

Legal Lines

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PRESIDENT'S MESSAGE

By Robert S. White

It's late May and we've just observed Memorial Day. In addition to paying tribute to our fallen veterans, Memorial Day is typically the unofficial start to Summer. But instead of looking forward to our vacations, and a day at the beach, we are now going into our third month of living with COVID-19. As I read past presidents' messages for this time of year, there is universally some commentary about presidential terms drawing to a close, about the efforts of so many people to support the Worcester County Bar Association, and of course about the upcoming annual meeting. My term has turned into something far from typical. There have been profound changes in our society.

We have been through a lot in the last few months, but recently, there have been signs of hope. Notwithstanding the terrible and heartbreaking losses from the coronavirus, the Commonwealth of Massachusetts has been successful in flattening the curve and getting the number of COVID-19 infections to drop consistently. The numbers and trends have improved so much that the Commonwealth has presented a four phase plan to reopen Massachusetts. We are just beginning Phase I and state-wide policies have been implemented that are pertinent to our law office operations.

On Friday, May 22, 2020, the WCBA held a Zoom webinar titled, "A conversation About Reopening your Law Office." Jeffrey Greenberg, Esq. and James Vevone, Esq., of Seder & Chandler, and Michael Badger, Esq., of Badger Legal Group gave an excellent presentation on general compliance with the new state-wide policies, best employment practices, and what you can expect from your landlord. Excellent course material was submitted and is available on the Worcester County Bar Association website. We now have a path to reopen and re-populate our law offices and to work our way back to the new "normal."

There is also work being done in the courts to get dockets moving again, and not too soon. In a recent letter to the bar, the Chief Justices of the SJC, Appeals Court and Trial Court noted that "we also recognize that, if one had asked in February of this year whether we would be able in two months to transform our court system from one that almost invariably required in-person appearance to one that was almost invariably virtual, few would have imagined that it was possible or that we would be as far along as we are." And to support that notion, the courts are starting to implement policies to allow non-emergency matters to be heard so that the dockets, and our cases, can start moving again.

Getting our cases moving again is critical to putting many lawyers back in business. Recognizing this, members of our bar have stepped up and have requested that we have a seat at the table for discussions in that reopening process. As always, our judges have been supportive of this idea and there will be a Zoom meeting this week to discuss what we feel would be productive ways to streamline the reopening process. Of course we make this effort with the respect owed to the people who have been operating the courts under extraordinary conditions.

There has also been much positive that we have accomplished. Sandy DiLuzio reports that more people are using the website than ever, which is preparing them for our new website. We have been able to accomplish our goal of virtual webinars with great success. And despite not being able to hold our Law Day event, we were able to hold our essay contest. Congratulations to this year's winner, Olivia Muller-Juez from the Bromfield School in Harvard!

We were also able to continue an annual tradition where local high school students watch a Law Day sitting of the Appeals Court as part of their curriculum. This year, we were asked by the Honorable James Lemire to reach out to North High School in Worcester to "attend" a virtual sitting of the Appeals Court and were able to coordinate that with the school. We received a heartfelt thank you from the teachers who ran the program for North High. Additionally, Judge Lemire and the entire panel expressed their appreciation. What's more, this program has been promoted to be available statewide, and there is talk of implementing similar programs nationwide. As Judge Lemire stated, "Once again Worcester leads the way for innovative use of technology in the Massachusetts justice system."

So now we come to our annual meeting. Our bylaws require that it be held in June of each year. The WCBA recently sent a notice to its members that the meeting will be held virtually, at 5:00pm on June 9, 2020. A link will be posted soon. While the format will be very different (and we will not be enjoying each other's company in person or enjoy a delicious prime rib dinner) the agenda will be the same. Most importantly, we will be voting on our President-elect and our Secretary/Treasurer. I will also give my remarks about the year that has been both frustrating and rewarding, and I will present my President's Awards. We will also get to hear from Terry McLaughlin about what he has in store for us in his coming term. The meeting will likely be shorter than it has in the past but I encourage you to please support us by attending.

What Do Medical Marijuana, the Consulate General of Canada and Opioid Addiction Have in Common?

Submitted by Attorney James E. Ramsey,
On behalf of the Worker's Compensation Section

All three of those things were central to issues that were litigated recently before the Massachusetts Department of Industrial Accidents ("DIA") and each may make appellate law in Massachusetts and beyond.

If you haven't practiced before the DIA recently, you're likely unaware of some cutting edge social and legal issues. The DIA is charged with litigating all work-related injuries in Massachusetts. Each year, we litigate more than 12,500¹ cases at the DIA. There are three stages of the litigation: a conciliation, a conference and then a hearing (you may think of the hearing like a bench trial). Resolution of disputes at each stage winnows down the number of cases. For example, approximately one half of the 12,500 cases are resolved at the conciliation stage. In 2019 several thousand scheduled hearings resulted in 228 decisions published by the Administrative Judges. If appealed, a case goes to the Reviewing Board and a panel of three Administrative Law Judges will then render a Reviewing Board decision. Further appeal would be to the Court of Appeals, and the Supreme Judicial Court.

So how does Canada fit into the mix? In *Cynthia L. Merlini vs. Consulate General of Canada vs. Workers' Compensation Trust Fund*, Ms. Merlini, a Massachusetts resident, was "locally engaged" to be an administrative assistant to the Consulate General of Canada in Boston. Ms. Merlini fell while at work injuring her back and her knee. She received Federal Workers' compensation benefits pursuant to Canadian law. When those benefits ended, she filed a claim for additional workers' compensation benefits under M.G.L Ch. 152. The Administrative Judge concluded that the Consulate General was *uninsured* for workers' compensation in MA and awarded benefits to the Employee from the Trust Fund.² On Appeal, the Trust Fund argued that the Administrative Judge had overlooked elements that are a prerequisite to such an award of benefits, to wit, 1) the employer must be *uninsured* (and obligated to have workers' compensation insurance in MA), 2) the employer must be subject to the personal jurisdiction of the Commonwealth and 3) the employee must not be entitled to benefits in any other jurisdiction. The Reviewing Board recommitted the case to the Administrative Judge to make more specific findings on the three mandatory elements. On recommitment, the Administrative Judge denied her claim. She appealed this decision to the Federal District Court. The U.S. District Court granted Canada's Motion To Dismiss. On June 10, 2019, the US Court of Appeals for the First Circuit reversed and remanded in a 63-page decision.³

Medical marijuana has been in the spotlight nationally and Massachusetts is no different. Locally we have had several cases with differing results. However, the right to medical marijuana provided by a worker's compensation insurer was squarely addressed in *Daniel Wright's* case⁴. In that case, now on appeal before the MA Supreme Judicial Court, the

¹ Workers' Compensation Advisory Council Fiscal Year Annual Report p. 36 (12,659 cases filed)

² The MA Trust Fund is legally charged to provide benefits for uninsured employers within MA.

³ I have been informed the case may ultimately be headed to the United States Supreme Court.

⁴ Daniel Wright v. Pioneer Valley vs. Central Mutual Ins. Co.

employee asked the workers' compensation insurer to reimburse him — or to provide directly to him — medical marijuana for his work-related injury. Acknowledging the conflict between federal and state law, the Administrative Judge denied the claim based on the Supremacy Clause of Article VI, clause 2 of the U.S. Constitution.⁵ The employee appealed and the Reviewing Board affirmed.⁶ After the Employee appealed to the MA Appeals Court, the Supreme Judicial Court of Massachusetts took direct appellate review. Oral arguments are pending. The novel issue in this case involves whether the local Massachusetts law authorizing the possession and use of medical marijuana trumps federal law, which still holds that all marijuana, medical or otherwise, is a banned Schedule 1 drug. If the workers' insurer complied with an order to provide marijuana (or reimburse the employee for it) the insurer would commit a Federal crime. This issue has been litigated in several other states with varying decisions and the issue may be more than ripe for appellate review at the United States Supreme Court.

The final case involves chronic use of opioid medication in treatment of a work-related injury. The issue presented to the Administrative Judge and ultimately the Reviewing Board was whether an employee can be forced to stop using opioids even though her treating physician continued to prescribe them and did not approve of a weaning program. The answer is Yes, an employee can be so compelled if the §11A impartial examiner⁷ believes that weaning is in her best interests. In *Shelly Chapin v. Gil Montague Regional School District v. Mass. Education and Government SIG*⁸, the employee refused to titrate on her own and the Administrative Judge adopted the opinion of the impartial physician indicating that the employee must wean for her own health and safety over a period of 16 months. The Reviewing Board adopted the weaning/tapering schedule found reasonable by the §11A impartial examiner, thus forcing the employee to reduce or allowing the insurer to cease payment for medication above the tapered level.

These three cases have in common complex, sometimes novel legal issues that are litigated on a daily basis at the Department of Industrial Accidents in Massachusetts. I am proud to say that we have a nationally respected system of workers' compensation, highly skilled litigants both for the employee and the workers' compensation insurer, and a seasoned and skilled judiciary. Although tempting for the average practitioner, it is this author's opinion that workers' compensation has become truly a specialized area of law and that most attorneys being faced with a workers' compensation controversy would do well by her or his client to contact a colleague who practices in this field extensively.

Written by James E. Ramsey, Esq. Ramsey Law Offices, Workers' Compensation Attorney, 25 years' experience, Member of the Worcester Bar Association Workers' Compensation Committee⁹ and Honorable Paul F. Benoit, Department of Industrial Accidents Administrative Judge as contributing editor.

⁵ Hearing decision Judge Steven Rose dated 10/12/2017, DIA NO. 04387-15.

⁶ Reviewing Board decision dated 2/14/2019.

⁷ M.G.L. Ch. 152 §11A provides for an impartial physician selected by the administrative judge to avoid the former system of "dueling" doctors. The impartial opinion has prima facie value.

⁸ Reviewing Board decision dated 1/21/20 DIA NO. 031999-08.

⁹ The WCBA WC Committee is co-chaired by Christine Narcisse, Esq. and Jane Eden, Esq. and meet monthly.