioids. He acknowledged that Bierbach had already weaned himself off opioids, but Dr. Coetzee opined that Bierbach would need something more than anti-inflammatory medications to alleviate his intractable pain and concluded that Dr. Meyer's advice would result in ongoing opioid use. Dr. Coetzee opined that medical cannabis is significantly better for chronic pain than opioids, and he noted that Bierbach had tried, and

responded well to, medical cannabis. Accordingly, Dr. Coetzee reiterated his opinion that "medical marijuana is an appropriate medication for Mr. Bierbach's condition."

At a hearing held by the compensation judge, Bierbach testified that he works as a sales associate at a large outfitter store over 60 hours a week and is on his feet for 90 percent of the day. He stated that he gets enormous swelling and discoloration when he is on his feet for extended periods of time. And despite trying various treatments, such as icing, medications, and ankle injections, his pain has slowly increased over the past 15 years since his work injury. He further explained that medical cannabis has provided him substantial relief by taking away the pain during the day and helping him sleep at night. Bierbach also testified that medical cannabis has helped him maintain employment and has improved his relationships with his family. He noted, however, that he sometimes runs out of his supply and cannot afford to refill it immediately and that he would use medical cannabis "a lot more" if he could afford it.

Bierbach admitted that he has misused drugs and alcohol in the past. He acknowledged to using recreational cannabis "[t]hroughout [his] life" but denied using it in recent years. Bierbach also admitted receiving two DWI's, including one in 2017 that was followed by chemical dependency treatment. He stated that he never informed Dr. Coetzee or the cannabis manufacturer of his DWI convictions because he was never asked. Bierbach also acknowledged that Dr. Coetzee has no control over the frequency or amount of medical cannabis that he receives under the program and that no one monitors his use.

In his Findings and Order, the compensation judge determined that the Workers' Compensation Act, Minn. Stat. §§ 176.001–.862 (2020), requires reimbursement for medical cannabis use, but he determined that he lacked jurisdiction to decide questions involving the federal Controlled Substances Act, 21 U.S.C. §§ 801–971. Under state law, the compensation judge found that medical cannabis was reasonable and necessary because Bierbach faced chronic pain without an effective alternative treatment. The judge found that the opinion of Dr. Coetzee was more persuasive than the opinion of Dr. Meyer, and the judge credited Bierbach's testimony about his pain, the decreasing efficacy of cortisone injections, and the benefits of using medical cannabis. The compensation judge also determined that Bierbach's use of medical cannabis was sufficiently regulated under a general treatment parameter, Minn. R. 5221.6050, subp. 1 (2019), and under the Department of Health's regulation of the medical cannabis program. Accordingly, the compensation judge ordered Digger's Polaris to pay for Bierbach's prior medical cannabis costs.[4]

The Workers' Compensation Court of Appeals (WCCA) affirmed, holding that the compensation judge did not abuse his discretion by crediting the opinion of Dr. Coetzee over the opinion of Dr. Meyer. *Bierbach v. Digger's Polaris*, No. WC19-6314, slip op. at 5 (Minn. WCCA Nov. 10, 2020). The WCCA also upheld the compensation judge's finding that medical cannabis is compensable under state law and that medical cannabis is reasonable and necessary to treat Bierbach's pain. *Id.* at 6–7. Finally, the WCCA held that

[4] Bierbach's counsel acknowledged at oral argument that the compensation judge's order for reimbursement applied only to the specific past expenses submitted to the court.

it did not have jurisdiction to decide whether the federal Controlled Substances Act preempts state law. *Id.* at 7.

Digger's Polaris sought review by certiorari on four issues: 1) whether the WCCA correctly determined that it did not have subject matter jurisdiction to decide questions that involve federal law, including a question of preemption, 2) whether the Controlled Substances Act, 21 U.S.C. §§ 801–971, preempts state law to the extent that Minnesota Statutes section 176.135, subdivision 1(a), requires an employer to reimburse an employee for reasonably necessary medical treatment, which in this case includes the purchase of medical cannabis, 3) whether the compensation judge abused his discretion by relying on the medical opinion of Dr. Coetzee instead of the opinion of Dr. Meyer, and 4) whether substantial evidence supports the compensation judge's finding that medical cannabis is reasonable and necessary to treat Bierbach's intractable pain.

I agree with the court that WCCA lacks subject matter jurisdiction to decide the preemption question, but I disagree with the court that federal law preempts the reimbursement order made under section 176.135. Because my reasoning on these two issues is set forth in my concurrence and dissent in *Musta*, slip. op. at C/D-1, I focus here on the issues that are unique to this case. These issues are whether Dr. Coetzee's opinion has adequate foundation and whether substantial evidence supports the finding that medical cannabis is reasonable and necessary to treat Bierbach's intractable pain.

II.

Digger's Polaris challenges Dr. Coetzee's expertise and the factual basis for his opinion. It contends that Dr. Coetzee lacked the relevant expertise to opine that medical

cannabis is reasonable and necessary because he is not a pain specialist, has never prescribed medical cannabis, and generally lacks education and experience in treating pain with medical cannabis. Bierbach counters that these objections go only to the weight, and not to the admissibility, of Dr. Coetzee's opinion, and therefore we should defer to the credibility determination by the compensation judge.

We apply "a very deferential standard . . . when reviewing a determination as to expert qualification, reversing only if there has been a clear abuse of discretion." *Teffeteller v. Univ. of Minnesota*, 645 N.W.2d 420, 427 (Minn. 2002) (citation omitted) (internal quotation marks omitted). "The qualifications of an expert do not usually go to the admissibility of the expert's opinion but merely to its weight." *Ruether v. State*, 455 N.W.2d 475, 477 (Minn. 1990); *see also Burke v. Precision Eng'g*, 1997 WL 581202 at *5 (Minn. WCCA Aug. 21, 1997) ("Once [an] expert medical opinion has been admitted into evidence without objection, that evidence may no longer be entirely disregarded by the compensation judge, and the evidentiary issue becomes one of weight rather than of competence.").

Because Digger's Polaris did not object to the admission of Dr. Coetzee's written opinions into evidence—in fact, Digger's Polaris offered the letters into evidence—their challenge to his expertise goes to evidentiary weight, not admissibility. *Burke*, 1997 WL 581202 at *5.[5]

[5] Even if the question of admissibility were properly preserved, I would conclude that Dr. Coetzee is adequately qualified because he has extensive training and experience in treating ankle injuries. *See Marquardt v. Schaffhausen*, 941 N.W.2d 715, 719 (Minn. 2020)

Digger's Polaris also claims that Dr. Coetzee lacked a sufficient factual foundation to opine because he relied on two pieces of medical literature that are not in the record, his first opinion incorrectly assumed that Bierbach was still using opioids, and he may have been unaware of Bierbach's prior alcohol and drug misuse. Accordingly, Digger's Polaris asserts that the compensation judge erred by relying on the opinion of Dr. Coetzee rather than the opinion of Dr. Meyer. Bierbach responds that, as his treating provider, Dr. Coetzee had an adequate factual foundation for the opinions provided and that the compensation judge permissibly weighed the conflicting expert opinions and found the opinion of Dr. Coetzee to be more persuasive than that of Dr. Meyer.

"It is well established that a compensation judge's choice among conflicting expert opinions must be upheld unless the opinion lacked adequate factual foundation." *Mattick v. Hy-Vee Foods Stores*, 898 N.W.2d 616, 621 (Minn. 2017). An expert opinion lacks adequate foundation when it "does not include the facts and/or data upon which the expert relied in forming [the] opinion," *Steffen v. Target Stores*, 517 N.W.2d 579, 581 (Minn. 1994), does not "explain the basis for [the] opinion," *Welton v. Fireside Foster Inn*, 426 N.W.2d 883, 887 (Minn. 1988), or when the expert assumes facts that "are not supported by the evidence," *Schuette v. City of Hutchinson*, 843 N.W.2d 233, 237 (Minn.

(requiring an expert to have "the necessary schooling and training" plus "practical or occupational experience" with the subject matter to testify). Dr. Coetzee is an orthopedic surgeon sub-specializing in foot and ankle surgery who performed Bierbach's surgery and has directed his course of pain management treatment for over 15 years. Although the full extent of Dr. Coetzee's training or experience with medical cannabis is unclear, Dr. Coetzee has observed Bierbach's response to the use of medical cannabis and has knowledge of medical literature relating to medical cannabis use. Consequently, the compensation judge did not abuse his discretion in admitting Dr. Coetzee's letters.

2014). *See Hudson v. Trillium Staffing*, 896 N.W.2d 536, 540 (Minn. 2017) (concluding that an expert opinion lacked foundation on each of these grounds). "An expert need not be provided with every possible fact, but must have enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Gianotti v. Indep. Sch. Dist. 152*, 889 N.W.2d 796, 802 (Minn. 2017). Whether an expert's opinion has adequate foundation is a determination for the compensation judge, subject to review for an abuse of discretion. *Mattick*, 898 N.W.2d at 621.

Based on my review of the record, I conclude that Dr. Coetzee had an adequate factual basis for opining that medical cannabis is reasonable and necessary to treat Bierbach's pain. The record amply supports Dr. Coetzee's opinion that traditional pain management treatments are not adequate for Bierbach's pain. The record establishes that Bierbach tried physical therapy, an ankle brace, an ankle boot, compression icing, cortisone injections, and anti-inflammatory drugs with decreasing effectiveness over 15 years. And because of Bierbach's relatively young age, ankle-replacement surgery is not advisable at this time.

Dr. Coetzee's opinion that medical cannabis is substantially better for chronic pain than opioids is also amply supported. Dr. Coetzee cited two articles indicating that medical cannabis is currently being used to replace opioids for pain management,[6] and even

[6] Although the medical articles cited by Dr. Coetzee are not in the record, workers' compensation proceedings are not bound by the usual rules of evidence, pleading, or procedure. Minn. Stat. § 176.411, subd. 1 (2020). Even if they were, Minnesota Rule of Evidence 703(a) permits an expert to rely on inadmissible facts or data if commonly relied on by experts in the field.

Dr. Meyer agreed that medical cannabis is safer than opioids. Moreover, Dr. Coetzee observed Bierbach's positive response to the use of medical cannabis between April 2018 and February 2019. *See* Minn. Stat. § 152.28, subd. 1(a)(5) (requiring a certifying provider to "agree to continue treatment of the patient's qualifying medical condition and report medical findings to the commissioner [of health]").

The attempts by Digger's Polaris to undermine Dr. Coetzee's opinion are not persuasive. Digger's Polaris is correct that Dr. Coetzee mistakenly reasoned that medical cannabis would help Bierbach wean off opioids, when in fact he had not used opioids for years. But Dr. Coetzee gave additional reasons why medical cannabis is reasonable and necessary, which are independently sufficient to sustain his opinion. Specifically, he explained that Bierbach needs more than anti-inflammatory medications and that, while helpful, cortisone injections do not provide adequate relief. He further explained that apart from medical cannabis, Bierbach would have to resort to long-term use of opioids, which Dr. Meyer agreed is more dangerous than use of medical cannabis. Consequently, Dr. Coetzee's opinion is adequately supported.

In addition, although the evidence does not show that Dr. Coetzee knew of Bierbach's history of chemical substance use, an expert "need not be provided with every possible fact," but need only "have enough facts to form a reasonable opinion that is not based on speculation or conjecture." *Gianotti*, 889 N.W.2d at 802. I conclude that this standard is met here, particularly given that the record does not show any current or recent chemical substance misuse.

Because Dr. Coetzee's opinion was admitted without objection and had an adequate factual basis, the compensation judge acted within his discretion when he weighed the conflicting opinions of Dr. Coetzee and Dr. Meyer and found that Dr. Coetzee's opinion was "more persuasive and in line" with the medical evidence in the case. *See Ruether*, 455 N.W.2d at 478 ("[I]t is axiomatic that a conflict in the opinions of expert medical witnesses is to be resolved by the trier of fact."). I therefore conclude that the compensation judge did not abuse his discretion in relying on the opinion of Dr. Coetzee instead of the opinion of Dr. Meyer.

III.

Having addressed the dispute over Dr. Coetzee's opinion, I now consider whether substantial evidence supports the compensation judge's finding that medical cannabis is reasonable and necessary to treat Bierbach's intractable pain. Although the primary question is an evidentiary one, the parties also raise questions about the interpretation of various statutes and administrative rules.

Digger's Polaris makes many arguments why medical cannabis cannot be reasonable and necessary to treat Bierbach's pain. Because possession of medical cannabis is illegal under federal law, Digger's Polaris contends that medical cannabis is per se unreasonable and unnecessary under the workers' compensation laws. Even if it is not per se unreasonable and unnecessary, Digger's Polaris maintains, medical cannabis is not "medically necessary treatment" under the administrative rules because there is no prescribing "provider" and because medical cannabis is not "consistent with the current accepted standards of practice." *See* Minn. R. 5221.6040, subp. 10 (2019), Minn. R.

5221.6050, subp. 1(A) (2019). It further argues that the compensation judge and WCCA relied on a mistaken understanding of the definition of "illegal substance" in the workers' compensation administrative rules. *See* Minn. R. 5221.6040, subp. 7a (2019). Finally, Digger's Polaris asserts that the record does not support a finding that medical cannabis is reasonable and necessary for Bierbach's pain.

Bierbach responds that substantial evidence supports the compensation judge's finding. He points to his treatment history, his own testimony, and the opinion of Dr. Coetzee. Bierbach further argues that the accepted standards of practice for using medical cannabis are the requirements established by the Legislature for a patient to participate in the state's medical cannabis research program. I address each of the parties' arguments in turn.

Construing a statute or administrative rule is a question of law subject to de novo review. *Ross v. N. States Power Co.*, 442 N.W.2d 296, 297 (Minn. 1989) (statute); *Johnson v. Darchuks Fabrication, Inc.*, 926 N.W.2d 414, 419 (Minn. 2019) (administrative rule). We first determine whether the language of the statute or rule is ambiguous. *Johnson*, 926 N.W.2d at 419. If the language is subject to more than one reasonable interpretation, the statute or rule is ambiguous. *Id.* But if the language is unambiguous, we construe it according to its plain meaning in light of the statute or rule as a whole. *Id.*

We "will not disturb findings affirmed by the WCCA unless the findings are manifestly contrary to the evidence or unless the evidence clearly requires reasonable minds to adopt a contrary conclusion." *Pelowski v. K-Mart Corp.*, 627 N.W.2d 89, 92 (Minn. 2001). Rather, when a compensation judge's findings are supported by substantial

evidence, we affirm a decision of the WCCA upholding those findings. *See Oseland by Oseland v. Crow Wing Cnty.*, 928 N.W.2d 744, 756 (Minn. 2019).

A.

I turn first to the argument by Digger's Polaris that medical cannabis is per se unreasonable and unnecessary.[7] The Workers' Compensation Act requires employers to furnish "any medical . . . treatment . . . as may *reasonably be required* . . . to . . . relieve from the effects of the injury." Minn. Stat. § 176.135, subd. 1(a) (emphasis added). Under federal law, cannabis is classified as a Schedule I controlled substance, 21 U.S.C. § 812(c), and therefore its possession is illegal, 21 U.S.C. § 844(a). Accordingly, the question is whether medical cannabis can be a reasonable and necessary treatment within the scope of section 176.135, subdivision 1, when its possession is illegal under federal law. This question of statutory interpretation is reviewed de novo. *Ross*, 442 N.W.2d at 297.

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[7] As a preliminary matter, Bierbach argues that the compensation judge and the WCCA did not have jurisdiction to determine whether medical cannabis is per se unreasonable based on its status as a Schedule I drug, because determining whether cannabis is illegal under federal law requires interpreting federal law. The compensation judge held that he did not have jurisdiction, but the WCCA disagreed. The court does not reach this question because it resolved the case on other grounds.

The WCCA is correct. The determination of the compensability of a particular medical treatment for a work-related injury is squarely within the jurisdiction of the WCCA. *See* Minn. Stat. § 175A.01, subd. 5 (2020) (conferring jurisdiction over "all questions of law and fact arising under the workers' compensation laws of the state"). Although the WCCA may not interpret and apply foreign law, *see, e.g.*, *Martin v. Morrison Trucking, Inc.*, 803 N.W.2d 365, 369 (Minn. 2011), it may determine certain questions ancillary to a compensation claim, *see, e.g.*, *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 152 (Minn. 2010), or look to foreign law for instruction in limited circumstances, *see, e.g.*, *Sundby v. City of St. Peter*, 693 N.W.2d 206, 215–16 (Minn. 2005). I conclude that the compensation judge and the WCCA were permitted to look to federal law to determine the narrow question of the legality of possessing medical cannabis to resolve a claim of compensability raised by Bierbach.

Digger's Polaris asserts that medical cannabis is per se *unreasonable* because Bierbach cannot knowingly possess cannabis without committing a federal crime and because it cannot reimburse him for his purchase without aiding, abetting, and conspiring to further that crime. This argument is incorrect. For the reasons explained in my concurring and dissenting opinion in *Musta*, No. A20-1551, slip op. at C/D-1, Digger's Polaris cannot be liable for aiding and abetting. Moreover, it cannot be liable for conspiring to further a possession offense because it shared no goal of helping Bierbach possess cannabis. *See Hager v. M&K Constr.*, 247 A.3d 864, 889 (N.J. 2021) (holding that an employer would not be liable for conspiracy by reimbursing an employee for the purchase of medical cannabis under court order because there would be no "unity of purpose").

Next, Digger's Polaris contends that medical cannabis is per se *unnecessary* because Congress has found that Schedule I drugs—and therefore cannabis—have "a high potential for abuse," have "no currently accepted medical use in treatment in the United States," and lack "accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1).

This argument is flawed because Minnesota workers' compensation law does not entrust the finding of medical necessity to Congress. To the contrary, state law entrusts a state official, the Commissioner of Labor and Industry, with establishing guidelines for determining whether a treatment is reasonable and necessary. *See* Minn. Stat. § 176.83, subd. 5(a) (2020) (requiring the commissioner to adopt rules for determining when treatment is "excessive, unnecessary, or inappropriate under section 176.135, subdivision 1"). Those determinations, in turn, must be "based upon accepted medical standards." *Id.*

Generally, whether a treatment is medically necessary depends on its consistency with an applicable treatment parameter. *See* Minn. R. 5221.6040, subp. 10 (defining "[m]edically necessary treatment" as those health services that are "consistent with any applicable treatment parameter"). The treatment parameters are rules that establish criteria for determining when a treatment is advisable for a particular condition, consistent with accepted medical standards. *See Johnson*, 926 N.W.2d at 418 (explaining that the treatment parameters are standards that set out reasonable medical treatment based on certain accepted medical and rehabilitation standards that are intended to control the costs for compensable medical treatment). For example, parameters govern the use of medications, *see* Minn. R. 5221.6105 (2019), long-term opioid use, Minn. R. 5221.6110 (2019), and chronic pain management, Minn. R. 5221.6600 (2019). The parameters also establish various limitations, such as how long a treatment may continue, *see, e.g.*, Minn. R. 5221.6600, subp. 2(B)(3) (permitting use of a health club for 13 weeks), or in what order treatment must progress, *see, e.g.*, Minn. R. 5221.6105, subp. 2(B) (requiring a generic ibuprofen or naproxen to be used before other drugs of the same type). When a specific treatment parameter does not apply, as is the case here, a treatment may be medically necessary if it is "consistent with the current accepted standards of practice within the scope of the provider's licensure or certification." Minn. R. 5221.6040, subp. 10.

Certainly, the congressional finding that there is "no currently accepted medical use in treatment in the United States" is relevant *evidence* of the absence of an accepted medical standard. But it need not be determinative of the "current standards of practice" if other evidence suggests otherwise. Accordingly, I conclude that medical cannabis is not per se

unreasonable or unnecessary medical treatment, and instead requires a case-by-case determination.[8]

B.

Next, I turn to the argument by Digger's Polaris that medical cannabis is not medically necessary treatment under the workers' compensation administrative rules because there is no prescribing "provider" and because the use of medical cannabis to treat a work-related injury is not consistent with accepted standards of practice.

1.

Because no specific treatment parameter governs the use of medical cannabis, *see* Minn. R. 5221.6050–.6600 (2019), medical cannabis is medically necessary, and therefore

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[8] Because I resolve this question under a plain-language analysis, I need not address additional arguments by Digger's Polaris that are based on the absurdity and constitutional-avoidance canons. As it admits, those canons generally apply only to ambiguous statutes. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 651 (Minn. 2012) (absurdity canon); *State v. Altepeter*, 946 N.W.2d 871, 877 (Minn. 2020) (constitutional-avoidance canon).

Similarly, I need not address an argument of Digger's Polaris based on amendments to the THC Act because the argument is premised on the canon of *in pari materia*, which applies only to ambiguous statutes. *State v. Thonesavanh*, 904 N.W.2d 432, 437 (Minn. 2017) (explaining that, under the canon of *in pari materia*, two statutes with common purposes and subject matter may be construed together to resolve an ambiguity).

I agree with Digger's Polaris that the compensation judge and the WCCA improperly relied on the definition of "illegal substance" in the administrative rules to determine that medical cannabis is compensable. *See* Minn. R. 5221.6040, subp. 7a (defining "illegal substance" by excluding the use of medical cannabis by patients in the medical cannabis research program). As acknowledged by the Department of Labor & Industry, which promulgated the administrative rules that govern medical services for workers' compensation claimants, the definition of illegal substance and the related rules "do not address whether treatment with medical cannabis is compensable under workers' compensation law." *Compact*, Minn. Dep't Lab. & Ind., Aug. 2015, at 2. Nevertheless, I reject the arguments by Digger's Polaris that medical cannabis is per se unreasonable and unnecessary for the reasons already explained.

compensable, if it is "for the diagnosis or cure and significant relief of a condition consistent with the *current accepted standards of practice* within the scope of the *provider's* license or certification." Minn. R. 5221.6040, subp. 10 (emphasis added).

The question here is what role the "provider" must play in relation to the "treatment." According to Digger's Polaris, the provider must "order" the treatment. Because Dr. Coetzee did not order or prescribe medical cannabis for Bierbach—he merely certified that Bierbach has a qualifying condition and opined that Bierbach was a good candidate for the state's medical cannabis program—Digger's Polaris maintains that the provider requirement is not met.

I disagree. Although it is apparent that a provider must have some role to play in the employee's acquiring of the treatment, limiting a provider's role to "ordering" a treatment is not reasonable in light of the meanings of "treatment" and "provider." "Treatment" is defined in the rules as "any procedure, operation, consultation, supply, product, or other thing *performed or provided* for the purpose of curing or relieving an injured worker from the effects of a compensable injury under [section 176.135, subdivision 1]." Minn. R. 5221.0100 subp. 15 (emphasis added). And "provider" means "a physician . . . or any other person who *furnishes* a medical or health service to an employee under this chapter." Minn. Stat. § 176.011, subd. 12a (emphasis added); *see* Minn. R. 5221.0100, subp. 12 (incorporating the definition of "provider" from section 176.011). These definitions show that, at a minimum, a provider may "furnish," "perform," or "provide" a treatment. Moreover, other rules use an even greater variety of words to describe the relationship between a provider and treatments. *See, e.g.*, Minn. R.

5221.6050, subps. 1(B) ("ordered"), 2 ("provided"), 3 ("offering or performing"), 4 ("prescribed"), 5 ("offer"), 6(B)(3) ("use"), 8(C) ("delivered"), 9 ("provide").

Given the variety of ways that the rules describe the relationship between a provider and the treatment at issue, the role of a provider in rule 5221.6040, subpart 10, cannot be read narrowly. *See Johnson*, 926 N.W.2d at 420 (adopting an interpretation that made sense "in light of the other language" in the rule). At the very least, a provider must include one who "provides" a treatment, which means "to supply or make [that treatment] available." *Provide*, *Merriam Webster's Collegiate Dictionary* 940 (10th ed. 1996). Unquestionably, Dr. Coetzee is a healthcare provider because he is an experienced surgeon. Although Dr. Coetzee did not prescribe Bierbach's medical cannabis, he certified that Bierbach has a qualifying condition, which is a prerequisite to participating in the state's medical cannabis program. Accordingly, Dr. Coetzee's certification made medical cannabis available to Bierbach. And similar to a prescription that may be valid for only a fixed period of time, Bierbach is required to seek re-certification from a doctor annually. Minn. Stat. § 152.27, subd. 3(b). I therefore conclude that the "provider" requirement of the definition is satisfied.

2.

Digger's Polaris next argues that medical cannabis is not a medically necessary treatment because no amount of medical cannabis is "consistent with the current accepted standards of practice." It argues that because doctors cannot lawfully prescribe medical cannabis, no accepted standards of practice could have developed. For the same reason, Digger's Polaris insists that any amount of medical cannabis is excessive. *See* Minn. Stat.

§ 176.136, subd. 2 (permitting an employer or insurer to refuse to pay an "excessive" fee, including a charge for a service that is "provided at a level, duration, or frequency that is excessive, based upon accepted medical standards").

Bierbach responds that the accepted standards of practice are the requirements for participating in the state's medical cannabis program. By finding that medical cannabis was reasonable and necessary for him, the compensation judge impliedly found that using medical cannabis to manage intractable pain is consistent with accepted standards of practice. Accordingly, I must determine whether this implied finding is "manifestly contrary to the evidence." *Pelowski*, 627 N.W.2d at 92.

The requirements for participating in the state's medical cannabis program do not reveal the accepted standards of medical practice because the Legislature, not medical professionals, established a *research* program. Nevertheless, other evidence in the record adequately supports the compensation judge's implied finding that treating intractable pain with medical cannabis is consistent with accepted medical standards.

The compensation judge's finding is supported by various parts of each expert's opinion. Dr. Coetzee and Dr. Meyer agreed that medical professionals are reasonably certain that medical cannabis is safer than opioids for long-term use to treat chronic pain. Although Dr. Meyer opined that the objective medical data in support of medical cannabis is "controversial" and does not himself support the use of medical cannabis for pain management, he acknowledged the significant anecdotal evidence of the effectiveness of medical cannabis for that purpose. In addition, Dr. Coetzee opined with "a reasonable degree of medical certainty" that medical cannabis is an "appropriate medication" for

Bierbach's intractable pain, relying on two articles that he interprets as showing that medical cannabis is currently replacing opioids as a safer treatment alternative. Dr. Coetzee's position is seemingly corroborated by the author of one of those articles, who, according to Dr. Coetzee, strongly encouraged patients to talk with their doctors about using medical cannabis instead of opioids for managing long-term pain.

Digger's Polaris and amici curiae cite to publicly available studies or reports concerning the use of medical cannabis to treat pain.[9] For example, Digger's Polaris points to findings by Congress and the Drug Enforcement Agency that use of cannabis to treat medical conditions lacks acceptance in the United States. *See* 21 U.S.C. § 812(b)(1)(B); Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53767 (Aug. 12, 2016). Digger's Polaris also cites to reports that conclude the clinical evidence supporting the use of medical cannabis to treat pain is weak. *See, e.g.*, Mary Butler, Ph.D., M.B.A., et al. Office of Medical Cannabis, Minn. Dep't of Health, *Medical Cannabis for Non-Cancer Pain: A Systematic Review* 24 (undated) (concluding that the medical literature studying the use of medical cannabis to treat chronic non-cancer pain "is sparse, patchy, of low quality, and leads to generally insufficient evidence for most patient populations and treatments"). On the other hand, amicus curiae Minnesota Association for

[9] We may take judicial notice of government websites and commissioned studies even though not part of the record below. *See State v. Jobe*, 486 N.W.2d 407, 420 n.3 (Minn. 1992) (taking judicial notice of a report issued by the Committee on DNA Technology in Forensic Science of the National Research Council); *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 793 (8th Cir. 2016) (recognizing that a court may take judicial notice of government websites). Because Bierbach did not object to the request of Digger's Polaris for judicial notice, I consider the government sources cited by Digger's Polaris and amici curiae.

Justice cites to a 2018 study stating that medical cannabis has been an effective alternative to opioids for pain relief for patients in the state's medical cannabis research program. Press Release, Minn. Dep't of Health, *Medical Cannabis Study Shows Significant Number of Patients Saw Pain Reduction of 30 Percent or More*, (Mar. 1, 2018).

Notably, Dr. Coetzee's opinion and the study cited by amicus curiae Minnesota Association for Justice in support of the use of medical cannabis to treat pain are more recent than the report cited by Digger's Polaris to assert that the data is sparse and of low quality. Although the evidence is mixed, I conclude that substantial evidence supports a finding that using medical cannabis for intractable pain relief as an alternative to opioids is consistent with accepted standards of practice. Accordingly, the compensation judge's finding is not manifestly contrary to the evidence and deserves deference. *Oseland*, 928 N.W.2d at 755.

C.

I turn now to the question of whether medical cannabis is reasonable and necessary to treat Bierbach's pain under the facts of this case. Digger's Polaris challenges the evidentiary basis for the compensation judge's finding that medical cannabis is reasonable and necessary to treat Bierbach's intractable pain. Bierbach responds that the record contains ample evidence to support the compensation judge's finding, including Bierbach's treatment records, his testimony, and Dr. Coetzee's opinion. Again, I must defer to the findings of the compensation judge unless they are manifestly contrary to the evidence. *Pelowski*, 627 N.W.2d at 92.

The record contains substantial evidence that medical cannabis is appropriate to treat Bierbach's pain. Digger's Polaris does not dispute that he has intractable pain and that traditional treatments, including icing, ankle injections, and over-the-counter anti-inflammatories are no longer adequate for managing the pain from his degenerative ankle condition. Digger's Polaris also does not deny that an ankle-replacement surgery is inappropriate for Bierbach at this time because of his age. In addition, Dr. Coetzee opined with a reasonable degree of certainty that medical cannabis is appropriate to treat Bierbach's pain, and Dr. Meyer agreed that cannabis is safer than opioids for long-term use. Further, not only does the record contain evidence that medical cannabis is necessary, it also shows that medical cannabis is helping Bierbach live a full life. Dr. Coetzee opined that he responded well to medical cannabis, and the compensation judge was persuaded by Bierbach's testimony that using medical cannabis reduces his pain and allows him to continue in a full-time job that requires him to be on his feet for many hours. This evidence is adequate to support the finding of the compensation judge.

Digger's Polaris contends that Bierbach's use is not reasonable because it is not limited by any external constraint. It points out that his cannabis dosage more than doubled in his first year of use and that he testified he would buy even more if he could afford it.

This concern is understandable but overstated. That Bierbach's use doubled during the first year sounds extreme, but it likely reflects that he eased into the new treatment and increased his dosage when he found it effective and could afford more. In addition, the requirement that a doctor must recertify his participation in the program every year places constraints on his usage.

In any event, I need not speculate about Bierbach's future use. The compensation judge's order does not require Digger's Polaris to give him a blank check. The order requires only that it reimburse him for purchases that he had already made. Whether Digger's Polaris has a statutory obligation to reimburse Bierbach for purchases made after the date of the order will depend on the facts and circumstances that exist at the time of those purchases, which may change as his condition changes and as research develops. *See* Minn. Stat. § 152.25, subd. 2 (requiring the commissioner of health to "review and publicly report the existing medical and scientific literature regarding the range of recommended dosages for each qualifying condition" and to update the information annually). At any time, Digger's Polaris is free to withhold payment for treatment that becomes unreasonable, unnecessary, or excessive. *See* Minn. Stat. § 176.136, subd. 2. For present purposes, the compensation judge determined that Bierbach's use was reasonable and necessary and should be reimbursed, and I see no clear error in the judge's finding.

III.

In sum, I would hold that the order of the compensation judge for Digger's Polaris to reimburse Bierbach for his purchases of medical cannabis is supported by substantial evidence and is not preempted. Accordingly, I would affirm the decision of the Workers' Compensation Court of Appeals upholding that order. Because the court's decision overextends the preemptive reach of federal law and denies Bierbach reimbursement for the best means of managing his painful, work-related injury while staying meaningfully employed, I respectfully dissent.