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MEMORANDUM TO ALL CLIENTS OF STEWART GREENBLATT MANNING & BAEZ

RE: Medical Marijuana and New York State Workers' Compensation Law

BACKGROUND

Compassionate Care Act: In July 2014 Governor Cuomo and the New York State Legislature enacted the Compassionate Care Act to comprehensively regulate the manufacture, sale and use of medical marijuana. The program ensures that medical marijuana is available for treatment of certified patients with serious conditions and is dispensed and administered in a manner that protects public health and safety.

Federal Law: As a Schedule 1 Drug under the Controlled Substances Act of 1970 (21 USC 801), marijuana may not be prescribed, administered or dispensed, and it is illegal to possess, use, purchase, sell or cultivate. The Drug Enforcement Agency (DEA) designates marijuana as a Schedule 1 controlled substance with: (a) no currently accepted medical use and (b) a lack of accepted safety for use under medical supervision, and a high potential for abuse.

The US General Attorney may by rule, transfer a drug or other substances between schedules of the Controlled Substance Act. Thus, the Attorney General has

delegated this responsibility to the acting administrator of the DEA. Several drugs containing marijuana products have been approved and transferred to other schedules under the CSA. Furthermore, the Rohrabacher-Blumenauer Amendment (formerly the Rohrabacher-Farr Amendment) prohibits the Department of Justice (DOJ) from using federal funds to interfere with state medical marijuana programs and from prosecuting medical marijuana businesses that are compliant with state law. New York is explicitly listed as one of the states with a legalized medical marijuana program. The Cole Memo, provided that in jurisdictions with strong and effective regulatory systems governing legalized marijuana usage and which do not threaten federal priorities related to federal marijuana, would be exempt from DOJ prosecution stemming from conduct that is permitted under a state's marijuana legalization program. However, former Attorney General Sessions issued a memo in January of 2018 which remains in force. The Sessions Memo rescinded the Cole Memo and three other memos related to exercising prosecutorial discretion around medical marijuana and directed federal law enforcement to "use pl established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country."

New York Law: "Serious condition"

Title V-A in Article 33 of the Public Health states as follows: (A) Public Health Law Section 3360(7)(8)(i) and (ii) provides the definition of a "serious condition" for which medical marijuana may be recommended by a certified provider. (B) 10 NYCRR 1004.2: DOH Emergency Regulation currently in effect.

Public Health Law Section 3360(7)(8): Two prongs medical marijuana may be prescribed pursuant to: (A) PHL Section 3360(7)(8)(i): for a severe debilitating or life threatening condition, and (B) PHL Section 3360(7)(8)(ii): a condition or symptom that is clinically associated with or is a complication of the severe debilitating or life threatening condition.

"Severe debilitating or life threatening conditions" under PHL 3360(7)(8)(i) include: (A) Cancer, (B) Positive status for Human Immunodeficiency Virus (HIV) or Acquired Immune Deficiency Syndrome (AIDS), (C) Amyotrophic Lateral Sclerosis (ALS), (D) Parkinson's Disease, (E) Multiple Sclerosis, (F) Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity, (G) Epilepsy, (H) Inflammatory bowel disease, (I) Neuropathies, (J) Huntington's Disease, (K) Post-traumatic stress disorder (PTSD), (L) Pain that degrades health and functional capability where the use of

medical marijuana is an alternative to opioid use, substance use, disorder, or as added by the commissioner.

"Pain that degrades health and functional capability" pursuant to 10 NYCRR 1004.2(8)(a)(xi) include: Any severe debilitating pain that the practitioner determines degrades health and functional capability; (A) where the patient has contraindications, has experienced intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and (B) where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or more beyond onset; (C) where the use of medical marijuana is an alternative to opioid use, (D) provided that the precise underlying condition is expressly stated on the patient's certification.

Current associated conditions pursuant to PHL 3360(7)(8) and 10 NYCRR 1004.2 include: (A) Severe or chronic pain resulting in substantial limitation of function; (B) Severe nausea; (C) Seizures; (D) Severe or persistent muscle spasms; (E) Post-traumatic stress disorder; (F) Opioid use disorder; (G) Or such other conditions, symptoms or complications as added by a commissioner of the Department of Health.

Routes of Administration: Approved routes of administration include (A) Metered liquid or oil preparations; (B) Solid and semi-solid preparations (e.g. capsules, chewable and effervescent tablets, lozenges; (C) Metered ground plant preparations; (D) Topical forms and transdermal patches.

Prohibited Routes of Administration: The Compassionate Care Act expressly prohibits smoking as a form of medical marijuana (in keeping with New York's longstanding commitment to eliminate all smoking), as well as edibles.

New York State Workers' Compensation Law/Medical Marijuana

New York Workers' Compensation Law Section 13 provides that "the employer shall be liable for the payment of the expenses of medical, dental, surgical, optometric or other attendance or treatment, nurse and hospital service, (and) medicine . . . for such period as the nature of the injury or the process of recovery may require."

In Matter of WDF (Case No. G140 3803 decided 2/16/2018), the Board opened the door to permitting treatment with medical marijuana when a variance is requested (if the Medical Treatment Guidelines apply to the injury or condition) and requiring carriers to reimburse Workers' Compensation claimants for such treatments. The Board authority in Matter of WDF, supra and its progeny is principally based on the Public Health Law and WCL Section 13.

In Matter of Kellner Brothers Inc., (Case No. 8031 6448, 5/29/18) is instructive. There, the carrier filed an RFA-2OP with the Board seeking opioid weaning consistent with the Non-Acute Pain Management Guidelines based on an independent medical examination report. The claimant was directed to produce up to date medical including a report from his physician as to whether alternatives to opioids were available. The treating physician indicated that the patient was being weaned off his opioids and was finding medical marijuana "very helpful." A subsequent IME report indicated that the claimant had "significantly tapered" his opioid use as a result of using a combination of medical marijuana and morphine sulphate. At the 8/17/2017 hearing, claimant's counsel indicated that this treating physician appeared on the DOH registry and requested that the claimant be reimbursed for the cost of his medical marijuana certification. The carrier objected on the basis that medical marijuana was illegal under federal law and was not an authorized form of treatment because it was not FDA approved. The WCLJ found "that medical marijuana is appropriate medication and medically necessary" and accordingly authorized the medical marijuana treatment and directed the carrier to reimburse the claimant for out of pocket expenses regarding medical marijuana. The carrier appealed arguing that medical marijuana was a violation of federal CSA, a violation of PHL 3368(2), i.e. "Nothing in Title 5A of the PHL shall be construed to require an insurer or health plan to provide coverage for medical marijuana and conflicts with Medical Treatment Guidelines because the treating provider did not request a variance to treat with medical marijuana." The Board Panel rescinded the WCLJ Decision finding that the claimant was prescribed

medical marijuana to treat chronic pain for an established neck injury. Therefore, the claimant's treating medical provider was required to adhere to the Board's Non-Acute Pain Management Guidelines which did not authorize treatment with medical marijuana. The provider should have sought a variance.

Under the New York State Workers' Compensation Law for a claimant to be reimbursed for medical marijuana the following criteria must be met: (A) The certification must have been written by a medical provider registered with the DOH to prescribe medical marijuana; (B) who is also Board authorized; (C) for an established site of injury or condition; (D) for a use authorized under Public Health Law 3360(7) and; (E) in accordance with the Medical Treatment Guidelines where applicable.

Payments for medical marijuana: Since marijuana remains a controlled substance under federal law, carriers cannot implicate the federal banking system when paying for medical marijuana. Accordingly, there are presently two options for medical marijuana payment: (A) Reimbursement to the claimant or; (B) permit payment to the dispensary when the carrier/SIE does not have funds in/or associated with the federal banking system.

If a variance is approved, payment for medical marijuana should be made by reimbursement to the claimant as a medical and travel reimbursement. The authority for this stems from WCL Section 13(a) for "other attendance and treatment." PHL Section 3368(2) exempts health insurers, but Workers' Compensation falls under "basic insurance" not health. Thus, M & T is the proper mechanism for the dispensed, variance approved medical marijuana.

WCL Section 13(a) also provide authority to compel employers/carriers to pay for all medical visits. Accordingly, a physician should use an appropriate E & M code to reflect the assessment and plan that includes the certification of the patient and prescription for medical marijuana. A variance is not to be used for billing for medical visits nor for the completion of the claimant's certificate for medical marijuana.

Variance request for medical marijuana: Medical marijuana is not addressed in the Medical Treatment Guidelines and a variance is required that supports compliance with both: (A) the New York State Department of Health's criteria for the use of medical marijuana and (B) the Medical Treatment Guidelines variance criteria.

General Guideline Principle A-20 states: Medical treatment that is experimental/investigational and not approved for any purpose, application or indication by the FDA is not permitted under the Guidelines. The FDA has approved three drugs containing synthetic marijuana products and one plant derived CBD drug. These include Marinol, Cesamet, Syndros and Epidiolex.

The variance request must provide documentation that the physician is both authorized by the WCB to treat injured workers and is registered by the New York State Department of Health to certify patients for medical marijuana. There must be documentation by the provider that the patient has been certified for medical marijuana and a copy of the certificate for the medical marijuana program must be provided with the variance request and Medical Treatment Guideline criteria are met. For a physician to treat Workers' Compensation claimants the physician must be authorized by the WCB pursuant to WCL Section 13-B.

Physicians/Practitioner registration criteria: Pursuant to 10 NYCRR 1004.1(a) medical practitioners seeking to issue certifications for their patients to receive medical marijuana products must meet the following criteria: (A) be qualified to treat patients with one or more of the serious conditions set forth in PHL 3360(7); (B) be licensed, in good standing as a physician and practicing medicine as defined in Education Law Article 131; (C) have completed a two to four hour course approved by the Commissioner of Health; (D) registered with the New York State Department of Health Medical Marijuana Program; (E) once these four requirements have been satisfied the provider may recommend medical marijuana to eligible patients. Additionally, to recommend medical marijuana as a treatment for substance use disorder or opioid use disorder 1004.2(a)(x) requires that: A practitioner must hold a Federal Drug Addiction Treatment Act of 2000 Waiver to be qualified to treat patients with substance use disorder or opioid use disorder. Additionally, medical marijuana may be recommended by nurse practitioners or physician's assistants under the supervision of a physician registered by the Department of Health. As of 1/1/2020 nurse practitioners may obtain WCB authorization and physician's assistants may obtain WCB authorization with a supervising physician who is WCB authorized.

Variance: It is settled that there are legitimate reasons for exceptions to the Medical Treatment Guidelines: (A) the variance process defines the criteria for exceptions to the MTGs including treatment that is not addressed in the Guidelines; (B) New York State's Department of Health qualifying serious and associated conditions include conditions for which there are MTGs including mid and low back and neck and non-acute pain. However, medical marijuana is not

addressed as a treatment option in these Guidelines so a variance would be required. Qualifying serious and associated conditions that are covered by the NYS MTGs include: (A) damage to the nerve tissue of the spinal cord with objective neurological indication and intractable spasticity; (B) neuropathies; (C) severe or persistent muscle spasms; (D) any severe debilitating pain that the practitioner determines degrades health and functional capability; (E) severe and chronic pain resulting in substantial limitation of function; (F) alternative to opioid use; (G) opioid use disorder.

The WC Non-Acute Pain Management Guidelines provides: (A) a continuum of options for the assessment and management of patients with chronic pain focused on function alternatives to opioids, tapering and discontinuing opioids as appropriate with referral to addiction medicine specialist as indicated. Meeting the medical necessity criteria for medical marijuana requests requires knowledge of the variance requirements with a focus on clinical outcomes (objective functional improvement and management of pain). The following Board Panel Decisions are instructive. Matter of Flatbed Express, case number G003 3782 (3/28/2018) the issue presented for administrative review was whether the treating medical provider met the burden of proof to support the 7/25/2017 MG-2 for treatment of chronic pain with medical marijuana. The case was established for an injury to the claimant's right shoulder and permanency was established and the claimant was found to have a 52.5% schedule loss of use of the right arm. The claimant reported significant persistent pain and lost mobility. Surgery was performed to the shoulder and the claimant continued to complain of pain and impaired function which resulted in a second arthroscopic surgery. The claimant's condition continued to deteriorate. A third surgery followed by physical therapy ensued. The claimant continued on a course of non-steroid anti-inflammatory drugs but reported to his treating physician sharp and excruciating pain with stiffness and weakness. The claimant's treating physician prescribed treatment with the use of marijuana and filed an MG-2 for continued treatment with medical marijuana as the claimant's pain "was not controlled on NSAIDs and opioids interfere with his job." The carrier denied authorization on grounds that the treatment was not consistent with the Board's regulations, specifically 12 NYCRR 324.3 and the Non-Acute Pain Management Guidelines. The carrier argued that the variance should be denied pursuant to 12 NYCRR 324.3 with regard to treatment previously rendered as a variance was not requested in advance of the treatment. The carrier also argued that the treatment was not causally related to the right shoulder injury but was related to the claimant's left knee and ankle conditions. The WCLJ found that the claimant's treating medical provider met the requisite burden of proof for treatment with medical marijuana for claimant's right shoulder condition under the

MTG and approved the MG-2 request. The Board Panel unanimously modified the WCLJ Decision to reflect that the request for the variance was denied inasmuch as the treating medical provider did not meet the requisite burden of proof under the MTG and DOH criteria set forth in 10 NYCRR 1004.2(a)(8)(xi). The Board Panel found that medical marijuana may be prescribed to treat conditions or sites of injury covered by the MTGs where the treating medical provider has obtained a variance to establish that the medical marijuana is medically necessary and treatment pursuant to the MTGs is not appropriate or sufficient. The Board found that claimant's treating physician properly requested to treat the claimant's chronic pain which is causally related to the established right shoulder following three surgical interventions and an extensive course of conservative care as a basis under the Public Health Law (Matter of WDF 2018 NY Wrk Comp G140 3803; 10 NYCRR 1004.2(a)(8)(xi)). The Board Panel also noted that claimant's treating physician was accredited by the New York State Department of Health to prescribe medical marijuana. The Board Panel in finding the medical provider's variance request insufficient relied on Matter of WDF Inc., supra where the Board Panel explained that:

> A request for the "Medical Marijuana Program" lacked appropriate specificity in Matter of Mercy Hospital, case number 8060 2833 (6/11/2019), where it did not outline the frequency, duration, usage or strength of the medical marijuana requested. The Board found that even if the medical provider could not determine an effective dose at the time he filed his variance request, his variance request could have indicated that he could not determine an effective dose at the time and detail the duration of a trial prescription he proposed outlining the manner in which he intended to try the titrate the claimant's medical marijuana dosage.
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> > Additionally, where, as here, the variance is sought for medical marijuana to treat a claimant for chronic pain, the treating medical provider bears the burden of proving that the claimant suffers from chronic pain per the Department of Health's criteria. That is, the treating medical provider must show that the claimant experiences "severe and debilitating pain that the practitioner determines degrades health and functional capability; where the patient has contraindications, has experience intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted three months or more beyond onset, or the practitioner reasonably anticipates such pain to last three months or

> more beyond onset" (10 NYCRR 1004.2(a)(8)(xi)). In Matter of Flatbed Express, the Board Panel found that the carrier did not merely check the "denied" box on the MG-2 form but articulated its objections to the variance request. The objections articulated by the carrier were that medical marijuana is experimental and inappropriate under the NAP MTG Section 8.20, discussed above, and the medical provider violated 12 NYCRR 324.3(a)(1) in that he did not request a variance from the MTG by submitting the form in the format prescribed by the Chair for such purpose before the treatment has been rendered. The carrier timely and sufficiently articulated its objections to the variance request. Therefore, it was incumbent on the Board to additionally evaluate whether the treating medical provider had satisfied the requisite burden of proof under the MTG as set forth in Matter of Syracuse Utilities, 2011 NY Wrk Comp 69806027.

The Board Panel further found that the treating medical provider set forth insufficient objective evidence to support approval of the variance request for treatment of the claimant's chronic pain with the use of marijuana under the MTG and DOH criteria. As an additional matter he failed to establish that the claimant suffered from chronic pain per DOH's regulations. Nor did he sufficiently show that the claimant experienced "severe debilitating pain that . . . degrades health and functional capability" per DOH regulations, particularly given that during a January 22, 2016 IME the claimant reported that his pain was routinely 3 on a pain scale to 10 and the claimant continued to work modified mostly desk duties at his job. The medical provider proffered no evidence that the claimant had contraindications, had experienced intolerable side effects (beyond generally stating that opiates interfere with the claimant's work) or that one or more previously tried therapeutic options had failed. Notably, the claimant deferred treatment with steroid injection prior to seeking current treatment. The Board continued that the provider's burden of proof under the MTG was likewise unsatisfied. Although the doctor stated appropriate goals of the avoidance of the use of opiate medication, better sleep and general pain reduction, generally the Board Panel found that the provider had not provided sufficient objective evidence that the claimant had experienced functional improvement to warrant variance from the MTG. (NAP MTG A3) Notably absent from the provider's records were results of visual analog scale or range of motion measurements and specific improvement activities of daily living with its use. Nor did the provider submit evidence of drug testing despite his conclusion that the claimant's past medical history of alcohol abuse and his assessment that the claimant was a high opiate

risk. The Board Panel therefore found that the provider's request for a variance was denied inasmuch as he had not met the requisite burden of proof under the MTG and DOH criteria.

The following cases are illustrative of the Board's treatment of involving authorization for medical marijuana.

A. **Federal Law**: The Board has routinely rejected a carrier's argument that it should not be required to pay for a marijuana prescription because it is not permitted under federal law. (See Matter of DWC Mechanical Inc., case number G094 4499, decided 12/5/2019). The Board has routinely found that the Public Health Law permits marijuana to be prescribed to treat the following severe debilitating or life threatening conditions: Cancer, HIV injection or AIDS, Amyotrophic Lateral Sclerosis (ALS), Parkinson's Disease, Multiple Sclerosis, Spinal cord injury with spasticity, Epilepsy, Inflammatory bowel disease, neuropathy and Huntington's disease. (Public Health Law Section 3360(7)). By rule adopted on 3/22/2017 the Department of Health added "chronic pain" to the list of conditions medical marijuana is approved to treat. See 10 NYCRR 1004.2(a)(8)(xi). Patients must also have one of the following associated or complicating conditions: Cachexia or wasting syndrome, severe or chronic pain, severe nausea, seizures or severe or persistent muscle spasm. See Public Health Law Section 360(7)(ii): 10 NYCRR 1004.2(a)(9).

   The Board continued in Matter of DWC Mechanical Inc. "Neither the Federal Courts in the Second Circuit nor the New York Court of Appeals have found the Public Health Law invalid under federal preemption. Therefore, absent a directive by controlling authority, the Board Panel finds Title 5-A of the Public Health Law is valid and applicable law."

B. **Authority under WCL Section 13(a)**: WCL 13(a) provides that "The employer shall be liable for the payment of the expenses of medical, dental, surgical optometric or other attendance or treatment, nurse and hospital services, and medicine . . . for such period as the nature of the injury or the process of recovery may require" to advance the "economic and humanitarian objectives of the WCL, the Board has compelled carriers to pay for wide ranging treatment under the umbrella of "other attendance or treatment" where there is credible medical evidence of its necessity, from reimbursement for expenses incurred in connection with the change of climate to relieve the symptoms of bronchitis and emphysema (Matter of

Clark v. Fedders-Quigan Corp., 284 App Div 430 [1954] to organic produce (Matter of Morrell v. Onondaga County, 244 A.D. 2d 695 [1997], to reproductive treatment that occurred outside of claimant's body so that he could impregnate his spouse, Matter of Spyhalsky v. Cross Construction, 294 A.D. 2d 223 [2002]. Compelling payment for medical marijuana under WCL Section 13(a) follows the Board's and the Court's liberal construction of the statute.

Although Public Health Law Section 3368(2) provides "Nothing in V-A of the Public Health Law shall be constructed to require an insurer or health plan under that chapter or the Insurance Law to provide coverage for medical marijuana because the Board's authority to compel payment arises from WCL Section 13 the limitations set forth in PHL Section 3368(2) are inapplicable. Further, the Board Panel finds that Public Health Law Section 3368(2) extends only to health insurers and not Workers' Compensation carriers. "Insurer" is not defined in Title V-A or within the Public Health Law generally. Guidance can be gleaned from the Insurance Law, however, which differentiates between "accident and health insurance" (See Insurance Law Section 113(3) "basic insurance" which includes Workers' Compensation insurance. (See Insurance Law Section 410(a). The placement of the word "insurer" within the Public Health Law indicates that it was meant to refer only to health insurance, as defined in the Insurance Law, and not basic insurers, such as Workers' Compensation carriers, See DWC Mechanical Inc., supra.)

The New York State legislature approved marijuana for specific medical uses as set forth in Title V-A of the Public Health Law, and the New York State Department of Health has delineated a process by which patients can legally obtain medical marijuana and medical providers can prescribe it. Accordingly, in Matter of DWC Mechanical, the Board Panel found that medical marijuana may be prescribed to treat conditions or sites of injury covered by the MTGs where the treating medical provider has obtained a variance to establish that the medical marijuana is medically necessary and treatment pursuant to the MTGs is not appropriate or sufficient.

C. **Compliance with the Medical Treatment Guidelines is required.**
Pursuant to 12 NYCRR 324.3(a)(1) "When a treating medical provider determines that medical care that varies from the MTGs is appropriate for the claimant and medically necessary, he or she shall request a variance from the insurance carrier or Special Funds by submitting the request in the

format prescribed by the Chair for such purpose. A variance must be requested and granted by the carrier, Special Funds, the Board or Order of the Chair before medical care that varies from the MTGs is provided to the claimant and a request for a variance will not be considered if the medical care has already been provided." The burden of proof to establish that a variance is appropriate for the claimant and medically necessary rests on the treating medical provider requesting the variance. See 12 NYCRR 324.3(a)(2).

Chronic Pain:

Where the variance is sought to treat a claimant for chronic pain, the treating medical provider bears the burden of proving that the claimant suffers from chronic pain per the Department of Health's criteria. That is, treating medical provider must show that the claimant experiences "severe debilitating pain that the practitioner determines degrades health and functional capabilities; or the patient has contraindications, has experienced intolerable side effects, or has experienced failure of one or more previously tried therapeutic options; and where there is documented medical evidence of such pain having lasted 3 months or more beyond onset, or the practitioner reasonably anticipates such pain to last 3 months or more beyond onset (10 NYCRR 1004.2(a)(8)(xi)). For example, where the variance request form only stated "medical marijuana" and did not indicate the suggested delivery mechanism or dosage the length of time for measuring the dosage for efficacy or the functional gains to be expected above and beyond what the claimant is currently experiencing, the Board Panel found that the medical provider did not meet the burden of proof. (See Matter of DWC Mechanical Inc.).

In Matter of Joe Basil Chevrolet Inc., case number G116 6190 decided 7/31/2019, the Board Panel found that the burden of proof to establish that a variance was appropriate and medically necessary was not met. Claimant's treating medical provider submitted insufficient objective evidence to support approval of the variance request for the treatment of the claimant's chronic pain with the use of marijuana under the MTG and the DOH criteria. In Matter of Basil Chevrolet, the case was established for an accident to the right wrist. Claimant underwent surgery and physical therapy and complained of chronic pain. The medical provider's report set forth that "the patient was not

interested in pursuing opiate therapy . . . and I feel that he would be an excellent candidate for medical marijuana which will be formally requested." The Board Panel found that the medical provider did not sufficiently show that the claimant experiences "severe debilitating pain that . . . degrades health and functional capability" per DOH regulations particularly given that in her report she did not describe the pain other than indicating that "the patient presents today with chronic pain" and "his pain is increased with activity as he explains even the simplest things such as holding the steering wheel of his automobile." The doctor indicated that the claimant was a candidate for medical marijuana and not interested in pursuing opioid therapy and continued taking ibuprofen as needed. Based on the lack of objective evidence the Board Panel found that the claimant's doctor had not met the burden of proof showing that the treatment requested was medically necessary. In addition, the doctor had not met her requirement to establish that the claimant suffered from chronic pain pursuant to the DOH's regulations.

Sufficient proof to support the approval of the variance request:

It may be appropriate given sufficient supporting documentation which would consist of a clear statement of the dosage, delivery mechanism and frequency of the marijuana being recommended. This would also include the functional improvements expected to be seen through the projected course of treatment, and an explanation of why other treatment has been unsuccessful. Once a sufficient plan is in place, the medical marijuana can be approved, and the case be brought back on the calendar after 6 months to determine the efficacy of the comprehensive treatment plan and direct any appropriate alterations.

Responsibility for payment: The carrier would only be responsible for payment of medical marijuana after a variance was approved, so the use of medical marijuana prior to the variance approval is not a bar to a subsequent request with sufficient supporting information.

Eligibility to legal obtain medical marijuana: The patient must be certified pursuant to the Public Health Law. In accordance with Public Health Law Section 3361 "A patient certification may only be issued if: (a) a practitioner has been registered with the department to issue a certification as determined by the commissioner; (b) the patient has a serious condition, which shall be specified in

the patient's healthcare record; (c) the practitioner by training or experience is qualified to treat the serious condition; (d) the patient is under the practitioner's continuing care for the serious condition; and (e) in the practitioner's professional opinion and review of past treatment, the patient is likely to receive therapeutic or palliative benefit from the primary or adjunctive treatment with the medical use of marijuana for the serious condition". Section 3363 of the Public Health Law then requires the department to issue registry identification cards to certify patients and designated care givers. See Matter of Absolute Concreter, case number 8061 2043, decided 9/23/2019). Moreover, medical marijuana may not be purchased under the Program without both the patient certification document and an active registry identification card. (See Tops Markets, case number 8990 3430, decided 9/30/2019). A regulation of the New York State Health Department, entitled "Practitioner issue of certification" sets forth the process a practitioner must follow to generate their certificate. See, 10 NYCRR 1000.4(2).

"(c) Submission of certification to the department. Practitioners shall utilize a form, which may be in an electronic format, developed by the department for the certification required in subdivision (a) of this section. The practitioner shall submit to the department, the information required by submission (a) of this section, in a manner determined by the department, including by electronic transmission through a secure website. In the instance that a practitioner submits this information to the department electronically, the practitioner shall retain, for a period of 5 years, a printed copy of the electronic certification that shall contain the information required in subdivision (a) of this section. (d) Medical record retention. The practitioner shall date and place his or her handwritten signature upon the printed certification, and provide he printed certification to the patient. The practitioner shall also maintain a copy of the signed certification in the patient's medical record.

The Board has denied variances when the "record does not contain any evidence that the claimant is eligible to receive marijuana treatment (Matter of Buffalo News, 2018 Wrk Comp, G036 1691). The Board has denied medical marijuana variance requests that do not include a copy of the certificate for the Medical Marijuana Program (See Matter of Our Lady of Victory Homes, 2019 NY Wrk Comp G085 6772). According to "Medical Marijuana Program Patient Certificate Instructions" on the website of the Department of Health, a practitioner generates this certification after inputting a claimant's information into a database, and then, printing and signing the "certification report."

Thus, the failure to include with the variance request a copy of the certificate for the Medical Marijuana Program renders the variance request defective resulting in their denial which obviates the need to examine the carrier's denials. (See Matter of Absolute Concreter, supra).

Variance denied where prior marijuana use: In Matter of United Cerebral Palsy Association, case number G024 9995 (decided 8/15/2019), the claimant began using medical marijuana prior to the filing of the MG-2. Although the Board has determined that it would not deny an MG-2 based solely on the claimant's use prior to the variance request (Matter of Village of East Aurora, NY Work Comp 8040 3328 (2019)), the Board Panel in Matter of United Cerebral Palsy Associated found a different result. There, the MG-2 was filed on 1/15/2019. The claimant tested positive for marijuana use as of January 2018 and medical marijuana use was treated in the medical provider's 2/28/2018 report. Subsequent medical reports continued to find the claimant to have severe low back pain with searing pain down his legs. In a 7/10/18 report the claimant was found to have more pain and continued to have increased low back burning pain and muscle spasm, was unable to feel his right leg and reported right foot numbness. Those complaints were again recited in a 9/18/2018 report where the claimant continued to be listed as medical marijuana certified. Again, in the medical report attached to the MG-2 filed on 1/15/2019 the medical provider reported the claimant's symptoms without sufficient documentation of improvement despite the claimant's use of medical marijuana. Therefore, based on precedent "the Board is entitled to alter a course previously set out in its Decisions provided it sets forth its reasoning for doing so" (See Matter of Danin v. Stop & Shop, 115 A.D. 3d 1077, 1079 [2014]; Matter of Canfora v. Goldman Sachs Group Inc., 110 A.D. 3d 1123, 1124 [2013]; Matter of Williams v. Lloyd Gunther Elevator Service Inc. 104 A.D. 3d 1013, 1015 [2013]; the Board Panel denied the MG-2 request for medical marijuana as the claimant's use of medical marijuana preceded the MG-2 request. The basis for the denial is that despite the prior use of medical marijuana claimant's chronic pain increased rather than improved.

Sufficient proof: In Matter of Safelite Glass Corp., case number G147 4251 decided 9/30/2019, an MG-2 was approved where the medical provider adequately documented the claimant's longstanding chronic pain, as well as the failed treatment the claimant had undergone. Specifically, a review of the record showed that other pain medications caused severe gastrointestinal side effects and affected the claimant's cognitive function. Further, both spinal surgery and physical therapy for the established injury to the low back, had proved ineffective for alleviating the claimant's pain. While the claimant did state that chiropractic care

had provided some relief, he also stated that medical marijuana provided the most pain relief out of all the treatments he tried. The Board Panel also noted that claimant's treating physician adequately documented the functional improvements she expected the claimant to achieve based on his past successful use of medical marijuana. Under those circumstances the WCLJ appropriately authorized the use of medical marijuana.

Accordingly, the Workers' Compensation Board has determined without a specific ruling by a Federal Court, that preemption does not apply and that the Board has the authority to direct payment under Workers' Compensation Law Section 13. The Board has also determined that the New York Public Health Law Section 3368(2) does not apply to workers' compensation carriers. Accordingly, a request for medical marijuana is handled thru the Medical Treatment Guidelines as requiring a variance and accordingly the attending physician has the burden of proof to show that medical marijuana is medically necessary and appropriate, that the claimant agrees with the request and that other treatment consistent with the Medical Treatment Guidelines has been tried and failed or why treatment consistent with the Medical Treatment Guidelines is not appropriate.

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