What do medical marijuana, the Consulate General of Canada and opioid addiction have in common?

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

If you haven't practiced before the DIA recently, you're likely unaware of some cutting edge social and legal issues. The DIA is charged with litigating all work-related injuries in Massachusetts. Each year, we litigate more than 12,500[1] cases at the DIA. There are three stages of the litigation: a conciliation, a conference and then a hearing (you may think of the hearing like a bench trial). Resolution of disputes at each stage winnows down the number of cases. For example, approximately one half of the 12,500 cases are resolved at the conciliation stage. In 2019 several thousand scheduled hearings resulted in 228 decisions published by the Administrative Judges. If appealed, a case goes to the Reviewing Board and a panel of three Administrative Law Judges will then render a Reviewing Board decision. Further appeal would be to the Court of Appeals, and the Supreme Judicial Court.

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

Medical marijuana has been in the spotlight nationally and Massachusetts is no different. Locally we have had several cases with differing results. However, the right to medical marijuana provided by a worker's compensation insurer was squarely addressed in *Daniel Wright's* case[4]. In that case, now on appeal before the MA Supreme Judicial Court, the

[1] Workers' Compensation Advisory Council Fiscal Year Annual Report p. 36 (12,659 cases filed)
[2] The MA Trust Fund is legally charged to provide benefits for uninsured employers within MA.
[3] I have been informed the case may ultimately be headed to the United States Supreme Court.
[4] Daniel Wright v. Pioneer Valley vs. Central Mutual Ins. Co.

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

The final case involves chronic use of **opioid medication** in treatment of a work-related injury. The issue presented to the Administrative Judge and ultimately the Reviewing Board was whether an employee can be forced to stop using opioids even though her treating physician continued to prescribe them and did not approve of a weaning program. The answer is Yes, an employee can be so compelled if the §11A impartial examiner [7] believes that weaning is in her best interests. In *Shelly Chapin v. Gil Montague Regional School District v. Mass. Education and Government SIG*[8], the employee refused to titrate on her own and the Administrative Judge adopted the opinion of the impartial physician indicating that the employee must wean for her own health and safety over a period of 16 months. The Reviewing Board adopted the weaning/tapering schedule found reasonable by the §11A impartial examiner, thus forcing the employee to reduce or allowing the insurer to cease payment for medication above the tapered level.

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

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[5] Hearing decision Judge Steven Rose dated 10/12/2017, DIA NO. 04387-15.
[6] Reviewing Board decision dated 2/14/2019.
[7] M.G.L Ch. 152 §11A provides for an impartial physician selected by the administrative judge to avoid the former system of "dueling" doctors. The impartial opinion has prima facie value.
[8] Reviewing Board decision dated 1/21/20 DIA NO. 031999-08.
[9] The WCBA WC Committee is co-chaired by Christine Narcisse, Esq. and Jane Eden, Esq. and meet monthly.