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In the Matter of VITO BARRETTA, Claimant

v.

PAL ENVIRONMENTAL SAFETY, et al., Appellants

and

WORKERS' COMPENSATION BOARD, Respondent

May 24, 2022

Facts: Appeal filed from a Decision of the Workers' Compensation Board which granted the claimant's doctor's request for a variance to treat claimant with medical marihuana. The claimant has an established claim for an occupational disease involving his back, hips, legs and right foot with a date of disablement of July 2, 2014. The claimant began treating with Dr. Jonathan Rudnick in June, 2017 and despite engaging in numerous forms of treatment including surgery and prescribed opiates, the claimant's pain persisted. In 2020, Dr. Rudnick submitted a variance seeking authorization to treat the claimant with medical marihuana. The request was denied on the basis that the treatment was not approved by the Federal Food & Drug Administration. The Judge granted the claimant's request for the variance determining that the requisite burden of proof had been satisfied. On Administrative Review, the Board affirmed the Judge and this appeal was taken by the employer/carrier.

Holding: *Decision is affirmed.*

Discussion: The Court noted that the Board's Decision affirming the approval of the variance was issued the day after the Court's Decision in Matter of Quigley v. Village of E. Aurora, 193 A.D.3d 207 (2021), L v denied 37 N.Y.3d 908 (2021) which held that coverage for medical marihuana expenses under the Compassionate Care Act is not preempted by Federal Law. Accordingly, consistent with the Court's Decision in Quigley, the Court affirmed the Board's Decision.

The Court further noted that in New York medical marihuana is authorized for the treatment of chronic pain and a medical provider is authorized to seek a variance from the Board's Medical Treatment Guidelines for authorization to utilize medical marihuana citing 12 NYCRR 324.2(a); 324.3(a)(I). The Court agreed that the burden of establishing the propriety and medical necessary of the variance rests with the claimant and claimant's treating medical provider and in this case the burden of proof was satisfied.

Stewart, Greenblatt, Manning & Boer