No. _____

IN THE
# Supreme Court of the United States

SUSAN K. MUSTA,
*Petitioner*,

v.

MENDOTA HEIGHTS DENTAL CENTER, AND HARTFORD INSURANCE GROUP,
*Respondents*.

On Petition for a Writ of Certiorari
to the Minnesota Supreme Court

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Does the Controlled Substances Act preempt an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury?

## STATEMENT OF RELATED CASES

- Minnesota Supreme Court: *Musta v. Mendota Heights Dental Center*, No. A20-1551.
- Minnesota Workers' Compensation Court of Appeals: *Musta v. Mendota Heights Dental Center*, No. WC19-6330.
- Minnesota Office of Administrative Hearings: *Musta v. Mendota Heights Dental Center*, No. 7750318-MR-2327

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## PETITION FOR WRIT OF CERTIORARI

Susan Musta petitions for a writ of certiorari to review the judgment of the Minnesota Supreme Court.

## OPINIONS BELOW

The decision of the Minnesota Supreme Court (Pet. App. 1a-46a) is not yet reported. The decision of the Workers' Compensation Court of Appeals (Pet. App. 47a-52a) is unreported. The decisions of the workers' compensation judge (Pet. App. 53a-63a and Pet. App. 64a-100a) are unreported.

## JURISDICTION

The judgment of the Minnesota Supreme Court was entered on October 13, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.[1]

## STATUTORY AND CONSTITUTIONAL PROVISIONS

The Supremacy Clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges

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[1] Because this action presents a preemption challenge to an order issued under Minnesota's workers' compensation statute, it may be considered a Supremacy Clause challenge to that statute, thus implicating 28 U.S.C. § 2403(b). Hence, pursuant to S. Ct. R. 14.1(e)(v) and 29.4(c), petitioner notifies the Court that she is serving this petition on the Attorney General of Minnesota.

> in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Controlled Substances Act provides in relevant part: "It shall be unlawful for any person knowingly or intentionally to possess a controlled substance." 21 U.S.C. § 844(a). "Marihuana" is a controlled substance. 21 U.S.C. § 812(c) Schedule I (c)(10).

The Controlled Substances Act includes the following preemption provision: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together." 21 U.S.C. § 903.

Since 2014, Congress's appropriations bills have included riders barring the Justice Department from enforcing federal marijuana laws in connection with medical marijuana programs that comply with state law. The most recent such rider is as follows:

> None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky,

> Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, 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, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020).

Minnesota's workers' compensation law provides in relevant part: "The employer shall furnish any medical … treatment, including …. medicines." Minn. Stat. § 176.135, subd. 1 (2020).

## INTRODUCTION

Marijuana possession is illegal under the Controlled Substances Act. Forty-seven states, however, permit the use of marijuana or related substances for medical purposes.[2] Recognizing the widespread popularity and

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[2] Thirty-six states, including Minnesota, authorize the use of medical marijuana, while an additional eleven states permit the medical use of cannabidiol (which derives from cannabis plants) with low concentrations of THC (marijuana's primary

ubiquitous nature of medical marijuana, Congress has, since 2014, barred the Justice Department from expending funds to impede states from implementing their own medical marijuana laws. But the federal prohibition on marijuana remains on the books.

Every state operates a workers' compensation program. Workers' compensation programs generally require employers to reimburse employees for the cost of medical treatment arising from workplace injuries. Sometimes, employees who sustain workplace injuries are prescribed medical marijuana. When medical marijuana is legal under state law, those employees sometimes seek compensation for the cost of that medical marijuana under their state's workers' compensation law.

This case presents the question whether the Controlled Substances Act preempts an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana. The state supreme courts have divided 2 to 2 on that question. In the decision below, a divided Minnesota Supreme Court joined a divided Maine Supreme Judicial Court in finding such orders preempted. The New Hampshire Supreme Court and the New Jersey Supreme Court have reached the

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psychoactive compound). The exceptions are Idaho, Kansas, and Nebraska. *See* Nat'l Conf. of State Legislatures, *State Medical Marijuana Laws* (Aug. 23, 2021), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (cataloguing state medical marijuana laws).

opposite conclusion on the identical question. This Court should grant certiorari to resolve the conflict of authority on this important and recurring question of federal law.

More generally, courts have been bedeviled with difficult questions regarding how to apply state marijuana laws in the shadow of the federal prohibition on marijuana. As more and more states legalize and regulate medical and recreational marijuana, cases raising these questions will multiply. This Court's guidance on this important issue is urgently needed.

## STATEMENT

### A. Statutory background.

The Controlled Substances Act of 1970 establishes five schedules of controlled substances. Drugs on Schedule I have the following characteristics: "(A) The drug or other substance has a high potential for abuse[;] (B) The drug or other substance has no currently accepted medical use in treatment in the United States[;] (C) 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). When Congress enacted the Controlled Substances Act, it included "marihuana" in its initial list of Schedule I substances. "Marihuana" has remained on that list ever since. 21 U.S.C. § 812(c) Schedule I (c)(10).

When the Controlled Substances Act was enacted, no state permitted medical marijuana. The situation has dramatically changed. In 1996, California voters approved Proposition 215, a ballot initiative that authorized the use of medical marijuana with a

physician's recommendation for diseases such as cancer, AIDS, and glaucoma. In 1998, voters in Washington, Oregon, Alaska, and Nevada approved similar initiatives, and other states rapidly followed suit. Today, forty-seven states permit the use of marijuana or related substances for medical purposes.

Bowing to the reality that medical marijuana laws are popular and widespread, Congress has, since 2014, barred the Justice Department from impeding states from implementing their own medical marijuana programs. Specifically, in each of its appropriations bills since 2014, Congress has barred the Justice Department from expending funds to "prevent" states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *See, e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020).

Courts have ruled that these appropriations riders are judicially enforceable. If a criminal defendant charged under the Controlled Substances Act can show that he strictly complied with state medical marijuana laws, the government may not expend funds prosecuting him and the criminal proceeding must halt. *See, e.g.*, *United States v. Pisarski*, 965 F.3d 738 (9th Cir. 2020) (affirming stay of federal prosecution when defendant strictly complied with state medical marijuana law). Hence, as a practical matter, if a person complies with state medical marijuana laws, he cannot be prosecuted while the appropriations rider remains in force.

Minnesota, like most states, authorizes the use of

marijuana for medical purposes. In 2014, the Legislature enacted the Medical Cannabis Therapeutic Research Act (the "Cannabis Act"). *See* Minn. Stat. § 152.22 *et seq.* The Cannabis Act establishes a patient registry program administered by the Minnesota Department of Health that allows patients to possess marijuana for medical purposes.

To be eligible for medical marijuana, a patient must be diagnosed with a qualifying medical condition. These conditions include amyotrophic lateral sclerosis (ALS); cancer with certain severe symptoms; HIV/AIDS; and terminal illness with certain severe symptoms and life expectancy of less than one year. *See* Minn. Stat. § 152.22 subd. 14. Minnesota law also permits the Commissioner of Health to authorize medical marijuana for other health conditions. *Id.* In 2019, the Commissioner announced that chronic pain would be a qualifying diagnosis.[3]

A qualifying diagnosis is a necessary, but not sufficient, condition to obtain medical marijuana in Minnesota. Once the patient has been diagnosed, the patient must apply to the Minnesota Department of Health. *See* Minn. Stat. § 152.27 subd. 3(a). The Department then issues a registry verification to the patient, the patient's health care practitioner, and the manufacturer, which allows the manufacturer to supply

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[3] *See* Press Release, Minn. Dep't of Health, *Medical Cannabis Program to Add Chronic Pain, Macular Degeneration as Qualifying Conditions* (Dec. 2, 2019), https://www.health.state.mn.us/news/pressrel/2019/cannabis120219.html.

the marijuana to the patient subject to approval by a licensed pharmacist. *See* Minn. Stat. § 152.27, subd. 6; *id.* § 152.29, subd. 3. Only two manufacturers may be registered in the state. *See* Minn. Stat. § 152.25 subd. 1. The patient must re-apply annually, and the Department verifies every year that the patient has a qualifying diagnosis before authorizing the patient to obtain medical marijuana. Minn. Stat. § 152.27 subd. 3(b).

Like every state, Minnesota also operates a workers' compensation program. If an employee sustains an injury at work, "[t]he employer shall furnish any medical, psychological, chiropractic, podiatric, surgical and hospital treatment, including nursing, medicines, medical, chiropractic, podiatric, and surgical supplies . . . as may reasonably be required at the time of the injury and any time thereafter to cure and relieve from the effects of the injury." Minn. Stat. § 176.135, subd. 1 (2018).

### B. Factual and Procedural Background.

Petitioner Susan Musta was employed by respondent Mendota Heights Dental Center as a dental hygienist. Pet. App. 4a.[4] In 2003, she injured her cervical spine when she attempted to catch an elderly patient who was falling. Pet. App. 66a.

For the next 16 years, petitioner's spine injury caused her unrelenting pain, leading her to seek

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[4] The other respondent, Hartford Insurance Group, is Mendota Heights's insurer. Pet. App. 4a n.1.

frequent medical assistance. In 2003, petitioner underwent surgery to her spine, which proved unsuccessful in relieving her ongoing pain. Pet. App. 66a. In 2006, petitioner underwent a second surgery, which again did not relieve her symptoms. Pet. App. 66a-67a. At that time, petitioner was not taking any pain medications. Pet. App. 67a.

In 2007, after four years of unsuccessful treatments, petitioner was prescribed Vicodin. Pet. App. 67a. In 2008, she was prescribed fentanyl. Pet. App. 68a. In 2009, she became permanently and totally disabled, and her fentanyl dosage was increased. Pet. App. 69a, 77a.

These narcotics resulted in significant side effects, to the point where petitioner believed she was "no longer living." Pet. App. 70a. With difficulty, petitioner weaned herself off these highly addictive narcotics, and her pain again got worse. Pet. App. 70a-71a.

In 2011, petitioner received a prescription for Nucynta, a different type of opioid. Pet. App. 71a. Between 2012 and 2015, petitioner received medical injections in a fruitless attempt to relieve her chronic pain. Pet. App. 72a-73a. In 2016, petitioner received more Nucynta, but her pain got worse, reaching a pain level of 10/10. Pet. App. 74a-75a.

In 2017, an independent physician examined petitioner, and concluded that Nucynta was not providing any significant benefit to her, and that she had developed a physical dependency and tolerance to Nucynta. Pet. App. 77a. In 2018, a workers' compensation judge concluded that petitioner's

employer no longer had to pay for Nucynta, although the employer did have to pay for petitioner's injections and other medical treatments. Pet. App. 81a-82a. Petitioner did not appeal that ruling. Pet. App. 48a.

In 2019, the Minnesota Commissioner of Health approved medical marijuana for chronic pain. By 2019, petitioner had suffered from chronic pain for 16 years. In light of her long ordeal, petitioner applied for, and received approval for, medical marijuana. Pet. App. 48a. Initially, she paid for the marijuana out of pocket. Pet. App. 48a-49a.

Pursuant to Minnesota's workers' compensation law, petitioner then requested reimbursement from her employer (via its insurer) for the cost of the medical marijuana. Pet. App. 49a. The employer and insurer stipulated that the medical marijuana was reasonable, necessary, and causally related treatment for her work injury. *Id.* They also stipulated that petitioner had properly followed the procedures outlined in Minnesota's Cannabis Act. *Id.* They asserted only one defense to petitioner's request for compensation: that the Controlled Substances Act preempted an order requiring reimbursement for medical marijuana. Pet. App. 49a-50a.

The workers' compensation judge concluded that federal law did not prohibit reimbursement for medical marijuana, and hence "conclude[d] the employer/insurer are liable to reimburse the employee for costs associated with her use of medical cannabis."

Pet. App. 63a.[5] The employer and insurer appealed, and the Workers' Compensation Court of Appeals held that it lacked authority to resolve questions of federal law and otherwise affirmed the order of the workers' compensation judge. Pet. App. 51-52a.

A divided Minnesota Supreme Court reversed, concluding that the Controlled Substances Act preempted an order requiring reimbursement for medical marijuana.[6]

The court "acknowledge[d] that this issue represents a unique and challenging intersection between the law of preemption, federal aiding and abetting jurisprudence, the ongoing tension between the states and the federal government regarding cannabis regulation, and the objectives of the Minnesota workers' compensation system." Pet. App. 18a. But the court pointed out that it was "not the first state court of last resort to decide this specific issue." *Id.* It thus "beg[a]n with the decisions that have already addressed the preemptive effect of the CSA on orders for reimbursement of medical cannabis made

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[5] Initially, the workers' compensation judge declined to address this question of federal law and certified the question to the Minnesota Supreme Court, but the Minnesota Supreme Court declined the certified question and directed the workers' compensation judge to address the issue in the first instance. Pet. App. 6a.

[6] The Minnesota Supreme Court affirmed the determination that the Workers' Compensation Court of Appeals lacked authority to resolve questions of federal law. Pet. App. 8a-15a.

under state workers' compensation laws." *Id.*

As the court explained, in *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10 (Me. 2018), the Maine Supreme Judicial Court concluded that if the employer covered the cost of medical marijuana, it "would be liable under federal law on an aiding and abetting theory." Pet. App. 19a (citing *Bourgoin*, 187 A.3d at 20). Hence, in the Maine Supreme Judicial Court's view, the Controlled Substances Act preempted the application of state workers' compensation law. *Id.*

But the Minnesota Supreme Court recognized that "[t]wo state supreme courts have reached a different conclusion." Pet. App. 19a. First, in *Appeal of Panaggio*, -- A.3d --, 2021 WL 787021 (N.H. Mar. 2, 2021), "the New Hampshire Supreme Court rejected the conclusion reached by the Maine Supreme Judicial Court in *Bourgoin*." Pet. App. 19a. "The *Panaggio* court concluded instead that the employer lacked the requisite mens rea for an aiding and abetting offense under federal law because the employer's reimbursement is compelled by state law, rather than voluntary participation in an offense." Pet. App. 20a (citing *Panaggio*, 2021 WL 787021, at *6).

In *Hager v. M&K Construction*, 247 A.3d 864 (N.J. 2021), "[t]he New Jersey Supreme Court reached the same conclusion, though on different reasoning." Pet. App. 20a. The New Jersey Supreme Court held that Congress's bar on expending funds to interfere with state medical marijuana laws precluded a finding of federal preemption. Pet. App. 20a-21a.

The Minnesota Supreme Court aligned itself with

the Maine Supreme Judicial Court. It "disagree[d] with the *Hager* court" that the appropriations riders could defeat federal preemption. Pet. App. 22a.

The court concluded that reimbursement would violate the Controlled Substances Act, and that a state-law order requiring such reimbursement was therefore preempted. The court explained that a "state law is preempted by the CSA only when 'there is a positive conflict between' a provision of the CSA and that state law 'so that the two cannot consistently stand together.'" Pet. App. 16a (quoting 21 U.S.C. § 903). The court reasoned as follows: "Mendota Heights is fully knowledgeable about the circumstances advanced by its compelled reimbursement: Musta's possession of cannabis that is unlawful under the CSA. This reimbursement, which Mendota Heights must comply with as it is embedded in a judicial order, finances Musta's possession and effectively facilitates future possession. Thus, the order compels Mendota Heights' active participation in the possession that is criminalized by the CSA." Pet. App. 25a. The court rejected petitioner's argument that "Mendota Heights cannot aid and abet her possession because that possession has already occurred by the time Mendota Heights reimburses her." Pet. App. 27a. It reasoned that "Musta obtained and possessed medical cannabis, and will continue to do so in the future, based on the expectation that Mendota Heights's reimbursement obligation is established by state law." Pet. App. 28a (footnote omitted). The court concluded: "As it is impossible to comply with both state and federal law, the compensation court's order is preempted by the

CSA." Pet. App. 29a.

Justice Chutich dissented.[7] In her view, "the court's conclusion that a conflict of law exists rests on an unduly expansive view of aiding and abetting liability, with the result of denying injured employees reasonable and necessary medical treatment." Pet. App. 31a.

Justice Chutich concluded that an employer who complies with a reimbursement order would not be liable for aiding and abetting a Controlled Substances Act violation. She first explained that "a person cannot aid and abet a crime after it is complete." Pet. App. 32a. She explained that because Musta's purchase and possession of marijuana were already complete, "reimbursing Musta now would not further any element of an offense of possession." Pet. App. 32a-33a. She offered a detailed rebuttal to the majority's reasoning on this point. Pet. App. 33a-35a.

Justice Chutich also concluded that "Mendota Heights could not be liable under an aiding and abetting theory because it lacks the required intent." Pet. App. 35a. She elaborated: "Mendota Heights is not encouraging Musta to buy or possess cannabis; neither is it paying her for future purchases ahead of time. Musta's past decision to purchase cannabis, and any decision to purchase cannabis in the future, is her own." Pet. App. 38a.

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[7] Justice Chutich agreed with the majority's view that the Workers' Compensation Court of Appeals lacked jurisdiction to decide the question of federal law. Pet. App. 31a.

Justice Chutich noted that the "expansiveness of the court's interpretation of the intent standard for aiding and abetting is troubling." Pet. App. 40a. Under the majority's standard, she explained, an employer who pays an employee knowing that the salary would fund marijuana, or a bus or taxi driver who drops off a passenger near a dispensary, could be liable for aiding and abetting. Pet. App. 40a-41a. Justice Chutich would instead have reached a conclusion "[c]onsistent with the holdings of the New Jersey and New Hampshire Supreme Courts." Pet. App. 42a.

Justice Chutich also concluded that the doctrine of obstacle preemption did not apply. In her view, "the reimbursement of medical cannabis that is purchased and used within the strictures of the state's medical cannabis research program does not stand as an impermissible obstacle to the purposes of the Act." Pet. App. 44a. She pointed out that "the Act does not make it illegal for an insurer to reimburse an employee for a purchase of medical cannabis or purport to regulate insurance practices in any manner." *Id.* Further, "the compensation judge's order in no way prevents the federal government from using its own resources to enforce the Act." *Id.* Justice Chutich also noted that in light of the appropriations riders, "Congress has chosen to 'tolerate' the tension between state medical cannabis laws and the Controlled Substances Act." Pet. App. 45a.

## REASONS FOR GRANTING THE WRIT

### I. State Supreme Courts Are Divided on Whether the Controlled Substances Act Preempts Workers' Compensation Orders Requiring Reimbursement for the Cost of Medical Marijuana.

In the decision below, the Minnesota Supreme Court concluded that the Controlled Substances Act preempted a workers' compensation order requiring reimbursement for medical marijuana used to treat a workplace injury. As the court acknowledged, state supreme courts are divided 2 to 2 on that question.

The Minnesota Supreme Court's decision is consistent with *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10 (Me. 2018). In *Bourgoin*, the employee sustained a back injury while working at a paper mill, and used medical marijuana to manage his chronic pain. *Id.* at 13. The Maine Workers' Compensation Board directed his employer to reimburse him for the cost of medical marijuana. *Id.*

The Maine Supreme Judicial Court vacated the order, holding that it was preempted by the Controlled Substances Act. The court concluded that there was a "positive conflict" between federal and state law. *Id.* at 22 (citing 21 U.S.C. § 903).

Like the Minnesota Supreme Court, the Maine Supreme Judicial Court concluded that if the employer complied with the reimbursement order, it "would necessarily engage in conduct made criminal by the [Controlled Substances Act]" because the employer "would be aiding and abetting Bourgoin—in his

purchase, possession, and use of marijuana—by acting with knowledge that it was subsidizing Bourgoin's purchase of marijuana." *Id.* at 19.

Justice Jabar, joined by Justice Alexander, dissented. Justice Jabar opined that "there is no state law that requires the employer—or any person or entity—to possess, manufacture, or distribute marijuana." *Id.* at 24 (Jabar, J., dissenting). Specifically, "reimbursement does not require the employer to physically manufacture, distribute, dispense, or possess marijuana, and, as a result, no physical impossibility exists between the federal law and the [Workers' Compensation Board] order in this case." *Id.* Justice Jabar rejected the view that reimbursement could result in aiding and abetting liability, concluding that "the government would not be able to prove that the employer would be acting with the specific intent necessary to establish the requisite mens rea element of the offense of aiding and abetting." *Id.* at 25 (Jabar, J., dissenting). Specifically, "completely disinterested in Bourgoin's use or possession of marijuana—and indeed only reimbursing him for his medical expenses as ordered by the WCB—the employer is not an active participant in the substantive 'offense' of Bourgoin's possession." *Id.* at 27 (Jabar, J., dissenting).

Justice Jabar further noted that there was no record of a "federal prosecution of possession of medical marijuana, let alone a federal prosecution of aiding and abetting a singular person's simple possession of medical marijuana." *Id.* at 28 (Jabar, J., dissenting). Justice Alexander filed a separate dissent, also pointing

to the federal practice of nonenforcement. *Id.* at 32-33 (Alexander, J., dissenting).

The New Hampshire Supreme Court reached the opposite conclusion in *Appeal of Panaggio*, -- A.3d --, 2021 WL 787021 (N.H. Mar. 2, 2021). The employee used medical marijuana to manage his ongoing pain from a work-related back injury. *Id.* at *1. He sought reimbursement from his employer's insurer for the cost of the marijuana. *Id.* The New Hampshire Compensation Appeals Board concluded that his medical marijuana was reasonable and medically necessary, but that a reimbursement order would violate federal law. *Id.*

The New Hampshire Supreme Court reversed, concluding that the Controlled Substances Act would not preempt a reimbursement order. The court held that "there is no direct conflict between the CSA and a Board order to reimburse Panaggio for his medical marijuana purchase." *Id.* at *4. The Act "does not criminalize the act of insurance reimbursement for an employee's purchase of medical marijuana." *Id.*

The court rejected the insurer's argument that complying with the reimbursement order would yield aiding and abetting liability. It "agree[d] with the reasoning of the dissenting justices in *Bourgoin* … that the insurer in this case, if ordered to reimburse Panaggio's purchase of medical marijuana, would not be guilty of aiding and abetting Panaggio's violation of the CSA because the insurer would not be an active participant." *Id.* at *6.

The court further concluded that the

reimbursement order was not barred by obstacle preemption. The court observed that "the CSA does not make it illegal for an insurer to reimburse an employee for his or her purchase of medical marijuana." *Id.* at *8. "Nor does it purport to regulate insurance practices in any manner." *Id.* "Moreover, a Board order to reimburse Panaggio does not interfere with the federal government's ability to enforce the CSA." *Id.*

The Minnesota Supreme Court's decision also conflicts with *Hager v. M&K Construction*, 247 A.3d 864 (N.J. 2021). In that case, the employee was injured by an explosion in a cement truck. *Id.* at 870. He took medical marijuana to manage his pain and sought reimbursement under New Jersey's workers' compensation statute. *Id.* A workers' compensation court ordered reimbursement for the cost of his marijuana. *Id.* The Appellate Division affirmed the workers' compensation court, and the New Jersey Supreme Court affirmed the Appellate Division. *Id.*

The New Jersey Supreme Court relied on the unbroken string of appropriations riders in which Congress barred the Justice Department from expending funds to "prevent" states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." *See, e.g.*, Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 531, 134 Stat. 1182, 1282-83 (2020). The court concluded that "[b]ecause DOJ enforcement of the CSA may not, by congressional action, interfere with activities compliant with" state marijuana law, there was no "'positive conflict'"

between federal law and the state workers' compensation order. *Hager*, 247 A.3d at 887. The court further held that state law "does not currently present an obstacle to Congress's objectives as articulated in the recent appropriations riders, and so the CSA does not preempt the Compassionate Use Act as applied to the Order." *Id.* (internal citation omitted).

The court "acknowledge[d] that our decision here departs from the holdings of other state supreme courts that have come to different conclusions when faced with the precise issue before us—whether state medical marijuana laws are preempted as applied to workers' compensation orders compelling employers to reimburse workers' medical marijuana costs." *Id.* at 888 (citing *Bourgoin*). But the court concluded that out-of-state authority "in no way bind[s] our Court or predetermine our analysis." *Id.* Moreover, the court noted that the New Hampshire Supreme Court had reached the same non-preemption conclusion in *Panaggio*. *Id.*

The court also rejected the contention that compliance with the order might subject the employer to federal aiding-and-abetting liability. The court explained that the employer "has gone to great pains to avoid facilitating an offense." *Id.* at 889. Further, the employer's "compliance with the [workers' compensation] Order" did not "exhibit[] a specific intent to aid-and-abet Hager's marijuana possession." *Id.* The court therefore ordered the employer "to reimburse costs for, and reasonably related to, Hager's prescribed medical marijuana." *Id.* at 890.

There is therefore a 2 to 2 split among state

supreme courts on whether the Controlled Substances Act preempt an order under a state workers' compensation law requiring an employer to reimburse an injured employee for the cost of medical marijuana used to treat a work-related injury.

## II. The Court Should Grant Certiorari in this Case to Resolve the Division of Authority.

The Court should grant certiorari in this case to resolve the conflict of authority, for several reasons.

**First,** the question presented recurs frequently, with three decisions from state supreme courts in 2021 alone. And, it is virtually guaranteed to recur in other jurisdictions in the future.

It is no coincidence that so many cases on this issue have arisen so recently. This sudden influx of case law is attributable to the remarkably rapid growth of medical marijuana programs across the Nation. Zero states operated medical marijuana programs before 1996. As recently as December 2014, when Congress first banned the use of federal funds to impede state medical marijuana programs, only 32 states operated such programs. Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014). By 2019 the appropriations rider identified 47 states. *Supra*, at 2-3.

Given that so many states have legalized medical marijuana, workers' compensation disputes in other jurisdictions will undoubtedly arise. Patients will inevitably take medical marijuana to treat workplace injuries, and will inevitably seek reimbursement from their employers. Some states bar medical marijuana

from their workers' compensation program by statute. *E.g.*, Fla. Stat. § 381.986(15). But in states without such a state-law restriction, state courts will have no choice but to confront the same preemption question.

Indeed, in another decision issued in 2021, New York's intermediate appellate court rejected a federal preemption challenge to a workers' compensation order requiring reimbursement for medical marijuana. *Quigley v. Village of East Aurora*, 193 A.D.3d 207 (N.Y. App. Div. 2021). New Mexico's intermediate appellate court has twice rejected federal preemption challenges to workers' compensation orders requiring reimbursement for medical marijuana. *Lewis v. Am. Gen. Media*, 355 P.3d 850 (N.M. Ct. App. 2015); *Vialpando v. Ben's Automotive Services*, 331 P.3d 975 (N.M. Ct. App. 2014). Connecticut's Workers' Compensation Commission has also approved a reimbursement order for medical marijuana, rejecting a federal preemption challenge. *Caye v. Thyssenkrupp Elevator*, Case No. 6296 CRB-1-18-11, 2019 WL 6168483 (Conn. Workers' Comp. Comm'n Oct. 29, 2019). Similar disputes will arise in any jurisdiction where medical marijuana is legal and covered by a state workers' compensation program.

**Second**, the Court should grant certiorari in this case and resolve the split rather than allowing the split to linger.

Although other state courts are likely to confront the same question in the future, additional percolation would serve no purpose. The arguments on both sides have now been fully aired. The Maine Supreme Judicial Court's majority and dissent explored both sides of the

preemption debate. The New Hampshire Supreme Court and New Jersey Supreme Court considered and rejected the reasoning of the Maine Supreme Judicial Court. Finally, the Minnesota Supreme Court acknowledged the decisions on both sides, with the majority lining up with Maine and the dissent lining up with New Hampshire and New Jersey.

In total, 26 state supreme court justices (5 on the New Hampshire court and 7 on the other three courts) have now considered this question, with 11 finding preemption and 16 finding no preemption. There are exhaustive judicial opinions on both sides. Given that there are now two courts on each side of the split, there is no prospect that the split will go away without Supreme Court intervention. Allowing this split to persist will merely prolong the nationwide uncertainty for employees, employers, and insurers.

Moreover, this case is an ideal vehicle to resolve the conflict of authority. In the workers' compensation proceedings, the parties stipulated that petitioner's use of medical marijuana complied with state law and was reasonable, medically necessary, and causally related to her work injury, as required to support an award of workers' compensation. Pet. App. 5a. As a result, the workers' compensation tribunal ordered that petitioner be compensated for the cost of her medical marijuana. Pet. App. 4a-5a. The Minnesota Supreme Court's decision reversing that order was based exclusively on its analysis of federal law. Pet. App. 29a-30a. This case is therefore the ideal vehicle to review that question of federal law.

**Third**, this Court's immediate review is warranted

because the current uncertainty over federal preemption creates the risk of distorting state law. State legislatures may exclude medical marijuana from workers' compensation programs in order to avoid federal preemption concerns. State courts may adopt strained interpretations of state law for the same reason. For example, in *Wright's Case*, 156 N.E.3d 161 (Mass. 2020), the Massachusetts Supreme Judicial Court held that an employer was not required to reimburse an employee for the cost of medical marijuana under the state workers' compensation program. Although the court's decision was based on state law, it was heavily influenced by federal preemption concerns. *See id.* at 171-72 ("[T]o determine whether medical marijuana expenses may be compensable at all, we must look to the provisions of the medical marijuana act. We must also seek to avoid conflict with Federal law and possible preemption under the supremacy clause. … The act itself, we conclude, is drafted with these concerns in mind. It expressly recognizes the Federal legal pitfalls and seeks to steer well clear of them by carving a narrow path through the marijuana regulatory thicket.").

Yet these legislative and judicial efforts to avoid federal preemption may prove unnecessary if federal law does not preempt state workers' compensation orders requiring reimbursement for medical marijuana. States should be permitted to legislate with a clear understanding of federal law. They should be able to make their own policy choices about workers' compensation rather than operating in a cloud of uncertainty regarding the scope of federal preemption.

**Fourth**, the conflict of authority on the question presented reflects broader uncertainty over the legality of medical marijuana. State supreme courts have struggled mightily, in a variety of contexts, to reconcile the Controlled Substances Act with state medical marijuana law. *Compare, e.g.*, *People v. Crouse*, 388 P.3d 39, 40 (Colo. 2017) (Controlled Substances Act preempted state law requiring police to return medical marijuana to patient who was acquitted of drug charges), *and Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 529 (Or. 2010) (in dispute over disability accommodation, Controlled Substances Act preempted Oregon medical marijuana law), *with In re State Question No. 807*, 468 P.3d 383, 392 (Okla. 2020) (Controlled Substances Act did not preempt Oklahoma medical marijuana amendment), *Reed-Kaliher v. Hoggatt*, 347 P.3d 136, 141-42 (Ariz. 2015) (in dispute over probation conditions, Controlled Substances Act did not preempt Arizona medical marijuana law), *and Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 539-41 (Mich. 2014) (in zoning dispute, Controlled Substances Act did not preempt Michigan medical marijuana law).

These challenging questions will only multiply in view of the recent trend of states legalizing recreational marijuana. Before 2012, recreational marijuana was illegal nationwide. It is now legal in 18 states, and the number is growing rapidly. Without Supreme Court guidance, employers, insurers, bankers, and contractors will be operating in the dark as to what is legal and what may expose them to aiding-and-abetting liability. Resolving this case will not answer

all difficult questions about federal preemption, but it will provide crucial guidance to stakeholders seeking to follow both federal and state law in good faith.

## III. The Minnesota Supreme Court's Decision is Wrong.

The Minnesota Supreme Court erred in holding that the Controlled Substances Act preempts a state workers' compensation order requiring reimbursement for medical marijuana. Justice Chutich's comprehensive dissent is correct: the order is not preempted.

The Minnesota Supreme Court held that the Controlled Substances Act preempted state law because compliance with the workers' compensation order would be a federal crime. In particular, the court concluded that reimbursing petitioner for the cost of her medical marijuana would constitute aiding and abetting of marijuana possession under 18 U.S.C. § 2. That conclusion was wrong. Reimbursing petitioner for the cost of her medical marijuana would not be a federal crime.

"[A] person is liable under § 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 572 U.S. 65, 71 (2014). If the employer complied with the workers' compensation order, neither requirement for aiding-and-abetting liability would be satisfied.

First, there would be no "affirmative act in the furtherance of that offense." *Rosemond*, 572 U.S. at 71.

To satisfy the affirmative-act requirement, the prosecution must prove that the defendant facilitated an element of the offense. Here, however, the employer would not be facilitating any element of the offense, because by the time petitioner sought reimbursement, the crime was complete. The marijuana had already been obtained and consumed.

In reaching a contrary conclusion, the majority reasoned that fulfilling the reimbursement order would facilitate *future* marijuana offenses because it would create an expectation that petitioner would be compensated for the cost of future medical marijuana orders. Pet. App. 28a. But as the dissent pointed out, "Musta's unilateral expectation does not extend the duration of a crime of possession after it is complete, at least when Mendota Heights does not agree in advance to reimburse her." Pet. App. 34a. Moreover, "[Mendota] Heights has not stated that it will reimburse any future purchase, and whatever statutory obligation it may have to reimburse Musta in the future will depend on the facts and circumstances existing at that time." *Id.* Mendota Heights would not aid and abet a hypothetical future crime which might never occur based on the hypothetical prospect of reimbursement after that crime will already have been completed.

Second, if Mendota Heights complied with the reimbursement order, it would not have the requisite "intent of facilitating the offense's commission." *Rosemond*, 572 U.S. at 71. "To aid and abet a crime, a defendant must not just in some sort associate himself with the venture, but also participate in it as in

something that he wishes to bring about and seek by his action to make it succeed." *Id.* at 76 (internal quotation marks omitted).

Mendota Heights neither wished for petitioner to use medical marijuana nor sought to make petitioner's efforts to obtain medical marijuana succeed. Mendota Heights, like every other employer, is subject to state workers' compensation law under which it must reimburse employees for the cost of medications prescribed by the patient's physician. Mendota Heights did not refer petitioner to her physician, encourage petitioner to obtain medical marijuana, or otherwise desire for her to violate the Controlled Substances Act. Petitioner did all of that by herself, and is merely requesting that Mendota Heights comply with a state reimbursement order, just like Mendota Heights must reimburse any other employee for the cost of any other treatment attributable to a workplace injury.

Moreover, in *Rosemond*, the Supreme Court posited a category of "defendants who incidentally facilitate a criminal venture rather than actively participate in it." 572 U.S. at 77 n.8. "A hypothetical case is the owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used." *Id.* Mendota Heights, if it complied with the reimbursement order, would fall into this category. The gun store owner generally sells guns to all patrons; the fact that one buyer might use a gun for ill purposes does not make the owner an aider and abettor. Likewise, the employer generally reimburses all employees who sustain workplace injuries for their medical costs; the

fact that one employee seeks reimbursement for the cost of marijuana does not make the employer an aider and abettor.

The Minnesota Supreme Court rejected this reasoning, concluding that "Mendota Heights is fully knowledgeable about the circumstances advanced by its compelled reimbursement: Musta's possession of cannabis that is unlawful under the CSA." Pet. App. 25a. But the gun store owner might be fully knowledgeable about the intended use of a gun, yet it would not be liable for aiding and abetting. Under *Rosemond*, mere knowledge is not enough to establish liability; the defendant must actively desire to bring about the crime. Mendota Heights' mens rea would not satisfy that standard.

Obstacle preemption also does not bar enforcement of the workers' compensation order. As the majority recognized, a "state law is preempted by the CSA only when 'there is a positive conflict between' a provision of the CSA and that state law 'so that the two cannot consistently stand together.'" Pet. App. 16a (quoting 21 U.S.C. § 903). That standard is not satisfied.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks omitted). Here, the "purpose of Congress" is not to preempt state workers' compensation orders. Congress has barred enforcement of the Controlled Substances Act with respect to state medical marijuana programs—which demonstrates an intent for the Controlled Substances Act and state medical marijuana programs to co-exist. As the dissent explained,

"[t]hese appropriation riders at the very least show that Congress has chosen to 'tolerate' the tension between state medical cannabis laws and the Controlled Substances Act." Pet. App. 45a.

Moreover, even without the appropriation riders, Minnesota's law would not be preempted. The Controlled Substances Act provides a complex carefully reticulated scheme of regulation of controlled substances. But, as the dissent pointed out, it does not "purport to regulate insurance practices in any manner." Pet. App. 44a. The Court should not supplement the Controlled Substances Act with additional restrictions on employers and insurers via the vague rubric of obstacle preemption.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# Appendix A

STATE OF MINNESOTA

IN SUPREME COURT

A20-1551

Workers' Compensation Court of Appeals

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

Susan K. Musta,

Respondent,

Vs.

Filed: October 13, 2021
Office of Appellate Courts

Mendota Heights Dental Center
& Hartford Insurance Group,

Relators.

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Cheri M. Sisk, Thomas D. Mottaz, Mottaz & Sisk Injury Law, Coon Rapids, Minnesota, for respondent.

William M. Hart, Julia Nierengarten, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota; and

Kassi Erickson Grove, Law Offices of Steven G. Piland, Overland Park, Kansas, for relators.

Keith Ellison, Attorney General, Liz Kramer, Solicitor General, Jeffrey K. Boman, Rachel Bell-Munger, Assistant Attorneys General, Saint Paul, Minnesota, for amicus curiae State of Minnesota.

Beth A. Butler, Kristine L. Cook, Peterson, Logren & Kilbury, P.A., Roseville, Minnesota, for amicus curiae Minnesota Defense Lawyers Association.

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## SYLLABUS

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.

## OPINION

ANDERSON, Justice.

The question presented here is whether the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801–971, which makes the possession of cannabis a federal crime, preempts provisions of the Minnesota Workers' Compensation Act that make an employer liable for an injured employee's cost of treating a work-related injury. More specifically, does the statutory requirement for an employer to "furnish any medical . . . treatment," reasonably necessary to treat a work-related injury, Minn. Stat. § 176.135, subd. 1 (2020), conflict with federal law that prohibits the possession of cannabis when the employer would be required to pay for the expense of treatment using medical cannabis? If federal law preempts state law in this specific instance, then an employer cannot be ordered to reimburse an injured employee for the cost of medical cannabis used to treat the effects of a work-related injury.

Respondent Susan Musta was injured while working for her employer, relator Mendota Heights Dental Center (Mendota Heights). After multiple rounds of medical intervention were unsuccessful, Musta's doctor certified her for participation in Minnesota's medical cannabis program. Musta then sought reimbursement for the cost of the medical cannabis from Mendota Heights, which agrees that medical cannabis is a reasonable and necessary treatment for Musta's chronic pain. Mendota Heights asserted, however, that the federal prohibition in the CSA on the possession of cannabis preempts the requirement under Minnesota's workers' compensation laws for an employer to pay for an injured employee's medical treatment when that

treatment is medical cannabis. The Workers Compensation Court of Appeals (WCCA) declined to address the preemption argument, concluding that it did not have the subject matter jurisdiction to do so, and then upheld the compensation judge's order requiring Mendota Heights to reimburse Musta for medical cannabis.

We conclude that the WCCA lacks subject matter jurisdiction to determine the preemption issue presented in this case because it requires the interpretation and application of federal law. We further conclude that the CSA preempts an order made under Minn. Stat. § 176.135, subd. 1, that obligates an employer to reimburse an employee for the cost of medical cannabis because compliance with that order would expose the employer to criminal liability under federal law for aiding and abetting Musta's unlawful possession of cannabis. We therefore reverse the decision of the Workers' Compensation Court of Appeals.

## FACTS

Musta was employed by Mendota Heights[1] as a dental hygienist when she suffered a work-related neck injury in February 2003. Musta received conservative care, including chiropractic treatment, medication management, physical therapy, and injection therapy. She then underwent surgery in November 2003 and August 2006, which provided some temporary relief.

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[1] The insurer for Mendota Heights is relator Hartford Insurance Group, and we refer to relator collectively as "Mendota Heights."

She was ultimately prescribed medication to manage the continuing pain, including Vicodin and fentanyl. In late 2009, Musta discontinued using narcotics to treat her pain because of the side effects. At this point, Musta was permanently and totally disabled.

In April 2019, after she was certified as eligible to participate in the state's medical cannabis program, Musta began using medical cannabis, in compliance with the THC Therapeutic Research Act (THC Act), Minn. Stat. §§ 152.21–.37 (2020), to treat her work-related injury. She then requested reimbursement for the cost of that treatment from Mendota Heights under Minn. Stat. § 176.135, subd. 1 (2020). In the proceedings before the compensation judge, the parties stipulated that Musta's use of medical cannabis complies with the THC Act and is reasonable, medically necessary, and causally related to her work injury. Mendota Heights opposed Musta's request for reimbursement, however, asserting before the compensation judge that paying for someone to possess cannabis is prohibited by federal law, specifically the CSA. Thus, the sole issue before the workers' compensation judge was whether the CSA preempts the employer reimbursement requirement in Minnesota's workers' compensation laws when that reimbursement is for medical cannabis.

Cannabis is a Schedule I controlled substance—the most restrictive level—and therefore cannot be lawfully prescribed. 21 U.S.C. § 812(c)(c)(10). Federal law provides that a Schedule I controlled substance has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and lacks accepted safety for use of the substance under medical

supervision. 21 U.S.C. § 812(b)(1). The CSA makes it a federal crime to possess a controlled substance knowingly or intentionally without a valid prescription. 21 U.S.C. § 844(a).[2] Anyone guilty of such an offense may be sentenced up to one year in prison and fined at least $1,000. *Id.* And anyone who aids and abets a federal crime is liable to the same extent as the principal. 18 U.S.C. § 2(a).

The compensation judge declined to resolve the issue of preemption, recommending instead to the Chief Administrative Law Judge that the question be certified to us. The Chief ALJ did so, but we declined to accept the certified question, stating that "the legal issue presented by this workers' compensation matter is best addressed through the decision process established by the Legislature." *Musta v. Mendota Heights Dental Ctr.*, No. A19-1365, Order at 2 (Minn. filed Oct. 16, 2019).

On remand, the compensation judge then analyzed the preemption issue. The judge observed that use of medical cannabis is legal under Minnesota law, and nothing in the workers' compensation laws prohibits reimbursement for medical cannabis when used to treat a work-related injury. Further, the judge noted that ongoing congressional appropriations riders prohibit the United States Department of Justice from criminally

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[2] Under Minnesota's THC Act, a physician does not prescribe medical cannabis for a patient's medical condition; rather, the physician determines whether the patient "suffers from a qualifying medical condition," Minn. Stat. § 152.28, subd. 1(a)(1), which if found allows the patient to apply for enrollment in the medical cannabis program, *see* Minn. Stat. §§ 152.27, subd. 3(a)(4), .30(a).

prosecuting an act that is compliant with a state's medical cannabis laws. The compensation judge stated that a federal prosecution would "prevent Minnesota from implementing its own laws" regarding medical cannabis use. Thus, the compensation judge concluded, there was no risk that Mendota Heights would be criminally prosecuted under federal law, and therefore no preemptive conflict between federal law and Minnesota law existed. Mendota Heights was accordingly required to reimburse Musta for her medical cannabis expenses.

The Workers' Compensation Court of Appeals affirmed. *Musta v. Mendota Heights Dental Ctr.*, No. WC19-6330, 2020 WL 6799288 (Minn. WCCA Nov. 10, 2020). The WCCA concluded that it lacked subject matter jurisdiction over the preemption issue because it "would need to interpret and apply laws beyond the Workers' Compensation Act and beyond [its] limited jurisdiction." *Id.* at *3. Instead, the WCCA believed that the preemption issue was "best addressed by a court of broader jurisdiction." *Id.* Thus, the court rejected the compensation judge's analysis on that issue and struck certain findings made regarding federal law. But, concluding that the legal question—the employer's reimbursement liability—could be resolved based on the stipulated facts and the remaining findings, the WCCA affirmed the award of reimbursement. Mendota Heights appealed to us by writ of certiorari.

## ANALYSIS

This case presents two issues. First, we must determine whether the WCCA correctly concluded that it lacks subject matter jurisdiction to decide whether

federal law—the CSA—preempts Minnesota law that requires an employer to reimburse an employee for treatment of a work-related injury. Second, we must determine whether the CSA preempts the requirement in Minnesota law for an employer to reimburse an injured employee for the cost of medical treatment when the treatment for which payment is sought is medical cannabis.

## I.

We begin with jurisdiction. "The subject matter jurisdiction of the workers' compensation courts is a question of law," which we review de novo. *Giersdorf v. A & M Constr., Inc.*, 820 N.W.2d 16, 20 (Minn. 2012). "Subject matter jurisdiction is the court's authority to hear the type of dispute at issue and to grant the type of relief sought." *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). The WCCA "is a tribunal of limited jurisdiction, restricted by statute to the construction and application of the Workers' Compensation Act."[3] *Hagen v. Venem*, 366 N.W.2d 280, 283 (Minn. 1985); *see also* Minn. Stat. § 175A.01, subd. 5 (stating that the WCCA has jurisdiction over "questions of law and fact arising under the workers' compensation laws of the state"). The WCCA's "powers are plenary" in cases arising under the Workers' Compensation Act, allowing that court to hear

[3] A compensation judge decides questions of fact and law to make "an award or disallowance of compensation" based on the pleadings. Minn. Stat. § 176.291(a) (2020) (allowing a party to initiate a proceeding by filing a petition when "there is a dispute as to a question of law or fact in connection with a claim for compensation").

and determine the legal and factual questions presented by a case appealed to that court. *Hagen*, 366 N.W.2d at 283.

The WCCA may decide certain questions ancillary to the employee's compensation claim, such as determining insurance coverage, *Giersdorf*, 820 N.W.2d at 20–21; awarding certain fees and costs, *Botler v. Wagner Greenhouses*, 754 N.W.2d 665, 668–70 (Minn. 2008); and determining the liability of a guaranty association, *Seehus*, 783 N.W.2d at 151–52. The WCCA may also look to the laws of other states and federal law "for instruction" in narrow circumstances. *See Sundby v. City of St. Peter*, 693 N.W.2d 206, 215–16 (Minn. 2005) (holding that the WCCA could look to the Social Security Act for instruction because the workers' compensation provision at issue was a means for coordinating workers' compensation benefits with the social security system, and the WCCA "neither construed nor applied federal law").

The WCCA is not authorized, however, "to consider questions of law arising under the workers' compensation statutes of other states." *Martin v. Morrison Trucking, Inc.*, 803 N.W.2d 365, 369 (Minn. 2011). The WCCA similarly may not "construe Minnesota statutes other than the Minnesota Act." *Id.* And its jurisdiction "does not extend to interpreting or applying legislation designed specially for the handling of claims outside the workers' compensation system." *Sundby*, 693 N.W.2d at 215; *see also Martin*, 803 N.W.2d at 369–70 (distinguishing between the WCCA's statutory authority to order reimbursement to a no-fault insurance carrier and the WCCA's lack of jurisdiction to

construe statutes other than those governing workers' compensation claims).

Mendota Heights asserts that this is a case "arising under" Minnesota's workers' compensation laws, and because the WCCA may hear and determine "all questions of law and fact" in such cases, the court possessed subject matter jurisdiction to decide the preemption issue. Mendota Heights emphasizes that requiring the preemption issue to be decided by a district court, while the merits of the workers' compensation action are decided by the compensation courts, would result in case-splitting and squander judicial resources with parallel proceedings. It cites to our decision in *In re McCannel*, 301 N.W.2d 910, 920 (Minn. 1980), in which we held that the tax court may decide constitutional claims in some instances. Mendota Heights asserts that the tax court's jurisdictional statute and that of the WCCA use "substantively identical language," while noting that *McCannel* was decided one year before the statute establishing the WCCA's jurisdiction was enacted.[4]

Musta responds that deciding the preemption issue would require the WCCA to interpret federal civil and criminal law as well as the statutes that govern Minnesota's THC Act, all of which are outside the scope

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[4] Mendota Heights also suggests that the WCCA's refusal to decide the jurisdictional question was a denial of due process. We need not decide this issue because we have resolved the preemption issue in favor of Mendota Heights. *See, e.g.*, *State v. N. Star Rsch. & Dev. Inst.*, 294 Minn. 56, 200 N.W.2d 410, 425 (1972) (stating that we do not "decide important constitutional questions unless it is necessary to do so").

of Minnesota's workers' compensation laws. Thus, she maintains, the WCCA did not have the necessary jurisdiction to decide the preemption issue in this case given our consistent conclusion that the WCCA does not have the authority to interpret the laws of other jurisdictions or other Minnesota statutes.

We agree with Musta. Although Musta's claim certainly arises under Minnesota's workers' compensation law—she seeks only reimbursement for the medical treatment she now uses, *see* Minn. Stat. § 176.135, subd. 1(a) (requiring the employer to "furnish any medical . . . treatment, including . . . medicines")—the precise legal question before the WCCA falls squarely outside of workers' compensation laws: does federal law, properly interpreted, preempt the broad requirement in section 176.135 for employers to reimburse injured employees for "any" medical treatment, including when the treatment at issue is medical cannabis. The Legislature has described the WCCA's jurisdiction over legal questions as specific to those "*arising under the workers' compensation laws*" of Minnesota. Minn. Stat. § 175A.01, subd. 5 (emphasis added). By requiring an interpretation and analysis of federal law, the preemption issue presented in this case does not arise under Minnesota's workers' compensation laws; it arises under federal law and legal principles that govern statutory interpretation when resolving claims of alleged conflicts between state and federal laws. *See, e.g.*, *In re Est. of Barg*, 752 N.W.2d 52, 63 (Minn. 2008) (explaining the importance of congressional intent and purpose in a preemption inquiry based on federal law).

Indeed, we have consistently held that when resolution of an issue would require the WCCA to interpret and apply, not merely look to, the laws of another sovereign, the WCCA is without jurisdiction to do so. *See Martin*, 803 N.W.2d at 371; *Hale v. Viking Trucking Co.*, 654 N.W.2d 119, 124 (Minn. 2002). For example, in *Sundby*, the WCCA held that children's benefits under Social Security Disability Insurance (SSDI) should be included in reducing an employer's payment of workers' compensation benefits. 693 N.W.2d at 213. We affirmed that decision, observing that the Workers' Compensation Act expressly permits "any government disability benefits" in the offset. *Id.* at 211 (citing Minn. Stat. § 176.101, subd. 4 (2004)). Although we noted that "[t]he WCCA's jurisdiction does not extend to interpreting or applying legislation designed specially for the handling of claims outside the workers' compensation system," we concluded that the WCCA had merely looked to federal law to ultimately "ascertain[ ] the appropriate inclusion of SSDI benefits in the workers' compensation benefits offset calculation" under Minnesota's workers' compensation laws. Id. at 215. Here, the WCCA correctly recognized that, consistent with our statement in *Sundby*, deciding the preemption issue would impermissibly require it "to interpret and apply laws beyond the Workers' Compensation Act." *Musta*, 2020 WL 6799288, at *3.

Mendota Heights contends that our order denying certification, which cited the decision process provided for in Minn. Stat. § 176.322 (2020) (authorizing a decision based on stipulated facts), reflected our expectation that the compensation judge or the WCCA would decide the

preemption issue on the merits. We disagree. In denying certification, we relied primarily on the principle that certification is not a substitute for the normal appellate process, even for important and doubtful questions. *See Musta v. Mendota Heights Dental Ctr.*, No. A19-1365, Order at 1–2 (Minn. filed Oct. 16, 2019) (stating that "'not every vexing question is important and doubtful' and questions of first impression are not alone sufficient 'to justify certification as doubtful.'" (quoting *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179–80 (Minn. 1988))).

Finally, our decision in *McCannel* does not support the conclusion that the WCCA has subject matter jurisdiction over the preemption issue presented here. In *McCannel*, we noted that "[a]s a general rule, administrative agencies lack the power to declare legislation unconstitutional" and that "[i]nstead, these issues must be raised in a court of the judiciary." 301 N.W.2d at 919. Nevertheless, we recognized the importance of allowing the tax court to operate "effectively and expeditiously" by deciding all issues presented by the case. *Id.* at 920. Thus, when a constitutional issue is presented in a tax dispute, we noted, the tax court could "acquire jurisdiction in the first instance through transfers of cases from the district court, which does have the jurisdiction to determine the constitutionality of legislative acts." *Id.* at 919 (emphasis added); *see Guilliams v. Comm'r of Revenue*, 299 N.W.2d 138, 139 n.1 (Minn. 1980) (noting that the tax court has jurisdiction over a constitutional claim when the claim is raised "in the first instance . . . in the district court before the case is transferred to the tax court");

*see also Erie Mining Co. v. Comm'r of Revenue*, 343 N.W.2d 261, 264 (Minn. 1984) (explaining that because the tax court does not have "original jurisdiction to decide constitutional issues," it must "refer the constitutional question to the district court," which can choose to "refer the matter back to the tax court which will then have subject matter jurisdiction" over that issue). No one contends that a district court conferred its original jurisdiction over the preemption issue presented here on the compensation judge or the WCCA. Thus, the general rule stated in *McCannel*—constitutional issues must be decided by "a court of the judiciary" rather than an executive branch agency—controls here, rather than the process used in tax cases to secure a district court's jurisdiction over a constitutional claim. *See Irwin v. Surdyk's Liquor*, 599 N.W.2d 132, 139–40 (Minn. 1999) (acknowledging that the WCCA does not have subject matter jurisdiction over constitutional claims).

We have reiterated that the statutory jurisdiction of the compensation courts does not extend to interpretation of laws outside of legal questions and facts arising under the workers' compensation law.[5] *See Martin*, 803 N.W.2d at 371 (holding that WCCA

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[5] When a case requires "judicial construction" of a statute outside of workers' compensation laws, the remedy is to bring "a declaratory judgment action in district court." *Taft v. Advance United Expressways*, 464 N.W.2d 725, 727 (Minn. 1991). Although Mendota Heights is correct that requiring a district court to determine a preemption issue may be an inefficient use of judicial resources, efficiency does not permit the WCCA to exceed the carefully defined limits of its specialized jurisdiction.

lacked jurisdiction to declare insurance contract invalid under Wisconsin law); *see also Freeman v. Armour Food Co.*, 380 N.W.2d 816, 820 (Minn. 1986); *Taft v. Advance United Expressways*, 464 N.W.2d 725, 727 (Minn. 1991). Consequently, 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.

**II.**

Having concluded that the WCCA correctly determined that it lacks jurisdiction over the preemption issue in this case, we now turn to that issue. *See Gist v. Atlas Staffing, Inc.*, 910 N.W.2d 24, 31–33 (Minn. 2018) (deciding a preemption issue under federal Medicaid and Medicare law that was not addressed by the WCCA, which concluded that it lacked jurisdiction over that issue); *see also In re Lauritsen*, 99 Minn. 313, 109 N.W. 404, 407–08 (1906) (recognizing that "a court of final resort" can provide "peremptory and prompt relief").

Preemption of a state law by federal law is based on the Supremacy Clause of the United States Constitution. *See Gist*, 910 N.W.2d at 33; *see also Gonzales v. Raich*, 545 U.S. 1, 29 (2005) (stating that when "there is any conflict between federal and state law, federal law shall prevail"). "Preemption is primarily an issue of statutory interpretation, which is subject to de novo review." *DSCC v. Simon*, 950 N.W.2d 280, 287 (Minn. 2020) (citation omitted) (internal quotation marks omitted). "In all preemption cases, and particularly those in which Congress has legislated

in a field that the states have traditionally occupied"—like workers' compensation—we begin "with the assumption that the historic police powers of the states were not superseded by the federal act unless that was the clear and manifest purpose of Congress." *Gretsch v. Vantium Cap., Inc.*, 846 N.W.2d 424, 433 (Minn. 2014). Accordingly, "preemption is generally disfavored." *Id.* At issue here is conflict preemption, which may occur when it is impossible to comply with both state law and federal law (impossibility preemption) or when the state law stands as an impermissible obstacle to accomplishing the objectives of the federal law (obstacle preemption). *DSCC*, 950 N.W.2d at 288.

"Congressional purpose is the ultimate touchstone" of our inquiry into preemption by federal law. *Barg*, 752 N.W.2d at 63 (citation omitted) (internal quotation marks omitted). "The main objectives of the CSA were to conquer drug abuse and control the legitimate and illegitimate traffic in controlled substances." *Raich*, 545 U.S. at 12. And "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12–13. The CSA explicitly defines the scope of its preemptive reach. A state law is preempted by the CSA only when "there is a positive conflict between" a provision of the CSA and that state law "so that the two cannot consistently stand together." 21 U.S.C. § 903. This provision "is an express invocation of conflict preemption." *Or. Prescription Drug Monitoring Program v. U.S. Drug Enf't Admin.*, 860 F.3d 1228, 1236 (9th Cir. 2017).

Mendota Heights contends that it is not possible to comply with both state and federal law because if it complies with the order made under the Minnesota workers' compensation law to reimburse Musta for the medical cannabis expense, then Mendota Heights cannot comply with the federal prohibition against aiding and abetting the possession of cannabis. *See Rosemond v. United States*, 572 U.S. 65, 76 (2014) ("[A] person aids and abets a crime when (in addition to taking the requisite act) he intends to facilitate that offense's commission."). Stated another way, Mendota Heights asserts that compelling it, by judicial order, to reimburse Musta for medical cannabis "require[d it] to commit a federal crime." Mendota Heights relies on the decision of the Maine Supreme Judicial Court case *Bourgoin v. Twin Rivers Paper Co., LLC*, which held that the CSA preempts an order to reimburse an employee for medical cannabis under the Maine workers' compensation laws because that order required the employer to "engage in conduct that would violate the CSA." 187 A.3d 10, 20 (Me. 2018). Mendota Heights also argues that the likelihood of prosecution for violating the CSA—minimal or otherwise—is a legally irrelevant factor in the preemption analysis.

In response, Musta contends that Congress has demonstrated an intent to not obstruct state medical cannabis programs by annually prohibiting the United States Department of Justice from spending funds to prosecute persons who use medical cannabis consistent with their state's laws. She relies on decisions from state courts that have found no conflict between the federal law and state law requirements to reimburse for

medical cannabis, including the dissenting opinion in Bourgoin, 187 A.3d at 23 (Jabar, J., dissenting). Finally, Musta asserts that Mendota Heights cannot be deemed to aid and abet her possession of cannabis because the crime of possession has already occurred, a completed crime cannot be aided and abetted, and Mendota Heights does not possess the specific intent required for aiding and abetting.

We acknowledge that this issue represents a unique and challenging intersection between the law of preemption, federal aiding and abetting jurisprudence, the ongoing tension between the states and the federal government regarding cannabis regulation, and the objectives of the Minnesota workers' compensation system. But we are not the first state court of last resort to decide this specific issue. Thus, we begin with the decisions that have already addressed the preemptive effect of the CSA on orders for reimbursement of medical cannabis made under state workers' compensation laws.

In *Bourgoin*, the Maine Supreme Judicial Court was the first state supreme court to decide a preemption challenge in the context of employer reimbursement for workers' compensation benefits. *Id.* at 19–20. As here, an employee sought reimbursement from the employer for medical cannabis, which was used to treat a work-related injury. *Id.* at 13. The employer opposed the reimbursement request, asserting that, even if the employee's medical cannabis use is permitted by state law, requiring the employer to pay for it is barred by federal law. *Id.* The *Bourgoin* court concluded that a right provided by state law to use

medical cannabis "cannot be converted into a sword that would require" an employer "to engage in conduct that would violate the CSA." *Id.* at 20. The court recognized that an employer would be liable under federal law on an aiding and abetting theory because the employer—required to reimburse the employee for his use of medical cannabis—would be "acting with knowledge that it was subsidizing Bourgoin's purchase of marijuana." *Id.* at 19. On the other hand, the employer would violate state law if it refused to reimburse the employee. *Id.* The *Bourgoin* court therefore concluded that "[c]ompliance with [state and federal law] is an impossibility." *Id.*; *see also Wright's Case*, 486 Mass. 98, 156 N.E.3d 161, 166 (2020) (stating that a state may "authorize those who want to use medical marijuana . . . to do so and assume the potential risk of Federal prosecution," but it is "quite another" thing for the state "to require unwilling third parties to pay for such use and risk such prosecution").[6]

Two state supreme courts have reached a different conclusion. In *Appeal of Panaggio*, —— A.3d —— 2021 WL 787021 (N.H. Mar. 2, 2021), the New Hampshire Supreme Court rejected the conclusion reached by the Maine Supreme Judicial Court in *Bourgoin*—that the employer would be criminally liable under federal law, 187 A.3d at 19—stating that federal law "does not

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[6] The Massachusetts Supreme Judicial Court concluded in this case that an employer is not required to reimburse an employee for medical cannabis used to treat a work-related injury, based on language in that state's medical cannabis law that relieves "any health insurance provider" from a reimbursement obligation. 156 N.E.3d at 172, 175.

criminalize the act of insurance reimbursement for an employee's purchase of medical marijuana." 2021 WL 787021, at *4. The *Panaggio* court concluded instead that the employer lacked the requisite mens rea for an aiding and abetting offense under federal law because the employer's reimbursement is compelled by state law, rather than voluntary participation in an offense. *Id.* at 6. Thus, the court concluded, it was not impossible to comply with both state and federal law. *Id.*[7]

The New Jersey Supreme Court reached the same conclusion, though on different reasoning, in *Hager v. M&K Construction*, 247 A.3d 864 (N.J. 2021). Looking to "appropriations acts as expressions of legislative intent," *id.* at 885, the *Hager* court observed that "Congress has, for seven consecutive fiscal years, prohibited the [Department of Justice] from using funds to interfere with state medical marijuana laws through appropriations riders." *Id.* at 886. The court concluded that this "clear, volitional act in the form of appropriations law takes precedence over" the CSA. *Id.* at 887. Thus, there was no conflict between federal

[7] The *Panaggio* court also analyzed, then rejected, obstacle preemption, stating that "the CSA does not make it illegal for an insurer to reimburse an employee" for medical cannabis, "does [not] purport to regulate insurance practices in any manner," and the reimbursement order "does not interfere with the federal government's ability to enforce the CSA" by prosecuting the employee for possession. *Id.* at *8. Because we conclude that the CSA preempts the order for reimbursement under the impossibility theory of conflict preemption, we need not—and decline to—analyze the obstacle theory of conflict preemption.

and state law, and state law did not stand as "an obstacle" to congressional objectives. *Id.*

Apart from the workers' compensation context, courts have found preemption by the CSA in some situations, and no conflict or preemption in others. *Compare Garcia v. Tractor Supply Co.*, 154 F. Supp.3d 1225, 1229–30 (D.N.M. 2016) (concluding that an employer is not required to accommodate an employee's use of medical cannabis as a matter of state law), and *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518, 536 (Or. 2010) (concluding that portion of Oregon law governing use of medical cannabis is preempted by CSA), *with White Mountain Health Ctr., Inc. v. Maricopa Cnty.*, 386 P.3d 416, 432–33 (Ariz. Ct. App. 2016) (concluding that requiring county to process application for medical cannabis provider as directed by state zoning law is not preempted by CSA), *and Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 537–41 (Mich. 2014) (holding that immunity provision in Michigan medical cannabis law is not preempted by CSA). We ultimately agree with the reasoning set forth by the Maine Supreme Judicial Court in *Bourgoin*: the CSA preempts mandated reimbursement of an employee's medical cannabis purchases under an impossibility theory of conflict preemption. Specifically, we agree that a right provided to an individual under Minnesota's workers' compensation law to secure reimbursement for the use of medical cannabis to treat a diagnosed medical condition cannot be "converted into a sword that" requires an employer to pay for those purchases and thus "engage in conduct that would violate the CSA." 187 A.3d at 20.

We recognize that the federal government's position on criminal prosecution of cannabis offenses has been in a state of flux for over a decade. At one point, the United States Department of Justice announced that it would not prosecute cannabis offenses under the CSA when a cannabis user complies with state law; but the Department later rescinded those directions. *See Hager*, 247 A.3d at 882–83. Further, Congress has prohibited the Department of Justice from using allocated funds to prevent states from implementing medical cannabis laws. Id. at 883–84. We disagree with the Hager court that these actions—and the congressional appropriation riders in particular—suspend the illegality of cannabis under the CSA or take precedence over that law. *See id.* at 887. Repeal by implication is heavily disfavored, especially when "the subsequent legislation is an appropriations measure." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) (citation omitted) (internal quotation marks omitted). As the Ninth Circuit observed in *United States v. McIntosh*, the appropriation riders "do[ ] not provide immunity from prosecution for federal marijuana offenses." 833 F.3d 1163, 1179 n.5 (9th Cir. 2016). The riders are merely temporary measures that can be rescinded at any time, thus allowing the government to "prosecute individuals who committed offenses *while the government lacked funding*." *Id.* (emphasis added); *see also Bourgoin*, 187 A.3d at 20–21 & n.10 (rejecting reliance on the Department's nonenforcement memorandum because it was a "transitory" policy, as evidenced by its later revocation by Attorney General Sessions).

Nor can we agree that, as a practical matter, Mendota Heights is unlikely to be prosecuted. Impossibility preemption does not turn on speculation about future prosecutorial decisions, but on whether compliance with both state and federal law is impossible. *See DSCC*, 950 N.W.2d at 288. The conflict here is real, not speculative. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 131 (1978) (stating that a "hypothetical conflict" does not warrant preemption). Despite action in multiple states relating to medical cannabis and other cannabis-related issues, Congress has never chosen to de-schedule or re-schedule cannabis; it has instead used funding mechanisms to institute temporary, short-term stays of enforcement. Possession of cannabis remains prohibited by the CSA, and we cannot read these riders as implicit suspensions of a legislative determination of illegality.

Even setting aside the prosecution risk, the heart of Musta's argument—an order made under state law that compels reimbursement negates mens rea and the specific intent necessary to satisfy federal aiding and abetting—is misplaced. The Supreme Court of the United States has consistently held that compelling a person to act does not necessarily negate the actor's mens rea. *See Dixon v. United States*, 548 U.S. 1, 6–7 (2006). Instead, necessity (like duress and self-defense) is an affirmative defense that goes to motive, not intent. *Rosemond*, 572 U.S. at 89 (Alito, J., concurring in part, dissenting in part) ("[O]ur cases have recognized that a lawful motive (such as necessity, duress, or self-defense) is consistent with the *mens rea* necessary to satisfy a requirement of intent."). As the

*Rosemond* Court put it, "The law does not, nor should it, care whether [the aider and abettor] participates with a happy heart or a sense of foreboding. Either way, he has the same culpability . . . ." *Id.* at 79–80.[8]

The intent requirement of federal aiding and abetting is satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense."[9] *Id.*

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[8] The dissent brushes aside the distinction between intent and motive, claiming that the *Rosemond* Court rejected a similar criticism when it held that a defendant must have "advance knowledge" of the presence of a firearm for the defendant to be guilty of aiding and abetting a crime involving the use of a firearm. 572 U.S. at 78. The *Rosemond* Court reasoned that the "distinctive intent standard for aiding and abetting" cannot be satisfied when a defendant learns of the presence of the firearm "only after he can realistically walk away." *Id.* at 81 n.10. But this reasoning lends no support to the dissent's position because Mendota Heights unquestionably has advance knowledge of the underlying conduct that it would be aiding.

[9] The *Rosemond* Court differentiated the knowledge and active participation that it found satisfied specific intent by describing the hypothetical case of a gun store owner "who sells a firearm to a criminal, knowing but not caring how the gun will be used." 572 U.S. at 77 n.8. Several courts, including the *Panaggio* court, 2021 WL 787021, at *5 n.1, have read this footnote as describing a situation in which specific intent is lacking. But the very next sentence in the footnote explains: "We express no view about what sort of facts, if any, would suffice to show that such a third party has the intent necessary to be convicted of aiding and abetting." *Rosemond*, 572 U.S. at 77 n.8. Rather than explaining that this situation was not aiding and abetting, the Court merely described one situation in which it *has not yet decided* whether aiding and abetting was satisfied.

at 77. Here, Mendota Heights is fully knowledgeable about the circumstances advanced by its compelled reimbursement: Musta's possession of cannabis that is unlawful under the CSA. This reimbursement, which Mendota Heights must comply with as it is embedded in a judicial order, finances Musta's possession and effectively facilitates future possession. Thus, the order compels Mendota Heights' active participation in the possession that is criminalized by the CSA.[10]

Our conclusion finds support in federal case law. In *Garcia*, an employee was fired after testing positive for

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[10] The dissent offers several hypotheticals to challenge our application of the *Rosemond* framework. The first is an employee who informs her employer that her paycheck will be used to purchase cannabis. But this hypothetical fails to appreciate the close connection between the aid provided and the crime committed. In the case at issue here, the reimbursement ordered is explicitly and exclusively for cannabis. In the dissent's hypothetical, the paycheck can be, and indeed ordinarily is, used for any number of purchases wholly outside the control of the employer.

The same is true with the bus driver hypothetical. The route driven is not solely for the benefit of a passenger to obtain cannabis, and the nexus between the transportation provided and results obtained is far weaker than the case here.

The taxi driver hypothetical is a closer call. For a taxi driver to knowingly transport a passenger to a location to commit a crime may implicate aiding and abetting. Consider the counter-hypothetical where a passenger informs the taxi driver, "I am going to rob a bank, wait for me outside so we can drive away afterwards." Setting aside affirmative defenses like duress, the taxi driver may be acting with full knowledge of the crime of robbery to be committed, and the taxi driver knowingly transporting a person to a dispensary for the sole purpose of purchasing cannabis in violation of federal law may in fact be doing the same.

cannabis despite informing his employer that he consumed medical cannabis to alleviate symptoms of HIV/AIDS. 154 F. Supp.3d at 1226–27. The employee sued, alleging discrimination based on a medical condition under the New Mexico equivalent of the Minnesota Human Rights Act. *Id.* at 1227. The federal district court held that the employer was not required to accommodate the employee's use of medical cannabis. *Id.* at 1230. It concluded that, "[t]o affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes." *Id.*; *see also Emerald Steel Fabricators*, 230 P.3d at 536 (concluding that the CSA preempted state law such that an employer was not prohibited from firing an employee for using medical cannabis).

Although the district court in Garcia did not explicitly find that the employer would be aiding and abetting the employee's possession of medical cannabis, the logic is the same: the state cannot force an employer to facilitate an employee's unlawful possession of cannabis, either through work accommodations or reimbursement for its purchase.[11]

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[11] The dissent criticizes our citation to *Garcia* because the implicit basis for that decision was obstacle preemption; and the case on which *Garcia* relies, *Emerald Steel Fabricators*, was decided explicitly under obstacle preemption. *Garcia*, 154 F.Supp.3d at 1230; *Emerald Steel Fabricators*, 230 P.3d at 536. But that fact alone does not undermine the persuasive nature of the analysis in those cases. And the case for preemption is indeed stronger here because an actual conflict exists that makes it impossible for Mendota Heights to comply with both federal and state law, as opposed to *Garcia* and *Emerald Steel Fabricators*, where

We also reject Musta's argument and the dissent's conclusion that Mendota Heights cannot aid and abet her possession because that possession has already occurred by the time Mendota Heights reimburses her. Generally, "a person cannot be found guilty of aiding and abetting a crime that has already been committed." *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003). But "aiding and abetting a drug offense may encompass activities, intended to ensure the success of the underlying crime, that take place after . . . the principal no longer possesses the [illegal substance]." *United States v. Ledezma*, 26 F.3d 636, 643 (6th Cir. 1994). The same is true with money laundering, which occurs after the distribution of illegal substances, but may nevertheless aid and abet the underlying crime because it is "*integral* to the success of a drug venture."[12] *United States v. Orozco-Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984).

Although the compensation court's order does not require Mendota Heights to reimburse Musta on an ongoing basis, neither does that order limit Mendota

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compliance with state accommodations law was simply an obstacle to congressional purpose in enacting the federal prohibition on cannabis possession under the CSA.

[12] Although *Orozco-Prada* was technically about conspiracy to aid and abet, in finding probable cause to support the conspiracy charge, the court implicitly recognized that aiding and abetting was also satisfied by the postdistribution act. *See United States v. Perez*, 922 F.2d 782, 786 (11th Cir. 1991) (citing *Orozco-Prada* in upholding a conviction of aiding and abetting illegal narcotics possession and distribution when the conduct at issue occurred after the underlying possession).

Heights's reimbursement obligation to a one-time purchase. Musta obtained and possessed medical cannabis, and will continue to do so in the future,[13] based on the expectation that Mendota Heights's reimbursement obligation is established by state law. *See* Minn. Stat. § 176.135, subd. 1(a).[14] Indeed, the entire purpose of reimbursement under our workers' compensation scheme is to fulfill the legislative policy to provide injured employees with "quick and efficient delivery of . . . medical benefits" that are reasonable and necessary to treat the work-related injury. *See* Minn. Stat. § 176.001 (2020). And as long as medical cannabis remains "reasonably . . . required" to treat and cure the effects of Musta's injury, the Workers' Compensation Act requires Mendota Heights to fund Musta's ongoing use and possession that is illegal under federal law.

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[13] Musta's qualifying condition under the THC act is chronic pain, and there is nothing in the record to suggest that she will purchase and possess medical cannabis on only a single occasion. Quite the opposite, Musta had undergone extensive, unsuccessful medical intervention before she began using medical cannabis, which appears to provide her at least some relief.

[14] It also strikes us as odd to suppose that Musta's first reimbursement of medical cannabis would not be preempted by the CSA, but each subsequent request would be. Or similarly, that Musta's reimbursement would not be preempted because she can afford her medical cannabis while another employee's reimbursement would be preempted if that employee could not afford the medical cannabis without reimbursement. It is far sounder, based on the expectations and obligations designed into our workers' compensation laws, to conclude that all of these reimbursements are preempted.

Thus, we conclude that mandating Mendota Heights to pay for Musta's medical cannabis, by way of a court order, makes Mendota Heights criminally liable for aiding and abetting the possession of cannabis under federal law.[15] Finally, we note the argument by the dissent that preemption here frustrates the intention of the Legislature to make medical cannabis available to patients suffering from intractable pain. We agree that if the result here is not beneficial to the employee, the remedy is for Congress to pass, and the President to sign, legislation that addresses the preemption issues created by the conflict between federal and state law.

As it is impossible to comply with both state and federal law, the compensation court's order is preempted by the CSA.[16] Accordingly, we reverse the

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[15] We note the constitutional danger lurking in Musta's argument that a state court order can negate the mens rea for a federal crime. Were we to adopt her reasoning, then a state could nullify *any* federal specific intent crime by simply passing legislation that mandates a person to perform the criminal act. Under our constitutional order, that cannot be. To do so would undermine the entire purpose of the Supremacy Clause of the United States Constitution.

[16] Because we conclude that the CSA preempts the order for reimbursement under impossibility preemption, we need not—and decline to—analyze obstacle preemption. We note that there may be other legal theories under which the CSA preempts such an order, but we confine our analysis to the theories raised and argued by the parties. *See State v. Caldwell*, 803 N.W.2d 373, 382 n.3 (Minn. 2011).

Although the dissent finds our interpretation of the intent standard for aiding and abetting liability to be "expansive[ ]" and "troubling," our decision is based on the authoritative statements by the

decision of the Workers' Compensation Court of Appeals.

## CONCLUSION

For the foregoing reasons, we reverse the decision of the workers' compensation court of appeals.

Reversed.

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*Rosemond* Court, which itself reflects the uncertainty and breadth of accomplice liability in the law as it stands. *See* Stephen P. Garvey, *Reading Rosemond*, 12 Ohio St. J. Crim. L. 233, 241 (2014) (stating that the Supreme Court's guidance on the mental state required for aiding and abetting liability "is no model of clarity" and offering three frameworks for interpreting Rosemond); Lauren A. Newell, *Hitting the Trip Wire: When Does a Company Become a "Marijuana Business"*?, 101 B.U. L. Rev. 1105, 1131–32 (2021) (explaining that the CSA "casts a wide net of potential liability" and that the "most difficult cases" involve potential liability under conspiracy or aiding and abetting theories).

Consequently, we emphasize that our decision here finding preemption by the CSA is limited to the unique facts and setting of this dispute: a claim for reimbursement of medical expenses, incurred to treat a work-related injury, where the treatment for which the expense is incurred is the purchase and use of medical cannabis, with the reimbursement liability determined in a legal proceeding. We express no opinion on whether the CSA preempts any component of Minnesota's medical cannabis program, nor does our preemption decision here extend to any other form of medical treatment.

## CONCURRENCE & DISSENT

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

I agree with Part I of the court's decision, which holds that the Workers' Compensation Court of Appeals lacks subject matter jurisdiction to *decide* whether federal law preempts a provision of Minnesota's workers' compensation law that requires an employer to reimburse an employee who purchases medical cannabis. *See* Minn. Stat. § 176.135, subd. 1(a) (2020) (requiring an employer to "furnish any medical . . . treatment . . . as may reasonably be required" to treat a work-related injury). I write separately because I disagree with the court's holding in Part II that the federal Controlled Substances Act, 21 U.S.C. §§ 801–971, *preempts* an employer's obligation under state workers' compensation law, Minn. Stat. § 176.135, subd. 1(a), to reimburse an employee who buys medical cannabis that is reasonably required to treat the employee's work-related injury. Because the court's conclusion that a conflict of law exists rests on an unduly expansive view of aiding and abetting liability, with the result of denying injured employees reasonable and necessary medical treatment,[1] I respectfully dissent.

Federal law establishes that a person who "aids, abets, counsels, commands, induces or procures" the commission of a federal offense "is punishable as a principal." 18 U.S.C. § 2. As explained in *Rosemond*

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[1] The parties stipulated that medical cannabis is reasonable and necessary to treat Musta's work-related injury.

*v. United States*, 572 U.S. 65, 71 (2014), aiding and abetting has two elements. A person must carry out an "affirmative act in furtherance of" the crime with "the intent of facilitating the offense's commission." *Id.* Reimbursing Musta for her prior purchase of cannabis pursuant to the order of the compensation judge satisfies neither element. Nor is Minnesota's workers' compensation law, Minn. Stat. § 176.135, subd. 1(a), an impermissible "obstacle" to the purposes of the Controlled Substances Act.

## I.

I begin with the element of an affirmative act in furtherance of the crime. A defendant can be convicted of aiding and abetting without proof of participating in every aspect of the crime, but the defendant must have aided in *some* aspect of the crime. *Rosemond*, 572 U.S. at 74–75 ("It is inconsequential . . . that [a defendant's] acts did not advance each element of the offense; all that matters is that they facilitated one component."). Accordingly, a person cannot aid and abet a crime after it is complete, as is well established. *See United States v. Centeno*, 793 F.3d 378, 390 (3d Cir. 2015); *United States v. Figueroa-Cartagena*, 612 F.3d 69, 74 (1st Cir. 2010); *United States v. Hamilton*, 334 F.3d 170, 180 (2d Cir. 2003); *United States v. Delpit*, 94 F.3d 1134, 1150-51 (8th Cir. 1996).

Here, the compensation judge ordered relators Mendota Heights Dental Center and Hartford Insurance Group (collectively, Mendota Heights) to reimburse Musta for her prior purchase of medical cannabis. Because that purchase and the related possession are already complete, reimbursing Musta

now would not further any element of an offense of possession. *See United States v. Ledezma*, 26 F.3d 636, 642–43 (6th Cir. 1994) (holding that the evidence did not support an aiding and abetting conviction when the defendant entered the conspiracy *after* the illegal possession was complete). Consequently, Mendota Heights can comply with the reimbursement order without violating federal law.

The court tries to circumvent the completed-crime rule in two ways. First, the court concludes that an exception to the rule applies, citing *Ledezma*. Under that exception, aiding and abetting drug offenses "may encompass activities, intended to ensure the success of the underlying crime, that take place after . . . the principal no longer possesses the [illegal substance]." *Id.* at 643. But *Ledezma* recognized that exception in only two contexts. First, after-the-fact actions may be aiding and abetting when the crime is still *on-going*, such as when the drugs have changed hands but the money has not. *Id. (citing United States v. Coady*, 809 F.2d 119, 124 (1st Cir. 1987)). Second, after-the-fact measures may aid and abet when the defendant's action is a "recurring contribution to a *continuing* crime," such as laundering money proceeds of a drug sale. *Id.* (citing *United States v. Orozco–Prada*, 732 F.2d 1076, 1080 (2d Cir. 1984)). Neither circumstance is present in this case.

Unlike the transaction in *Coady*, Musta's purchase is already complete. So too is the related possession, or at least, if ongoing, it would not be affected by any reimbursement now. And unlike *Orozco-Prada*, reimbursement after the fact is not "*integral* to the

success" of unlawful possession in the same way that money-laundering is integral to a drug distribution scheme. *Orozco–Prada*, 732 F.2d at 1080. After all, selling drugs is useless if the proceeds are unusable, but a person may find any number of ways to fund a purchase of medical cannabis. Here, Musta purchased the medical cannabis on her own without knowing whether she would ultimately be reimbursed.

Second, the court relies heavily on Musta's *expectation* of reimbursement and assumes that Musta will continue to buy medical cannabis with the expectation of being reimbursed. But Musta's unilateral expectation does not extend the duration of a crime of possession after it is complete, at least when Mendota Heights does not agree in advance to reimburse her. Heights has not stated that it will reimburse any future purchase, and whatever statutory obligation it may have to reimburse Musta in the future will depend on the facts and circumstances existing at that time. *See* Minn. Stat. § 176.135, subd. 1(a) (requiring an employer to furnish treatment that is reasonably required "at the time of the injury and *any time thereafter*" (emphasis added)); Minn. Stat. § 176.136, subd. 2(2) (2020) (permitting an employer to refuse to pay for treatment that is excessive).

Musta's personal expectation of future reimbursement is therefore far different from the recurring contribution of a defendant who, by agreeing to launder proceeds of illegal sales on a recurring basis, has offered encouragement and aid for the completed sale—and potentially for future sales too. *See Orozco-Prada*, 732 F.2d at 1080. Accordingly, Mendota

Heights can comply with the reimbursement order without violating federal law because reimbursement would not contribute to any element of a crime "before or at the time the crime was committed." *Delpit*, 94 F.3d at 1151.

**II.**

Even assuming that the affirmative-act requirement would be met, Mendota Heights could not be liable under an aiding and abetting theory because it lacks the required intent. Under the "canonical formulation" of intent for aiding and abetting, "a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'" *Rosemond*, 572 U.S. at 76 (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)). In other words, the defendant must act with the purpose of furthering the crime.

Undoubtedly, Mendota Heights has no desire to help Musta possess cannabis. This lawsuit and appeal are ample evidence of that fact. *See Hager v. M&K Constr.*, 246 A.3d 864, 889 (N.J. 2021) (observing that, "[b]y the very nature of its appeals," the employer "has made it clear that it does not wish" to aid in an employee's possession of medical cannabis). Accordingly, the court turns to a different formulation of the intent standard in *Rosemond*, namely, that the intent requirement may be satisfied "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." 572 U.S. at 77. The court reasons that because reimbursement would finance Musta's

possession and effectively facilitate her future possession, Mendota Heights would actively participate in Musta's possession of medical cannabis if it reimburses her. And because Mendota Heights is "fully knowledgeable about the circumstances advanced" by its compelled reimbursement, the knowledge requirement is met.

I agree with the court that active participation with full knowledge of the criminal scheme can satisfy the intent requirement for aiding and abetting, as is clearly stated in *Rosemond*. 572 U.S. at 77. But I disagree that reimbursing an employee to fulfill a statutory duty that is determined by a court order is "active participation" in a crime that the employee chooses to commit.

*Rosemond* does not suggest that knowingly active participation represents a lesser mens rea than acting with the specific purpose of furthering the crime. Instead, active participation operates as a *means of demonstrating* that a person intends to facilitate a crime, as both the majority and dissent in *Rosemond* recognized. *See id.* ("[A] person who *actively participates* in a criminal scheme *knowing* its extent and character *intends* that scheme's commission." (emphasis added)); *id.* at 85 (Alito, J., dissenting) ("[T]he difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight.").

The cases cited by the *Rosemond* Court as examples of knowingly active participation are instructive. *See* 572 U.S. at 77. In *Pereira v. United States*, 347 U.S. 1, 12 (1954), the Court found that the defendant had the requisite intent for aiding and abetting mail fraud when

he deceptively obtained a check from the victim knowing that a confederate would do the actual mailing to collect on the check. And in *Bozza v. United States*, 330 U.S. 160, 165 (1947), the Court upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant "helped operate a clandestine distillery" while he was aware of the illegal nature of the business.

In each case, the defendant's purpose of furthering the illegal scheme is inferable from his active participation in, with full knowledge of, the underlying crime. In *Pereira*, the defendant's desire that the check be mailed was clear from his part in deceiving the victim and obtaining the check, knowing that the check would later be mailed. 347 U.S. at 12 ("[I]t is also clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interstate commerce."). And in *Bozza*, assisting with a secret distillery operation implied an intent to help the owner evade taxes. 330 U.S. at 165 ("[A] person who actively helps to operate a secret distillery knows that he is helping to violate Government revenue laws. That is a well known object of an illicit distillery."). In short, each defendant's actions showed that he had chosen "to align himself with the illegal scheme in its entirety." *Rosemond*, 572 U.S. at 78.

But the conduct that satisfied active participation in *Pereira* or *Bozza* was far more involved in the underlying scheme than the conduct here. Unlike *Bozza*, Mendota Heights is not directly involved in carrying out the illegal scheme: Mendota Heights is not participating in the transaction between Musta and the cannabis dispensary nor in Musta's related

possession of the cannabis. Any reimbursement would be paid after the purchase and possession are already complete, and any ongoing possession of that cannabis would be unaffected by the reimbursement. Unlike *Pereira*, Mendota Heights is not seeking to facilitate a criminal act by a confederate. Mendota Heights is not encouraging Musta to buy or possess cannabis; neither is it paying her for future purchases ahead of time. Musta's past decision to purchase cannabis, and any decision to purchase cannabis in the future, is her own. Further, Mendota Heights is doing everything it can to distance itself from Musta's purchase and possession of medical cannabis. Consequently, there simply is no sign that Mendota Heights has "align[ed]" itself with Musta's choice to possess cannabis or desires in any way to "make [any plan of Musta's] succeed." *Rosemond*, 572 U.S. at 78. Accordingly, Mendota Heights lacks the required intent to aid and abet.

The court cites to *Garcia v. Tractor Supply Co.*, 154 F. Supp.3d 1225, 1226 (D.N.M. 2016), to support its conclusion that Mendota Heights would have the required intent to aid and abet. This reliance on *Garcia* is misplaced. *Garcia* held that an employer was not required to accommodate an employee's use of medical cannabis because the New Mexico Human Rights Act was preempted by federal law to the extent that the act required the employer to accommodate the employee's illegal drug use. *Id.* at 1230. But *Garcia* did not rely on impossibility preemption based on a theory of aiding and abetting liability. It relied on obstacle preemption, *see id.*, the form of preemption applied in *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d

518, 536 (Or. 2010), which is a theory that the court does not reach and that I will address later. Therefore, *Garcia* offers no support for the court's conclusion that federal law preempts section 176.135, subdivision 1(a), based on impossibility preemption.

The court also stakes its analysis on the difference between intent and motive. The court implicitly acknowledges that the compensation judge's order may be relevant to a defense of necessity but insists that the order has no relevance to the question of intent. Notably, a similar criticism was leveled at, and rejected by, the Court in *Rosemond*. The Court held that, to be liable for aiding and abetting, a defendant must have "advance knowledge" of the facts constituting the entire crime such that the defendant can "do something with" that knowledge. *Rosemond*, 572 U.S. at 78. For example, if an accomplice to a drug transaction knows nothing of a gun until it appears on the scene, that accomplice may not be liable for aiding and abetting a gun crime if there was no realistic opportunity for him or her to leave the scene. *Id.* Justice Alito, dissenting in part, accused the Court of confusing intent to commit an act with the motive for committing an act, *id.* at 88 (Alito, J., concurring in part, dissenting in part), but the Court explained that aiding and abetting has a "distinctive intent standard" that requires a defendant to participate in the venture as something to be brought about and not just "in some sort associate himself with the venture." *Id.* at 81 n.10 (internal quotation marks omitted).

Here, the record clearly shows that Mendota Heights has no desire to help Musta possess cannabis. Neither

has Mendota Heights chosen to "align [itself] with the illegal scheme in its entirety." *Id.* at 78. Although Mendota Heights has advance knowledge that Musta seeks reimbursement for medical cannabis, it reimburses her for this medical treatment only under the obligation of state law and at the order of a court. I therefore conclude that the "distinctive intent standard" for aiding and abetting is not met.

The expansiveness of the court's interpretation of the intent standard for aiding and abetting is troubling.[2] Mendota Heights would reimburse Musta only after the fact and only to fulfill a statutory duty as determined by a court. If that counts as active participation in Musta's possession solely because Mendota Heights would be knowingly "financing" or "facilitating" that possession, then other actions thought to be innocent could likewise trigger criminal liability.

For example, if an employee tells her employer, "I'm going to use my next three paychecks to buy medical cannabis," and the employer pays the employee those three paychecks, has the employer then knowingly "financed" that employee's unlawful possession? It would be absurd to suppose that, in such a situation, state fair labor laws requiring an employer to pay an employee a minimum hourly wage are partially preempted. Or, if a bus route passes a cannabis

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[2] The court tries to shield responsibility for its expansive interpretation behind the "authoritative statements" by the Supreme Court in *Rosemond*. But as I have explained and other courts of last resort have found, *Rosemond* by no means compels the interpretation or result that the court reaches today.

dispensary, and the bus driver knows that a passenger is on his way to purchase medical cannabis, has the bus driver knowingly "facilitated" a future possession of cannabis? Is the same true of a taxi driver who knows the purpose of the trip? Surely those facts alone are not enough to convict the bus or taxi driver of aiding and abetting the possession of cannabis. If intent is inferable from those circumstances—which are nothing more than incidental participation in the crime[3] —then the government's burden of proving intent is effectively eliminated.[4]

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[3] The Court in *Rosemond* distinguished between incidental and active participants, stating that the owner of a gun store, who sells a gun to a criminal while knowing but not caring how the gun will be used, would be only an *incidental* participant in the subsequent crime. *See* 572 U.S. at 77 n.8. Although the Court declined to decide whether incidental participants are guilty of aiding and abetting an offense, the logical answer is no. The whole point of specific intent is that the defendant is aligned with the venture as something the defendant wishes to bring about. *Id.* at 76. Incidental participants lack this alignment and are more like those who are merely associated "'in some sort' " with a venture than those who actively participate in bringing the venture about. *Id.* (citation omitted).

Notably, Mendota Heights is even less involved than the Court's hypothetical gun store owner who willingly sells the gun. Mendota Heights would be like a gun store owner who staunchly refuses to sell the gun to a customer until ordered to do so by a court.

[4] The court tries to distinguish the employer hypothetical by stating that a paycheck is ordinarily used "for any number of purchases" other than cannabis. That distinction is irrelevant. Under my hypothetical, the paycheck is used to purchase cannabis and, following the court's reasoning, the employer is aiding and abetting the purchase by knowingly financing it.

The law of aiding and abetting does not allow for such expansive liability. *Rosemond* dictates that the government prove "inten[t] to facilitate that offense's commission." 572 U.S. at 76. It is not enough that a person is "in some sort associate[d]" with the offense; a person must "'participate in it as in something that he wishes to bring about.'" *Id.* (quoting *Nye & Nissen*, 336 U.S. at 619). Consistent with the holdings of the New Jersey and New Hampshire Supreme Courts, I conclude that Mendota Heights does not have a specific intent to aid Musta in unlawfully possessing cannabis merely by reimbursing her after the fact based on a court order applying state law. *See Hager*, 247 A.3d at 889; *Appeal of Panaggio*, —— A.3d —— WL 787021 at *6 (N.H. Mar. 2, 2021).[5]

## III.

Because it is not impossible for Mendota Heights to comply with the compensation judge's order and federal

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The court tries to distinguish the bus driver hypothetical by stating that the route is driven "not solely for the benefit of the passenger to obtain cannabis." But that distinction resorts to the motive of the driver, an argument which the court itself rejects.

[5] The court claims that, following my reasoning, a state could nullify *any* federal specific intent crime by simply passing legislation that commands a person to perform the criminal act. Not so. A person could still be liable for aiding and abetting an offense if there were facts demonstrating that the person had aligned themselves with the criminal scheme. Further, even if *impossibility* preemption did not apply, there would still be a serious question of *obstacle* preemption, which is triggered when a state law thwarts Congress's intent. As I will explain, obstacle preemption does not exist under the specific facts of this case, but it may apply if a state attempted what the court describes.

law, I next address the question of obstacle preemption. Obstacle preemption exists when "state law is an obstacle to the accomplishment of the purposes of the federal scheme." *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002). Under Minnesota's workers' compensation laws, an employer must "furnish any medical . . . treatment" as "may reasonably be required" to "cure and relieve from the effects of the injury." Minn. Stat. § 176.135, subd. 1(a). The question, then, is whether section 176.135, subdivision 1(a), stands as an obstacle to the purpose of the Controlled Substances Act if section 176.135 requires an employer to reimburse an employee for the purchase of medical cannabis.

"Congressional purpose is the ultimate touchstone of the preemption inquiry." *Gretsch v. Vantium Cap., Inc.*, 846 N.W.2d 424, 432–33 (Minn. 2014). But preemption is usually disfavored. *Martin*, 642 N.W.2d at 11. Because workers' compensation is traditionally a matter of state law, I start with the assumption that section 176.135 is not preempted "'unless that [is] the clear and manifest purpose of Congress.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alteration in original). The case for preemption is also particularly weak when Congress knew that state law operated in an area of federal interest, but "nonetheless decided to stand by both concepts and to tolerate whatever tension there was between them." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

"The main objectives of the [Controlled Substances Act] were to conquer drug abuse and to control the

legitimate and illegitimate traffic in controlled substances." *Gonzales v. Raich*, 545 U.S. 1, 12 (2005). "Congress was particularly concerned with the need to prevent the diversion of drugs from legitimate to illicit channels." *Id.* at 12–13. "To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the [Act]." *Id.* at 13.

Consistent with the decisions of courts of last resort in other states, I conclude that the reimbursement of medical cannabis that is purchased and used within the strictures of the state's medical cannabis research program does not stand as an impermissible obstacle to the purposes of the Act. As observed by the New Hampshire Supreme Court, the Act does not make it illegal for an insurer to reimburse an employee for a purchase of medical cannabis or purport to regulate insurance practices in any manner. *Appeal of Panaggio*, 2021 WL 787021 at *8. In addition, the compensation judge's order in no way prevents the federal government from using its own resources to enforce the Act. *Id.*; *see Erwin Chemerinsky et al.*, *Cooperative Federalism & Marijuana Regulation*, 62 UCLA L. Rev. 74, 111–12 (2015) (arguing that, because the federal government cannot commandeer state legislatures and require them to prohibit cannabis altogether, a state's regulation of medical cannabis does not stand as an obstacle to the objectives of the Controlled Substances Act).

Furthermore, as explained by the New Jersey Supreme Court, since 2015, Congress has prohibited the

Department of Justice from using its funds to prevent states from implementing their medical cannabis laws. *Hager*, 247 A.3d at 886. These appropriation riders at the very least show that Congress has chosen to "tolerate" the tension between state medical cannabis laws and the Controlled Substances Act, *see Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166–67 (1989), and may even have eliminated liability under federal law for the possession of medical cannabis that was permitted under state law during those years, *see Hager*, 247 A.3d at 887. For these reasons, I conclude that the high bar for obstacle preemption is not met.

## IV.

In sum, because it is not impossible for Mendota Heights to comply with state and federal law, and because reimbursing Musta does not stand as an impermissible obstacle to federal law, I would hold that the section 176.135, subdivision 1(a), is not preempted by federal law. Consequently, I would affirm the decision of the Workers' Compensation Court of Appeals.

The court has chosen to do otherwise, and the effect of today's decision is to prevent Musta and other injured workers who suffer intractable pain from receiving the relief that medical cannabis can bring. In doing so, the court frustrates the Legislature's goal of providing "quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." Minn. Stat. § 176.001 (2020). today's decision misconstrues the scope of the specific intent underlying an aiding and abetting offense—with the effect of denying reimbursement for reasonable and

necessary treatment for injured workers—I respectfully dissent.

## Appendix B

SUSAN K. MUSTA, Employee/Respondent, v. MENDOTA HEIGHTS DENTAL CTR., and HARTFORD INS. GRP., Employer-Insurer/Appellants.

WORKERS' COMPENSATION
COURT OF APPEALS
NOVEMBER 10, 2020
WC19-6330

JURISDICTION – SUBJECT MATTER. As the parties stipulated that the medical marijuana dispensed to the employee was reasonable and necessary to relieve the effects of the employee's work injury, the compensation judge's award of reimbursement is affirmed, but the findings made regarding the federal preemption issue arising under the Controlled Substances Act, 21 U.S.C. § 801 et seq., are stricken as the compensation judge had no subject matter jurisdiction to consider that issue.

Determined by:

Sean M. Quinn, Judge
Patricia J. Milun, Chief Judge
Gary M. Hall, Judge
Deborah K. Sundquist, Judge

Compensation Judge: Kirsten M. Tate

Attorneys: Thomas D. Mottaz, Coon Rapids, Minnesota, for the Respondent. William M. Hart, Julia J. Nierengarten, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota, and Kassi Erickson Grove, Law Offices of

Steven G. Piland, Overland Park, Kansas, for the Appellants.

Affirmed.

## OPINION

SEAN M. QUINN, Judge

The employer and insurer appeal the Findings and Order of a compensation judge awarding reimbursement to the employee for her out-of-pocket expenses incurred in purchasing medical cannabis. We affirm.

## BACKGROUND

The employee, Susan Musta, suffered a work injury to her neck on February 11, 2003. She has undergone numerous medical modalities to treat her symptoms including surgery, chiropractic care, medical management, physical therapy, and injections. For some time, she was taking a long-term opioid. On February 2, 2018, a compensation judge found that long-term opioids were not reasonable and necessary treatment because they were no longer effective, that the prescriptions did not comply with the treatment parameters, and that a departure from the treatment parameters was not appropriate. There was no appeal.

Subsequently, a medical doctor certified the employee as suffering from intractable pain, which qualified her to obtain medical cannabis under the Minnesota Medical Cannabis Therapeutic Research Act (MCTRA), Minn. Stat. § 152.21 et. seq. (2018), to treat her condition. The employee then did just that, obtaining medical cannabis from a state authorized distributor and paying for the prescription out of her

own pocket. She requested reimbursement from the employer and insurer. Because they asserted federal law preempts the MCTRA and precludes them from reimbursing the employee for these out-of-pocket expenses, they declined to do so.

The matter came on for hearing before a compensation judge on August 8, 2019. The parties stipulated that employee's use of medical cannabis was reasonable, necessary, and causally related treatment for her work injury. They also stipulated that the employee had properly followed the procedures outlined in the MCTRA. The only issue presented to the compensation judge was whether, despite the factual stipulations, an order requiring the employer and insurer to reimburse the employee for her out-of-pocket expenses associated with her use of the medical cannabis would be in violation of federal law. Before the compensation judge issued her decision, the Office of Administrative Hearings certified the preemption question to the supreme court. By order dated October 16, 2019, the supreme court declined to accept the certified question, stating "the legal issue presented by this workers' compensation matter is best addressed through the decision process established by the Legislature." They sent the matter back to the compensation judge for resolution, informing the parties that they could go through the normal appellate process if dissatisfied with the outcome.

On November 13, 2019, the compensation judge issued her Findings and Order determining that the employer and insurer must reimburse the employee for out-of-pocket expenses associated with her use of

medical cannabis. In doing so, the compensation judge addressed the federal preemption issue and held that because the United States Congress, through their specific decision to not appropriate funds to the Department of Justice for the prosecution of any violations of the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq., involving medical cannabis, there was no federal preemption of state medical cannabis laws. Because the parties otherwise stipulated to reasonableness, necessity, and causation, the compensation judge awarded reimbursement to the employee for her out-of-pocket expenses.

The employer and insurer appeal.

## STANDARD OF REVIEW

On appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3). Substantial evidence supports the findings if, in the context of the entire record, "they are supported by evidence that a reasonable mind might accept as adequate." *Hengemuhle v. Long Prairie Jaycees*, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. *Id.* at 60, 37 W.C.D. at 240. Similarly, findings of fact should not be disturbed, even though the reviewing court might disagree with them, "unless they are clearly erroneous in the sense that they are manifestly contrary to the weight of evidence or not reasonably supported by the evidence as a whole."

*Northern States Power Co. v. Lyon Food Prods., Inc.*, 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

A decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which the Workers' Compensation Court of Appeals may consider de novo. *Krovchuk v. Koch Oil Refinery*, 48 W.C.D. 607, 608 (W.C.C.A. 1993), *summarily aff'd* (Minn. June 3, 1993).

## DECISION

An employer and insurer are required to pay for all reasonable, necessary, and causally related medical expenses to treat an injured employee. Minn. Stat. §176.135. The parties stipulated that the employee's use of medical cannabis is a reasonable, necessary, and causally related treatment for her work injury. Consequently, the employee's claim for reimbursement for her out-of-pocket expenses for her medical cannabis is compensable under the Workers' Compensation Act.

Though compensable under state law, the employer and insurer argue that federal law preempts the state's medical cannabis law. The question raised to this court is whether the CSA, which governs the manufacture, distribution, and possession of marijuana, preempts the MCTRA and precludes a Minnesota workers' compensation judge from awarding reimbursement to an injured employee for her out-of-pocket expenses associated with purchasing medical cannabis to treat her work injury.

To answer this question, this court would need to interpret and apply laws beyond the Workers'

Compensation Act and beyond our limited jurisdiction.[1] The mere fact that our supreme court declined to consider this matter on a certified question did not vest to the compensation judge nor to this court additional jurisdiction to decide legal questions governed by laws, including criminal laws, outside of the WCA. We decline to do so and conclude that this is best addressed by a court of broader jurisdiction. To the extent the compensation judge interpreted and applied federal law, we reject her analysis and strike Findings 1-9. However, because the state law questions can be resolved on the stipulated facts and on Finding 10, we affirm the result reached.

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[1] Minn. Stat. § 175A.01, subd. 5, states that this court has jurisdiction for "all questions of law and fact arising under the workers' compensation laws of the state." The statute further provides that we do not have jurisdiction "in any case that does not arise under the workers' compensation laws of the state or in any criminal case." *Id.* In fact, the ramifications of this court adopting the preemption argument by the employer and insurer would be to invalidate the MCTRA in its entirety, something clearly beyond our jurisdiction.

## Appendix C

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

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WID: 7750318
DOI: 02-11-2003

OAH Case No. 7750318-MR-2327
Workers' Compensation Judge
Kirsten M. Tate

SUSAN K. MUSTA,
EMPLOYEE,

v. **FINDINGS AND ORDER**

MENDOTA HEIGHTS
DENTAL CENTER,
EMPLOYER,

AND

HARTFORD INSURANCE
GROUP,
INSURER.

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Following the filing of a Request for Formal Hearing, this matter came on for hearing before Workers' Compensation Judge Kirsten M. Tate on August 8, 2019.

Thomas D. Mottaz, of Mottaz & Sisk Injury Law, appeared on behalf of the employee.

Kassi Erickson Grove, of the Law Offices of Steven G. Piland, appeared on behalf of the employer/insurer.

The legal issue in this matter was submitted to the Minnesota Supreme Court for purposes of addressing it under Minn. Stat. § 176.325, subd. 1 (2018). On October 16, 2019, the Minnesota Supreme Court declined to accept the certified question and remanded the case to the Office of Administrative Hearings (OAH) for decision.

## STATEMENT OF ISSUES

1. Does the illegality of marijuana under federal law prohibit the employer/insurer from reimbursing the employee for her use of medical marijuana?
2. Should the potential intervention interest of Entira Family Clinic be extinguished for its failure to timely file a motion to intervene?

The parties agreed to the following stipulations of fact:

## STIPULATION OF FACTS

1. The employee's use of medical cannabis is reasonable, necessary, and causally related to her work injury.
2. The employee has weaned off of Nucynta since the issuance of the Findings and Order of February 5, 2018.
3. The employee's utilization of medical cannabis has been in compliance with Minn. Stat. §§ 152.22-37 (2018).

Based upon all of the files, records, and proceedings in this matter, the undersigned Workers' Compensation Judge issues the following:

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

**Medical marijuana reimbursement issue:**

1. In 2014, the Minnesota State Legislature legalized the use of medical cannabis for residents of Minnesota who have a qualifying medical condition.[1] The "patient"[2] must ensure that his/her use of medical cannabis complies with the provisions of the statute.[3]

2. Minn. Stat. § 176.135, subd. 1 (2018), provides, "The employer shall furnish any medical, psychological, chiropractic, podiatric, surgical and hospital treatment, including nursing, medicines, medical, chiropractic, podiatric, and surgical supplies . . . [a]s may reasonably be required at the time of the injury and anytime thereafter to cure and relieve from the effects of the injury." The legislature has not enacted a prohibition

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[1] Minn. Stat. § 152.22 – 37, also known as the Minnesota Medical Cannabis Act.

[2] Pursuant to Minn. Stat. § 152.22, subd. 9, "patient" is defined as, "A Minnesota resident who has been diagnosed with a qualifying medical condition by a health care practitioner and who has otherwise met any other requirements for patients under sections 152.22 to 152.37 to participate in the registry program under sections 152.22 to 152.37."

[3] Minn. Stat. § 152.22.37.

or limitation regarding medical cannabis or other non-FDA approved drug or treatment modality.[4]

3. Under Minnesota Law, use of medical cannabis is legal, and under the stipulated facts of this case, the employee's use of medical cannabis is reasonable, necessary and causally related to the employee's work injury, and is compensable under Minn. Stat. 176.135, subd. 1.[5]

4. Minnesota's Medical Cannabis Act excludes certain payors (Minnesota Healthcare Programs and Medical Assistance) from paying for/reimbursing a "patient" for his/her use of medical cannabis. Minnesota employers and workers' compensation insurers are not specifically identified as an excluded payor.[6]

5. Under federal law, the possession and/or use of marijuana is illegal, as is aiding or abetting another's possession and/or use of it.[7]

6. The U.S. Constitution assigns to Congress the power to appropriate government funding and forbids the Executive from spending money that has not so been allocated.[8] The Supreme Court of the United States has held that the Appropriations Clause of the U.S.

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[4] Minn. Stat. § 176.135, subd. 1; *see also* Minn. R. 5221, 6040, subp. 10 (2019).

[5] Minn. Stat. § 176.135, subd. 1.

[6] Minn. Stat. § 152.23, subd. (b).

[7] 21 U.S.C. § 844 (a) (2018); 18 U.S.C. § 2(a) (2018).

[8] U.S. Const., art. 1 §§ 8-9.

Constitution is meant to "assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good, and not according to the individual favor of Government agents."[9]

7. On February 15, 2019, President Trump signed the Consolidated Appropriations Act, which funded the federal government through September 30, 2019.[10] The Act allocated funds to the Department of Justice (DOJ) and included a rider at § 537, which provides, "[n]one of the funds made available under this Act to the DOJ may be used with respect to [Minnesota . . . along with 49 other U.S. States and jurisdictions], to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[11]

8. Federal prosecution by the DOJ of an employer/insurer ordered to reimburse an employee for costs incurred to receive medical treatment that is reasonable, necessary, and causally related to her work injury, would prevent Minnesota from implementing its

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[9] *See U.S. v. Jackson*, 388 F. Supp.3d 505 (E.D. Penn. 2019), citing *Office of Pers. Mgmt v. Richmond*, 496 U.S. 414, 110 S. Ct. 2465, 110 L.Ed.2d 387 (1990).

[10] *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 113 Stat. 13 (2019).

[11] *Id.* at § 537.

own laws that authorize the use, distribution, and possession of medical cannabis.[12]

9. The employer/insurer are liable to reimburse the employee for her use of medical cannabis, as it is legal under Minnesota Law, conforms with the Minnesota Workers' Compensation Act, and the current rider prohibits the DOJ from Tusing its funds to prevent Minnesota from implementing its own laws that authorize the use, distribution, and possession of medical cannabis.[13]

**Potential intervenion interest of Entira Family Clinic:**

10. On July 2, 2019, Entira Family Clinic was placed on notice of its right to intervene in this matter. Entira Family Clinic was advised that the hearing in this matter was scheduled for August 8, 2019, and that pursuant to Minn. Stat. § 176.361, subd. 2(a) (2018), it must intervene within 30 days of notice of an expedited hearing. As of the date of the hearing, Entira Family Clinic had not timely filed a motion to intervene.[14]

Based upon these Findings of Fact and Conclusions of Law, and for the reasons set forth in the incorporated

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[12] *See* Minnesota Kedical Cannabis Act; Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, 113 Stat. 13 (2019); and *U.S. v. Jackson*, 388 F.Supp.3d. at 512.

[13] *U.S. v. Jackson*, 388 F. Supp.3d 505.

[14] *See* Notice to Potential Intervenor served and filed with OAH on July 2, 2019, as contained in C-Track; *see also* Minn. Stat. § 176.361, subd. 2(a).

memorandum, the undersigned Workers' Compensation Judge makes the following:

## ORDER

1. The employer/insurer shall reimburse the employee for her use of medical cannabis.

2. The potential intervention interest of Entira Family Clinic for services provided through the date of the service of this Order is hereby extinguished and Entira Family Clinic shall not collect its extinguished interest against the employee, the employer, the insurer or any governmental program.

Dated: November 13, 2019

/s/
Kirsten M. Tate
Workers' Compensation Judge

Digitally Recorded

## NOTICE

Notice is hereby given that any party aggrieved by this Order may appeal it, or any portion thereof, to the Workers' Compensation Court of Appeals. An appeal must be filed with the Chief Administrative Law Judge no later than 30 days following service of this Order. An appeal must contain the information required by Minn. Stat. § 176.421 (2018), including the required $25.00 filing fee.

## MEMORANDUM

This case solely involves a legal issue that is not unique to the people of Minnesota, but also touches those of other states—what happens to an individual or entity which is subject to a state law that legalizes the use of medical cannabis, but is also concomitantly subject to federal law, which expressly criminalizes the possession and/or use of marijuana?

In 2014, Minnesota legalized the use of medical cannabis for certain qualified individuals. As part of the Medical Cannabis Act, Minnesota outlined parameters for its possession, use, manufacture, and sale. Also, as part of the Act, the legislature placed certain limitations on state-funded health insurers' obligations, specifically noting that medical assistance and MinnesotaCare programs were not required to reimburse an enrollee or provider for costs associated with the use of medical cannabis.[15] Workers' compensation insurers, however, were not included as part of that excepted group of potential third-party payors.

Because Minnesota's Medical Cannabis Act allows an injured worker, who has met the requisite qualifications, to use medical cannabis, and workers' compensation insurers are not expressly excepted from having to reimburse an employee for his/her use of it, the next step in the analysis is whether its use is permitted under the Minnesota Workers' Compensation Act. The threshold analysis in this regard is under Minn. Stat. § 176.135,

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[15] Minn. Stat. § 152.23, subd. (b).

subd. 1, which provides that an employer/insurer is liable to provide medical care and treatment which is reasonably required to cure and relieve the employee of the effects of the work injury. The legislature has not placed any limits on this portion of the statute. Consequently, medical cannabis, by all accounts, is a permissible and compensable form of medical care/treatment under Minn. Stat. § 176.

The crux of the analysis then rises and falls with the difference between state and federal laws. This issue was recently examined by a federal court in *U.S. v. Jackson*, and this Compensation Judge holds that the Court's analysis in *U.S. v. Jackson* is relevant and instructive.

In *U.S. v. Jackson*, the United States Probation Office sought to revoke the terms of the defendant's supervised release based on the defendant's use of medical marijuana. The defendant was a resident of Pennsylvania, and had been certified to use of medical marijuana under Pennsylvania's Medical Marijuana Act. With respect to the supervised release violation itself, the Court held that because the use of marijuana was unlawful for any purpose under federal law, his state law-compliant use of medical marijuana violated the terms of his supervised release.

However, the Court then turned to the analysis of whether the appropriations rider of 2019 prohibited the DOJ from prosecuting the supervised release violation. The Government argued that while they were prohibited from taking legal action against the states, such as to enjoin state marijuana laws, the rider did not prohibit the DOJ from engaging in more individualized

actions like criminal prosecutions. The Court rejected this theory, holding that to parse out the plain meaning of the rider in such fashion would "torture the plain meaning of the statute."[16]

The Court held, ultimately, that DOJ involvement in a violation of supervised released hearing—through the presence of an Assistant U.S. Attorney, the U.S. Marshals, or the Bureau of Prisons—constitutes use of DOJ funding.[17] The Court further concluded that the appropriations rider prohibits the DOJ from using its funds to criminally prosecute an act that his compliant with the implementation of a state's medical marijuana laws.

The analysis is similar in this case. The employer/insurer's sole contention is that a Compensation Judge's order requiring it to reimburse the employee for her legal use of medical cannabis may subject it to federal prosecution for aiding/abetting. The federal appropriations rider, however, prohibits the DOJ from using its funds to criminally prosecute an act that is compliant with the implementation of a state's medical cannabis laws. Here, the employee's use of medical cannabis is legal under Minnesota Law, and reimbursement by the employer/insurer conforms with the Minnesota Workers' Compensation Act. Federal prosecution of the employer/insurer for reimbursing the employee for medical treatment that is reasonably

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[16] *See U.S. v. Jackson* at 512, citing *United States v. Marin Alliance for Medical Marijuana*, 139 F. Supp. 3d 1039, 1044 (N.D. Cal. 2015).

[17] *See U.S. v. Jackson* at 514.

required to cure and relieve the employee of the effects of her work injury and is lawful medical treatment under Minnesota Law, would prevent Minnesota from implementing its own laws that authorize the possession, use, and distribution of medical cannabis.

In light of the above analysis, this Compensation Judge concludes the employer/insurer are liable to reimburse the employee for costs associated with her use of medical cannabis.

**K.M.T.**

## Appendix D

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
WORKERS' COMPENSATION DIVISION

WID: 7750318
DOI: 02/11/2003

Susan Musta,
Employee,

vs. **FINDINGS AND ORDER**

Robert McNamara, DDS,
Employer,
and
Hartford Insurance Group,
Insurer,
And
United Hospital,
Allina Medical Clinic,
Injured Workers' Pharmacy,
Intervenors.

The above-entitled matter came on for hearing, pursuant to notice, before Kirsten M. Tate, a Compensation Judge of the Office of Administrative Hearings, on December 13, 2017, in Saint Paul, Minnesota.

Thomas D. Mottaz, Attorney at Law, 3340 Northdale Blvd. NW, Suite 140, Coon Rapids, Minnesota 55448,

appeared on behalf of the employee. Kassi Erickson Grove, Attorney at Law, 7400 College Blvd., Suite 550, Overland Park, Kansas, 66210, appeared on behalf of the employer and the insurer.

The Request for Formal Hearing filed on May 22, 2017, initiated this proceeding.

The record in this matter closed on December 20, 2017.

Notice is hereby given that any party aggrieved by the decision herein may appeal the decision, or any portion thereof, to the Workers' Compensation Court of Appeals. An appeal must be filed with the Chief Administrative Law Judge at P.O. Box 64620, St. Paul, Minnesota 55164-0620, no later than 30 days following service of this order; it must contain the information required by Minn. Stat. § 176.421 (2016); and must be accompanied by the $25.00 fee required by Minn. Stat. § 176.421, subd. 4 (2016).

## STATEMENT OF ISSUES

1. Should the employer/insurer be relieved of its obligation to pay for Nucynta by application of Minnesota Treatment Parameter 5221.6110 (2017)?

2. Should the employer/insurer be relieved of its obligation to pay for ongoing trigger point injections, bilateral occipital nerve blocks, and V1 injections, as the treatment is not reasonable or necessary, and barred by application of Minnesota Treatment Parameter 5221.6205 (2017)?

The parties agreed to the following stipulation of fact at the hearing:

## STIPULATION

The employer/insurer will pay the employee's medical treatment/expenses as they relate to her neck or headache condition, through November 30, 2017.

Based upon all of the files, records, and proceedings herein, the Compensation Judge makes the following:

## FINDINGS

**Relevant factual/medical history:**

1. The employee sustained a work-related injury to her cervical spine when she attempted to catch an elderly patient who was falling.[1]

2. Following the work injury, the employee underwent a course of conservative care, including chiropractic treatment, medication management, physical therapy, and injection therapy.[2]

3. On November 19, 2003, the employee elected to undergo a right C5-6 hemilaminotomy with microdissection to address her C6 radiculopathy. The employee initially had some relief in her symptoms following the surgery, but her symptoms eventually returned.[3]

4. On August 3, 2006, due to ongoing pain in her neck which radiated into both shoulders, and chronic headaches, the employee underwent a two-level fusion

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[1] Employee testimony (EE test.)

[2] Petitioner's (Pet.) Exhibits (Ex.) 1-4.

[3] Pet. Exs. 5 and 6.

at the C4-5 and C5-6 levels. Once again the employee initially had some relief in her symptoms following the surgery, but her symptoms eventually returned.[4]

5. The employee initiated care with Dr. Todd Hess of the United Pain Center in August 2007. The employee indicated her pain levels ranged from a 5 — 8/10, and her pain interfered with almost all of her activities. It was noted that her father had issues with chemical dependency. From a psychological standpoint, Dr. Hess noted the employee was doing poorly, as she was feeling anxious and depressed. It was also noted the employee was on no pain medications at the time of Dr. Hess's evaluation. However, the employee's intake questionnaire indicated she was taking one tab of Darvocet (500 mg) as needed. Dr. Hess referred the employee to Dr. Bob Tolles for a mental health evaluation; prescribed Vicodin and Tizanidine; and recommended biofeedback, occipital nerve blocks and trigger point injections, warm pool therapy and massage.[5]

6. The employee met with Dr. Tolles in September 2007. It was noted the employee was on Paxil, which helped her with "panicky feelings" she was experiencing. Dr. Tolles diagnosed pain disorder with psychological forces of consternation, frustration,

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[4] Pet. Exs. 5, 6 and 10; EE test.

[5] Pet. Ex. 1.

anxiety, and dysthymia. Dr. Tolles also suggested the employee undergo biofeedback.[6]

7. The employee returned to see Dr. Hess on September 24, 2007. She indicated she was ready to undergo the recommended injections. The employee also reported that Vicodin was helping with pain relief. Dr. Hess refilled the employee's Vicodin prescription (5 mg/500 mg tablet — up to four times daily) and told the employee to discontinue her use of Darvocet. The employee's pain level was a 6/10 at that time.[7]

8. The employee had her first set of occipital nerve blocks and trigger point injections on October 3, 2007. The employee had approximately five days without a headache following the injections. By October 14, 2007, the employee's headaches had returned.[8]

9. In November 2007, Dr. Hess prescribed Diazepam (5 mg), three times per day to treat the employee's muscle spasms. The employee's pain level was a 6/10.[9]

10. In June of 2008, Dr. Hess prescribed fentanyl patches. The employee's dosage of Vicodin was kept the same. The employee's pain level was a 7/10.[10]

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

11. In September 14, 2009, the employee saw Dr. Hess as part of her regular course of follow-up with him. The employee had been undergoing pool therapy and was seeing an increase in her functional ability and improvement in her pain levels with therapy. However, the employee was feeling more depressed. Dr. Hess referred the employee back to Dr. Tolles to address her increasing depression.[11]

12. On October 7, 2009, at the employee's next visit with Dr. Hess, she advised she had been in a motor vehicle accident just a few days prior and was having increased pain in her neck. It was also noted the employee was distraught and from a psychological standpoint was the lowest she had been. The employee's cervical pain was a 7/10. No new objective findings were noted. Dr. Hess recommended the employee increase her fentanyl patch dosage, continue to use the diazepam but more aggressively while in spasm, and added Tapentadol (100 mg) for the acute pain. Dr. Hess indicated that Tapentadol was very powerful and provided for less constipation. The employee's Vicodin prescription was continued.[12]

13. The employee followed up with Dr. Edrie Kioski of United Pain Center later in October. The employee's fentanyl patch dosage was decreased to 50 mg as she was having a hard time tolerating the higher dose. The employee also indicated that Vicodin was no

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[11] *Id.*

[12] *Id.*

longer helping, so the employee was instead placed on Dilaudid (4 mg) up to four times per day.[13]

14. At the employee's visit with Dr. Hess on November 20, 2009, her pain level was a 6/10. The employee had been experiencing more panic and anxiety.[14]

15. In late 2009, the employee decided that she wanted to get off of all narcotics as she believed she was no longer living and was having a lot in the way of side effects. A taper was scheduled and monitored by the physicians at United.[15]

16. In January 2010, at an appointment with Dr. Hess, the employee again expressed her desire to get off of the opioid medication. The employee's fentanyl patch dosage was decreased, but the employee's Tapentadol dosage was maintained and she was again prescribed Vicodin for breakthrough pain. The employee's pain level was a 6/10.[16]

17. In February 2010, the employee expressed having a difficult time coming off of the opioid medication as she was having significant trouble with side effects. The employee's fentanyl patch wean was nearly complete, and the employee was instructed to

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

slowly wean off of the Vicodin. The employee's Tapentadol dosage was increased to 50 mg twice daily.[17]

18. In October 2010, the employee's monthly head and neck injections were discussed. Dr. Hess told the employee that they only wanted to continue with the injections if they were working. The employee reported that they were of significant help and kept her mobile.[18]

19. By late 2010, the employee was off of all narcotics but Tapentadol. The employee's dosage was increased, in November 2010, however, to 75 mg, up to six times daily. The employee's pain level at that time was a 7/10.[19]

20. At the employee's visit with Dr. Hess in March 2011, her pain level was an 8/10.[20]

21. In December 2011, Dr. Hess prescribed Nucynta ER (extended release), at 150 mg, twice daily, in addition to the short-acting Nucynta. The employee's pain level was a 7/10.[21]

22. The employee reported to Dr. Hess in January 2012 that her pain level was a 7/10. It was noted the employee still needed significant restrictions. The

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

record is devoid of any indication the employee's function had improved.[22]

23. At the visit on March 20, 2012, Dr. Hess questioned whether the employee had fibromyalgia, as she had a hypersensitivity reaction to almost every treatment they had tried. It was also noted that the employee had walked around at Target the night before and had a significant flare in her pain. The employee's pain level was an 8/10, and she psychologically not doing well. Bilateral occipital and V1 nerve blocks were performed. Dr. Hess noted the trigger point injections were not offering the employee any significant relief, so those were not repeated. The employee's pain dropped from an 8/10 to a 2/10 following the blocks.[23]

24. At the employee's next visit on April 17, 2012, Dr. Hess again performed bilateral occipital and V1 nerve blocks, along with trigger point injections. The employee's pain level dropped from an 8/10 to a 3/10.[24]

25. In October 2012, the employee indicated that her migraines had worsened following her last set of injections. The employee's blocks and trigger point injections were discontinued at that time.[25]

26. In January 2013, the employee returned complaining of a "horrible month of headaches". The

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

bilateral occipital nerve blocks, V1 nerve blocks, and trigger point injections were administered. The employee's pain level dropped from a 7/10 to a 2/10.[26]

27. Throughout the remainder of 2013 and 2014, the employee continued to see Dr. Hess on a monthly basis. At most visits, bilateral occipital nerve blocks, V1 nerve blocks, and trigger point injections were administered. The employee continued to be prescribed Nucynta. Employee's pain level would generally be at a 7 or 8/10 prior to the injections, and drop to a 2 or 3/10 following the injections. The employee had approximately 3 to 4 weeks in relief of her symptoms with the injections.[27]

28. In November of 2015, the employee reported that she had been doing poorly. She was particularly concerned that she was unable to cognitively process as well as she once had been able to. There was discussion about whether this could be medication or pain related. Injections were once again administered, bringing the employee's pain level from a 7/10 to a 3/10.[28]

29. At the employee's visit with Dr. Hess in February 2016, she continued to report that she was not doing well. She was particularly troubled by her low back pain. The employee's DIRE score was noted to be

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[26] *Id.*

[27] *Id.*

[28] *Id.*

over 14. Injections were administered, bringing the employee's pain from a 7/10 to a 2/10.[29]

30. At the employee's visit with Dr. Hess in April 2016, the employee reported her pain had been extremely high and she was not doing well. The employee's medications were refilled (long and short acting Nucynta), and injections were administered.[30]

31. At the employee's visit with Dr. Hess in July 2016, she again reported that she was not doing well, and after her last set of injections (June 2016), she had a headache before she left the recovery room and a migraine within a couple of days. Injections were administered.[31]

32. In August 2016, the employee signed a Controlled Substance Treatment Agreement for Pain Management. The Agreement provided certain parameters that must be met in order for the narcotics to be prescribed on an ongoing basis. The first parameter was the treatment plan should help the employee function better, and that her activity level and general function should improve, or the treatment would be changed or discontinued.[32]

33. In September 2016, the employee indicated she was not doing well, and that one week ago she had a four

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

day long migraine. The employee's pain level was at a 7/10. Dr. Hess documented that the medications and injections were working well, and refilled the Tapentadol and administered the injections. Following the injections, the employee's pain was completely alleviated.[33]

34. In October 2016, the employee again indicated she was not doing well, and was experiencing more headaches. The employee also reported that she was having issues with her ear, including her ability to hear and her equilibrium. The employee's pain level was at an 8/10. Injections were administered.[34]

35. At the employee's visit on December 22, 2016, her pain level was at a 10/10.[35]

36. In January 2017, the employee reported to Dr. Hess that she had been experiencing an increase in her headaches and migraines throughout the last month. In fact, her migraines were occurring on almost a daily basis. She was miserable. Injections were administered, bringing the employee's pain level from. a 7/10 to a 2/10.[36]

37. The employee was seen again by Dr. Hess in April 2017. It had been approximately two months since her last round of injections, and she was feeling

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[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

horrible. The employee's pain level was at a 7/10, and following the typical injection regimen her pain was reduced to a 1/10.[37]

38. At the employee's visit with Dr. Hess in May 2017, she reported she was not doing well. She had a severe migraine at the time. Injections were administered bringing her pain level from a 7/10 down to a 2/10.[38]

39. The employee returned to see Dr. Hess in July 2017, noting she was not doing well. It had been approximately two months since her last injections, and she had done well after the first month but by the end of the second month her pain increased and she was having a migraine on a daily basis. Injections were administered bringing her pain level from a 7/10 to a 2/10.[39]

40. At the employee's visit with Dr. Hess in October 2017, she indicated that she had been taking less of her Nucynta (75 mg) because she was fearful that her coverage would be denied. She noticed her pain increased and her ability to complete her household chores decreased when she was tapering back the Nucynta. The employee's pain level that day was a 7/10. Dr. Hess explained to the employee there was a difference between pain patients and addicts, and

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[37] *Id.*

[38] *Id.*

[39] *Id.*

instructed the employee to return to her normal dose of medication.[40]

41. The employee has been permanently and totally disabled since 2009.[41]

42. On October 4, 2017, Dr. Matthew Monsein performed an independent medical evaluation. After reviewing the employee's medical records and performing a physical evaluation, Dr. Monsein issued a narrative report in which he opined:

**Nucynta:**

a. Nucynta was not providing any significant benefit to the employee, and the employee has developed a physical dependency and tolerance to Nucynta.

b. Minn. R. 5221.6110, subp. 2 (2017), outlines parameters under which long term opioid use would be permitted. The employee's situation does not warrant long term opioid use because:

   i. Nucynta has not led to any clinical improvement in the employee's ability to function at work or activities of daily living.

   ii. Dr. Hess has not ruled out Somatic Symptom Disorder.

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[40] *Id.*

[41] EE Test.

iii. All reasonable treatment options, including a comprehensive pain program, have not been exhausted.

iv. It is possible the employee has failed to take the medications as prescribed.

v. Assessments regarding the employee's pain and disability, like an Oswestry questionnaire, have not been performed.

vi. Dr. Hess has not documented potential contraindications.

vii. Objective assessment of the treatment program has not been documented.

viii. Dr. Hess has not documented any discussions with the employee regarding the risks associated with long-term opioid use.

**Trigger point injections, bilateral occipital nerve blocks and V1 injections:**

c. Trigger point injections are not providing the employee with diminishing control of her symptoms or objective functional gains, and therefore are not warranted under Minn. R. 5221.6205, subp. 5 A (2) (b) (2017).

d. Because the injections are only providing temporary relief of her symptoms, they are

not reasonable and necessary medical treatment.[42]

43. On December 4, 2017, Dr. Hess issued a narrative report, in which he opined:

**Nucynta:**

a. The employee's use of Nucynta comlies with Minn. R. 5221.6110 (2017) (long-term use of opioids).

b. Dr. Tolles, a pain psychologist, evaluated the employee in 2007 and determined that the employee was at a low risk for substance abuse and did not have any evidence of somatic symptoms.

c. Specific contraindications were reviewed with the employee.

**Trigger point injections, bilateral occipital nerve blocks and V1 injections:**

d. The employee's response to the occipital nerve blocks and trigger point injections has been documented, and supports that she receives benefit, albeit short-term.

**Ultimate opinions:**

e. The employee continues to have significant medical issues as a result of her work injury. Those include spinal canal narrowing at the C2-3 level, which is likely the cause of her occipital pain; spurs at the C3-4 level;

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[42] Resp. Exs. A & E.

myofascial and trigger point pain, which is also likely contributing to her headaches; and interspinous ligament pain.

f. The employee has exhausted all other treatment modalities, and receives relief of her symptoms with the current medication and injection regimen.

g. The employee's medical situation is complex and likely warrants a departure from the treatment parameters due to the complicated nature of the employee's medical situation.[43]

44. On December 12, 2017, Dr. Hess, via a narrative report, responded to the opinions of Dr. Monsein. Dr. Hess opined and clarified:

a. The employee's Nucynta dosage has not been increased since December 2011.

b. The employee has complied with her substance abuse agreement.

c. The employee has undergone al of the components of a comprehensive pain program such as the one offered by Courage Kenny or the Mayo Clinic.[44]

45. On December 18, 2017, Dr. Monsein, via a narrative report, responded to the opinions of Dr. Hess. Dr. Monsein opined and clarified:

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[43] Pet. Ex. 1.

[44] Pet. Ex. 1.

a. His reference to Minn. R. 5221.6205, subp. 5 A (2) (b) (2017) was in error. Instead, the applicable rules are 5221.6205, subp. 5 A (1) (b) (2017) and subp. 5 A (3) (c) (2017). Nonetheless, the analysis is the same and his opinions remained unchanged on this issue.

b. The employee is currently using substantially more medication (300 milligrams) then when she originally began treatment with Dr. Hess. The employee's opioid should be tapered completely or at least to a dose consistent with the Minnesota Workers' Compensation guidelines and the CDC (80-100 milligram equivalents of Morphine per day).[45]

**Ultimate Findings of Fact and Conclusions of Law:**

46. The preponderance of the evidence is that the employee's use of Nucynta does not comply with the Minnesota Treatment parameters, and the employer/insurer should therefore be relieved of its obligation to pay for Nucynta.[46]

47. The preponderance of the evidence is that the injection therapy, including trigger point injections, bilateral occipital nerve blocks, and V1 injections, is not barred by application of the Minnesota Treatment

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[45] Resp. Ex. E.

[46] Minn. R. 5221.6110, subp. 8 (2017); Resp. Exs. A & E.

parameters, and is reasonable and necessary medical treatment.[47]

Based upon the foregoing Findings, the Compensation Judge makes the following:

## ORDER

1. The employer/insurer is relieved of its obligation to pay for Nucynta. A weaning program shall be approved by the employer/insurer and administered to the employee. Upon completion of the weaning program, the employer/insurer are no longer required to provide Nucynta.

2. The employer/insurer shall continue to approve and pay for the employee's current injection therapy.

3. The request for Formal Hearing filed May 22, 2017, is dismissed.

/s/
KIRSTEN M. TATE
Judge Supervisor
(651) 361-7900
TDD: (651) 361-7878

Dated at St. Paul, Minnesota
this 2nd day of February, 2018.
KMT/mo
Digitally Recorded

## MEMORANDUM

### Nucyenta:

The employer/insurer argue that the employee's use of Nucyenta does not comply with various provisions of the Minnesota Treatment Parameter on long-term

[47] EE test; Pet. Ex. 1.

narcotics. The particular provisions of the Rule that are in dispute are discussed and analyzed below:

**Application of Minnesota Treatment Parameter 5221.6110:**

**Patient selection criteria (subp. 4 (C)):**

Provides, "Before initiating a plan for long-term treatment with opioid analgesic medication, the prescribing health care provider must determine that all of the following criteria are met:

A. the patient cannot maintain function at work, or in the activities of daily living, without long-term use of opioid analgesic medication;

B. the patient does not have a Somatic Symptom Disorder as defined in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5);

C. all other reasonable medical treatment options have been exhausted as determined by either a pain medicine specialist or a health care provider specializing in the treatment of the area, system, or organ of the body identified as the source of the pain;

D. the patient does not have a history of failing to comply with treatment or failing to take medication as prescribed;

E. the patient does not have a current Substance Use Disorder as defined in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5); and

F. a qualitative urine drug test confirms that the patient is not using any illegal substances."

This particular provision of the Rule outlines the parameters under which a provider may initiate a long-term opioid care plan. At the time the employee's opioid program was initiated in 2007, these particular parameters had been met. The employee was not working at the time, a Somatic Symptom Disorder was ruled out by Dr. Tolles, the employee had undergone all other reasonable treatment options, the employee had no history of failing to take previously prescribed medication as prescribed, a Substance Use Disorder was also ruled out by Dr. Tolles, and the employee's drug test was negative for any illegal substances. The preponderance of the evidence supports that Dr. Hess's initiation of the long-term opioid care plan complied with this particular provision of the Rule.

**Potential contraindications (subp. 5):**

Provides, in part, "subp. 5. Potential contraindications.

A. Before beginning long-term treatment with opioid analgesic medication, the prescribing health care provider must assess whether any of the following circumstances are present and, if present, whether they constitute contraindications to the long-term treatment with opioid analgesic medication:

(1) the patient has a history of respiratory depression, or a condition that can cause respiratory depression when taking opioid analgesic medications;

(2) the patient is pregnant or is planning to become pregnant during the period of treatment with opioid analgesic medications;

(3) the patient has a Substance Use Disorder in remission as defined in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5);

(4) the patient has another mental disorder referenced in the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5);

(5) the patient is a suicide risk;

(6) the patient has poor impulse control; and

(7) the patient regularly engages in an activity that could be unsafe for a patient taking opioid analgesic medications."

Similarly, this particular provision of the Rule applies to an assessment that must be undertaken prior to the initiation of the long-term opioid care plan. The preponderance of the evidence supports that Dr. Hess and Dr. Tolles considered these factors and concluded that the employee's situation, as it existed at the initiation of the program, and appropriately concluded that a long-term opioid care plan was not contraindicated.

**Opioid risk assessment; program of treatment (sub p. 6):**

Provides, in part:

A. "Long-term treatment with opioid analgesic medication must be part of an integrated program of treatment that complies with this subpart and that is documented in the medical record.

B. The health care provider must complete an opioid risk assessment using a tool validated in the peer-reviewed scientific literature. Examples of this type of assessment tool are the Opioid Risk Tool; the Diagnosis, Intractability, Risk, Efficacy Scale (DIRE); and the Screener and Opioid Assessment for Patients with Pain—Revised (SOAPP-R). The provider must disclose the results of the assessment to the patient.

(1) If the assessment shows the patient to be at high risk of dependence or abuse, the provider must refer the patient to a pain medicine specialist or addiction medicine specialist for a second opinion before initiating long-term treatment with opioid analgesic medication.

(2) Following the second opinion, if long-term treatment with opioid analgesic medication is initiated in a patient at high risk, the prescribing provider must:

(a) Perform urine drug testing at least twice a year;

(b) Review the patient's prescription history in the Minnesota prescription monitoring program at each visit; and

(c) See the patient in clinic for follow-up every month for the first six months of treatment and every three months thereafter.

C. The patient and the prescribing health care provider must sign a formal written treatment contract that meets the requirements of subp. 7.

D. All opioid analgesic medications must be used in fixed schedules of dosing and prescribed in an amount sufficient to preclude exhaustion of a prescription on a weekend, holiday, or vacation day when the prescribing health care provider is not available.

E. Other treatment modalities are permitted in conjunction with long-term treatment with opioid analgesic medication, to the extent indicated by parts 5221.6010 (2017) to 5221.6600 (2017).

F. The prescribing health care provider must have a written plan for treatment of episodic pain due to the injury being treated, specifying the modality or medication to be used, the frequency and scheduling of the modality or dosing of medication, the duration of use, the circumstances for contacting the prescribing health care provider, and treatment of possible side effects of the medications.

G. All prescriptions for long-term treatment with opioid analgesic medication must be written only by the prescribing health care provider or the designated proxy. The patient must agree

to inform the prescribing health care provider if short-term treatment with opioid analgesic medications or other controlled drugs is prescribed by other health care providers in the treatment of acute injuries or conditions so that overall care can be properly coordinated. Examples of acute medical problems are dental procedures, acute trauma, surgery, or emergency medical treatment. The patient must also agree to inform the prescribing health care provider of any use of medical cannabis permitted under Minnesota Statutes, sections 152.22(2016) to 152.37 (2016).

H. The prescribing health care provider must discuss with the patient the risks associated with the long-term treatment with opioid analgesic medication, the specific medications to be used, and possible side effects.

I. All medications and other treatment modalities for the work-related injury must be prescribed or provided on referral by the single health care provider party to the written treatment contract or by a proxy designated in the medical record by the health care provider party to the written treatment contract.

J. The prescribing health care provider must document in the medical record the name of the drug prescribed, the dose, the dosing schedule, the amount to be dispensed, and the number of refills allowed, if any, for each opioid analgesic prescribed.

K. The prescribing health care provider must establish a schedule of follow-up visits for monitoring the treatment.

L. The prescribing health care provider must provide written reports of work ability or restrictions as required by part 5221.0410, subp. 6 (2017).

M. If long-term treatment with opioid analgesic medication is discontinued, the prescribing health care provider must prescribe a schedule of tapering dosages and ancillary medications as needed to minimize symptoms of withdrawal, taking into account the type, dose, and duration of the opioid medication being discontinued. The health care provider must offer alternative pain management treatment or referral to another provider."

As specified in subp. 6 (A), this provision of the Rule applies to the provider's obligations in connection with its prescription of ongoing long-term opioid therapy.

As provided for in subp. 6 (B), Dr. Hess does use the Efficacy Scale (DIRE) on a regular basis to assess whether the employee is at high risk for opioid dependence or abuse. The employee's scale was regularly noted to be at a 14 or higher, which does not indicate that she is at a high risk for dependence or abuse.

Subp. 6 (C) necessitates a written contract be in place for the employee's ongoing use of opioids, and Dr. Hess and the employee have complied in that regard.

The employer/insurer do not take issue with Dr. Hess's compliance with subparts (D) — (G), and this Compensation Judge concludes that the current opioid treatment regimen is in compliance with the requirements as outlined in (D) — (G).

Subp. 6 (H) provides that the prescriber must discuss with the employee the risks and side effects associated with long term opioid use. While the thoroughness of the discussions with Dr. Hess are not well documented, the employee testified that she is aware of the risks of opioid addiction and abuse.

The employer/insurer also do not take issue with Dr. Hess's compliance with subparts (I) — (M), and this Compensation Judge concludes that the current opioid treatment regimen is in compliance with the requirements as outlined in (I) — (M).

**Written treatment contract (subp. 7):**

This portion of the Rule provides that a written contract must be in place with the employee, and also identifies what must be identified and contained in the contract.

The employer/insurer argue that the written contract is not in compliance as it fails to identify the goals of long-term treatment. The particular portion of this Rule provides:

"The goals of long-term treatment with opioid analgesic medication; the program of treatment identified in subp. 6, items D, G, H, I, K, L, and M; and the monitoring described in subp. 8, items E, F, and G."

The employee's most recent pain contract of August 2016 provides, "The treatment plan should help you function better. We expect your activity level & general function to improve; otherwise, the treatment may be changed or discontinued." While this is without much specificity, this Compensation Judge concludes that there is a written treatment contract in place that identifies the goals of the long-term treatment, and otherwise comports with the requirements of subp. 7.

**Monitoring long-term treatment with opioid analgesic medications (subp. 8):**

This portion of the rule addresses what the provider must evaluate and document throughout the course of the long-term opioid therapy. The Rule provides, in part:

A. "The prescribing health care provider must schedule regular follow-up visits with the patient. Visits must be at least quarterly in the first year of treatment and no less than annually thereafter, except for patients taking more than 120 morphine-equivalent milligrams per day who must be seen at least every three months, and except for patients at high risk of dependency or abuse under subp. 6, item B, who must be seen every month for the first six months and every three months thereafter.

B. At each follow-up visit, the prescribing health care provider must assess the success of the program treatment in meeting its goals. The prescribing health care provider must assess pain and function at each follow-up visit, using

the same tools chosen for the initial assessment in subp. 3. The program is considered successful if there is improvement in both pain and function within six months after long-term treatment with opioid analgesic medication is initiated, and this improvement is at least maintained at subsequent follow-up assessments.

C. At each follow-up visit, the prescribing health care provider must assess the possible side effects of treatment, misuse of medications, aberrant behaviors indicative of addiction, or contraindications to continuing treatment.

D. At each follow-up visit, the prescribing health care provider must assess the patient''s adherence to the entire program of treatment.

E. At least semiannually, the prescribing health care provider must review the patient's prescription history in the Minnesota prescription monitoring program to validate correct medication usage, except that the prescription history must be reviewed at every follow-up visit for each patient who is taking more than 120 morphine-equivalent milligrams per day or is at high risk for dependence or abuse under subp. 6, item B. If there is more than one instance of unreported opiate prescriptions from other providers, the health care provider must discontinue opioid medications using a schedule of tapering dosages as described in subp, 6, item M.

F. The prescribing health care provider has discretion to order urine drug testing as part of a patient's monitoring, except that monitoring must include urine drug testing at least twice per year for each patient who is taking more than 120 morphine-equivalent milligrams per day or is at high risk for dependence or abuse under subp. 6, item B.

(1) Urine drug testing protocol is within the discretion of the prescribing provider. After all tests requested by the prescribing provider are completed, urine drug testing is failed if it shows the presence of an illegal substance or if the results are inconsistent with the opiate and dosage prescribed. If the urine drug testing is failed, opioid medications must be discontinued using a schedule of tapering dosages as described in subp. 6, item M.

(2) If a urine sample is sent to a laboratory for testing, the employer or insurer may designate the laboratory so long as it is accredited by the College of American Pathologists under the Forensic Urine Drug Testing Program.

G. The prescribing health care provider must provide a referral to a pain medicine specialist for consultation under any of the following circumstances:

(1) there is a sudden or progressive increase in the dosage of opioid analgesic required;

(2) the goals of the treatment program are not met; or

(3) the patient requires more than 120 morphine-equivalent milligrams per day to meet or maintain the program's treatment goals."

The employer/insurer do not take particular issue with subps. A, or C — G. This Compensation Judge has reviewed those particular subparts and concludes that Dr. Hess has complied with the requirements as outlined.

The employer/insurer argue that the employee's opioid treatment is not in compliance with subp. B, which requires the provider to assess and document the employee's pain and function at each visit in an effort to address the success of the treatment regimen. The rule goes on to state, "The program is considered successful if there is improvement in both pain and function within six months after long-term treatment with opioid analgesic medication is initiated, and this improvement is at least maintained at subsequent follow-up assessments."

The employer/insurer argue the treatment program (opioid regimen) has not been successful, a requirement which must be met. After a careful review of the medical records offered in this case, as well as consideration of the competing expert opinions, this Compensation Judge agrees.

The employee first started treating with Dr. Hess in excess of ten years ago. At the employee's initial visit with Dr. Hess, she complained of pain levels between a 5—8/10, and interfered with all of her activities. While the record is equivocal, what is clear is that the employee was either on no narcotic pain medication or only taking Darvocet on an as needed basis.

Over the next several months, and then years, albeit while trying the efficacy of a variety of pain medications, Dr. Hess prescribed an increasing amount of narcotic pain medication. As outlined by Dr. Monsein in his report, the employee's dosage of Nucynta as of her last visit in October 2017 was equal to approximately 300 mg of Morphine, three times the daily dosage amount recommended by the Center for Disease Control. While the employee testified that Nucynta helps with her pain and ability to function, her testimony is not supported by the records. Instead, when comparing the employee's pain levels on a monthly basis, they have been steadily at a 7 or 8/10 over the course of her treatment with Dr. Hess despite her taking a substantial amount of narcotic pain medication. Even limiting the review of the records to the employee's initial six months of treatment with Dr. Hess in which he prescribed opioids, or focusing on the six months after the prescription of Nucynta, or even focusing on the six months after his last addition of the extended release Nucynta, the records do not support that the employee's overall pain level decreased.

In addition, the preponderance of the evidence is that the employee's ability to function has not improved with her opioid regimen. The employee's pain affected all of

her activities as noted when she first saw Dr. Hess in 2007. Since that time, and despite the increase in pain medication, the employee has not been able to return to any type of work, and is severely limited in her ability to function. Throughout her records, it is noted that tasks like grocery shopping and walking her dog substantially increased her pain. The Rule specifically requires that the employee's ability to function improve within the first six months of the opioid regimen being initiated, and irrespective of the time period considered (e.g. whether you look at the initial six months, the six months after the initiation of Nucynta, or the six months after the extended release of Nucynta, the records do not document or support that the employee's ability to function has improved.

**Treatment Parameter departure per 5221.6050, subp. 8 (2017):**

Because the employee's use of Nucynta does not comply with the treatment parameter regarding long-term use of opioids, an analysis must be undertaken as to whether a departure from the parameter is appropriate in the employee's case. The employee argues that a departure is in fact warranted, either under subp. 8 (A) or (D).

Subp. 8 (A) provides that a departure may be warranted if there is a documented medical complication. The Compensation Judge is not persuaded that the employee's medical situation qualifies as a documented medical complication. While the employee's situation is a difficult one, and one that has not been receptive to surgery or much else in the way of treatment, the employee's medical situation is not

necessarily unusual or the result of a particular medical complication.

Subp. 8 (D) provides that a departure may be warranted if two of the following three criteria are met:

(1) the employee's subjective complaints of pain are progressively improving as evidenced by documentation in the medical record of decreased distribution, frequency, or intensity of symptoms;

(2) the employee's objective clinical findings are progressively improving, as evidenced by documentation in the medical record of resolution or objectively measured improvement in physical signs of injury; and

(3) the employee's functional status, especially vocational activity, is objectively improving as evidenced by documentation in the medical record, or successive reports of work ability, of less restrictive limitations on activity.

As outlined earlier, the employee's subjective complaints of pain have not progressively improved, the employee's objective clinical findings have not improved, and her functional status, including her vocational activity, has not improved. This particular subpart does not support a departure from the treatment parameters.

The Compensation Judge has also reviewed the other circumstances under which a departure is allowed under 5221.6050, subp. 8 (2017), and concludes that they also do not support a departure from the treatment parameter.

**Rare case exception under Asti:**

In Asti, the Supreme Court held that a Compensation Judge may depart from the treatment parameters in rare cases where a departure is necessary to obtain proper treatment.[48] The employee argues, as an alternative, that her opioid regimen should be permitted under the rare case exception outlined in the Asti case.

This is an unfortunate situation for the employee. Over the past ten years she has continued to struggle with pain. However, the goal of long-term opioid use is to reduce the employee's pain levels and to keep her functioning. Despite the employee's high dosage level, coupled with her ongoing injections and non-opioid medication, which is also substantial, the employee continues to report high levels of pain and significant impairment in her ability to function. The Compensation Judge is ultimately persuaded by the opinion of Dr. Monsein that the employee's situation and pain complaints do not warrant ongoing opioid use because it does not provide substantial improvement in her pain or function. In light of Dr. Monsein's opinion, coupled with the record as a whole, this Compensation Judge concludes that the employee's situation does not warrant a departure as a rare case exception.

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[48] *See Gary Asti v. Northwest Airlines*, 588 N.W. 737, 53 W.C.D. (Minn. 1999).

**Injection therapy:**

**Application of Minnesota Treatment Parameter 5221.6205 (2017):**

**Trigger Point Injections (subp. 5(A) (1)):**

Provides, "Therapeutic injections include trigger points injections, facet joint injections, facet nerve blocks, sympathetic nerve blocks, epidurals, nerve root blocks, and peripheral nerve blocks. Therapeutic injections can only be given in conjunction with active treatment modalities directed to the same anatomical site.

(1) Trigger point injections:

(a) Time for treatment response, within 30 minutes;

(b) maximum treatment frequency, once per week if a positive response to the first injection at that site. If subsequent injections at that site demonstrate diminishing control of symptoms or fail to facilitate objective functional gains, then trigger point injections should be redirected to other areas or discontinued. Only three injections are reimbursable per patient visit; and

(c) maximum treatment, four injections to any one site."

The employer/insurer argue the ongoing injection therapy does not comply with the applicable treatment parameter, and in addition, is not reasonable or necessary medical treatment.

The relevant portion of the rule for purposes of further analysis is subp. 5 (A) (1) (b). The employer/insurer argue the ongoing injection therapy fails to diminish the employee's symptoms or facilitate objective functional gains. This Compensation Judge is not persuaded.

The employee's pre and post injection pain levels are documented each and every time she elects to undergo the injections, and each and every time her pain level is reduced substantially. While her pain eventually returns, sometimes after approximately a month of relief and sometimes less, the employee's relief is substantial. The Rule does not require a diminution in the employee's symptoms over time. The Compensation Judge therefore concludes that the employee's injection regimen is not barred by application of the treatment parameter.

The employee's migraines are frequent and sustained without the injection therapy. With the injection therapy, the employee sees a reduction in her overall pain levels, and this reduction includes the frequency and nature of the migraines. In light of this measurable relief, and that the injection therapy appears to be the only treatment modality which provides the employee with relief in her symptoms, this Compensation Judge concludes that the employee's monthly injection therapy is reasonable and necessary, and adopts the opinion of Dr. Hess in that regard.

K.M.T.