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Up in Smoke: Developments in Medical and Recreational Marijuana

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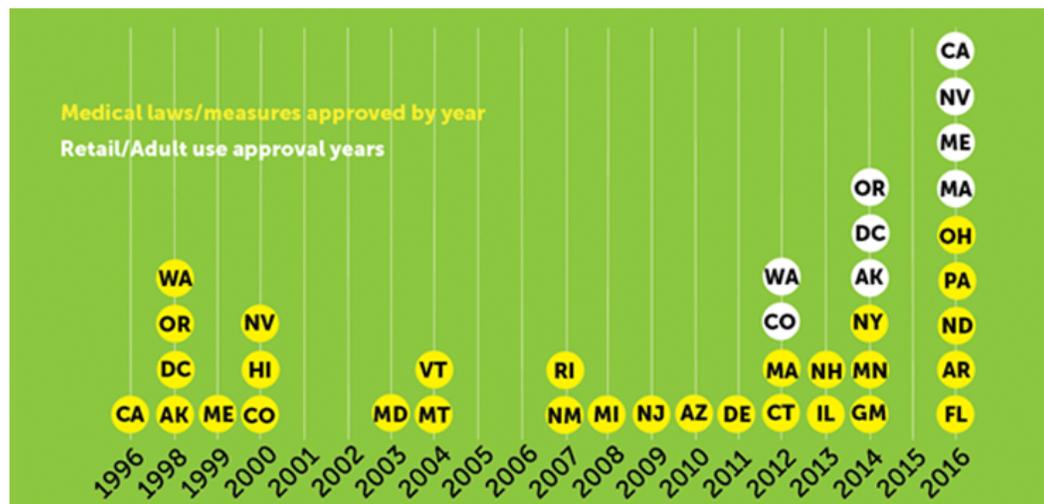
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Section 1. Introduction and Overview

Introduction

Overview of Recent Efforts to Legalize at the State Level

Twenty-nine (29) states and the District of Columbia have enacted laws to legalize medical marijuana since 1996. At least another seventeen (17) states allow the use of products with low-THC (the active ingredient in marijuana) for medical purposes. Among these jurisdictions, eight (8) states and the District of Columbia have also legalized adult-use recreational marijuana. California, Nevada, Maine and Massachusetts all approved adult-use recreational marijuana in November 2016 elections, while voters in Arizona disapproved of a similar measure on their ballot. No state legislature, to date, has legalized recreational marijuana separate from a voter initiative.¹



Source: Marijuana Deep Dive, National Conference of State Legislatures, <http://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> (last visited Jan. 27, 2017)

The recent surge in states that have legalized medical and adult-use recreational marijuana raises a number of legal issues for employers including: employer obligations for workplace accommodation; individual rights and employment discrimination in the workplace; employer liability for workplace injuries proximately caused by employee impairment; and compensability of medical marijuana under private insurance or state workers' compensation statutes.

This paper addresses medical marijuana in the context of workers' compensation statutes and considers whether an employer or its insurer must reimburse or compensate an injured worker for the employee's lawfully purchased medical marijuana.

¹ <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx#7>

Brief History of Legal Cannabis in the United States

As early as 1853, recreational cannabis was listed as a "fashionable narcotic". A versatile crop, George Washington reportedly grew hemp as one of his three primary crops. In fact, cannabis was legal and accepted in the United States prior to 1937.²

Possession or transfer of cannabis became illegal throughout the United States under The Marihuana Tax Act of 1937. The Act excluded medical uses and required payment of an "excise" tax. Anecdotally, over 400,000 acres of hemp were cultivated in the United States between 1942 and 1945.

Botanically, hemp and marijuana both come from the same plant, cannabis. One type of cannabis is high in the psychoactive cannabinoid, THC, and low in the anti-psychoactive cannabinoid, CBD. This type is popularly known as marijuana. Another type is high in CBD and low in THC. Variants of this type are called industrial hemp.³

Recent Developments in Federal Law

Marijuana is DEA Schedule I drug under the Federal Controlled Substances Act and thus, possession, usage, purchase, sale, and/or cultivation is illegal. Drugs or other substances are included under this schedule when:

1. The drug or other substance has a high potential for abuse.
2. The drug or other substance has no currently accepted medical use in treatment; in the United States; and
3. There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C.A. § 812 (West)

As a Schedule I drug, marijuana may not be lawfully prescribed, administered, or dispensed in the United States. Policy advocates note that marijuana is the only Schedule I drug that DEA prohibits from being produced by private laboratories for scientific research, which impedes standard FDA development processes that would allow marijuana to be brought to market as a prescription medicine.⁴ Several attempts to reschedule or de-schedule (i.e. completely remove marijuana from the Controlled Substances Act) have not succeeded.

Department of Justice Memoranda

The Ogden Memo:

In 2009, the Department of Justice issued a memorandum announcing that the Justice Department would no longer make it an enforcement priority to pursue those who are in "clear and unambiguous compliance" with state medical marijuana laws in the then fourteen (14) states that had passed legislation legalizing medical marijuana.⁵

² http://en.wikipedia.org/wiki/Legal_history_of_cannabis_in_the_United_States (last visited Jan. 27, 2017)

³ <http://hempethics.weebly.com/industrial-hemp-vs-cannabis.html> (last visited Jan. 27, 2017)

⁴ *Removing Marijuana from the Controlled Substances Act*, The Drug Policy Alliance, <http://www.drugpolicy.org/> (last visited Jan. 30, 2017)

⁵ <http://www.justice.gov/opa/documents/medical-marijuana.pdf> (last visited Jan. 27, 2017)

Cole Memo:

In 2011, the Department issued new guidance and clarified that the Ogden Memorandum was never intended to shield large scale cultivation, sale or distribution of marijuana from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law.

Cole 2 Memo:

On August 29, 2013, the DOJ issue new guidance regarding marijuana enforcement priorities. Deputy Attorney General James Cole, stated:

“In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above.... In those circumstances, ... enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity.”

“If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government ... bring individual enforcement actions, including criminal prosecutions, focused on those harms.”⁶

Federal Legislation – Rohrabacher-Farr Amendment

In Pub. L. No. 113-235, the U.S. Congress included an amendment in the federal budget that “[n]one of the funds made available in this Act to the Department of Justice may be used with respect to [list of states with existing medical marijuana laws] to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”⁷

Federal Case Law

Ams. for Safe Access v. Drug Enforcement Agency, 706 F.3d 438 (D.C. Cir. 2013) The US Court of Appeals for the District of Columbia rejected a petition to change marijuana from a Schedule I drug under the Controlled Substances Act to a non-Schedule I drug, which would have allowed for the possibility of authorized medical marijuana use with a prescription.

Gonzales v. Raich, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) Users and growers of marijuana for medical purposes under California Compassionate Use Act sought declaration that Controlled Substances Act (CSA) was unconstitutional as applied to them. The Supreme Court, Justice Stevens, held that application of CSA provisions criminalizing manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes did not violate the Commerce Clause.

⁶ <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (last visited Jan. 27, 2017)

⁷ Consolidated and Further Continuing Appropriations Act, 2015, Hinchey-Rohrabacher Amendment, § 538

Section 2. Medical Marijuana Statutes and Workers' Compensation

Medical Marijuana – Implications for Workers' Compensation Insurance

The conflict between state and federal law raises significant issues and concerns for employers whose employees obtain a medical marijuana “prescription” (often written as a “recommendation” or “certification” to avoid the Controlled Substances Act). Fundamentally, under the Supremacy Clause, any state law that conflicts with a federal law is preempted. U.S. Const. art. VI. cl. 2. Nonetheless, the unresolved tension has the following implications:

1. The U.S. Food and Drug Administration (FDA) has not approved marijuana as a safe and effective drug for any indication. This impedes medical research.
2. The lack of large-scale medical research leaves many unresolved issues related to dosing and the drug's inconsistent potency.
3. The American Medical Association (AMA) advocates well-controlled studies of marijuana; however, the organization does not currently support marijuana's use as a medical treatment option.
4. Pharmacy Benefit Managers are unable to dispense or bill without a National Drug Code (NDC). A medical marijuana “prescription” is drafted as a “recommendation” or “certification”.
5. Marijuana is not included as one of the “accepted medical services” under most Workers' Compensation laws, and insurers are not required to reimburse for it, even in most of the state in which it has been legalized.⁸

Compendium of State Law (Authorizing Statutes)

A key concern for employers and insurers is whether they must reimburse injured employees for medical marijuana. A survey of medical marijuana statutes indicates that a large number of state statutes imply that employers and their insurers are exempt from reimbursement liability, but recent cases and administrative decisions often turn on whether the employer/insurer falls within an enumerated statutory exception.

States Where Reimbursement of Medical Marijuana is Permitted by Statute

New Mexico N.M. Sate Ann. §§ 26-2B-1 to 26-2B-7
N.M. Admin. Code 7.34.2 and 11.4.7

N.M. Admin. Code (NMAC) 11.4.7.9 - Recognizes the medical cannabis may be a reasonable and necessary medical treatment, but only where an authorized health care provider certifies that other treatment methods have failed.

Establishes the maximum payment that a worker may be reimbursed for medical cannabis shall be determined by the method and amount set forth in health care provider fee schedule.

⁸ For a further discussion of these issues see *Medical Marijuana and Workers' Compensation: The Impact of Federal Reclassification*, GenRe Research Newsletter, Feb. 2016. <http://www.genre.com/knowledge/publications/iinapcwcmarij1602-en.html> (last visited Jan. 31, 2017).

States Where Reimbursement of Medical Marijuana is Restricted by Statute

Arizona Ariz. Rev. Stat. Ann. §§ 36-2801 to 36-2819

“Nothing in this chapter requires: [] A government medical assistance program, a private health insurer or a workers' compensation carrier or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana.” § 36-2814(A)(1).

Illinois 410 ILCS 130/1 – 410 ILCS 130/999

“Nothing in this Act may be construed to require a government medical assistance program, employer, property and casualty insurer, or private health insurer to reimburse a person for costs associated with the medical use of cannabis.” 410 ILCS 130/40(d). [scheduled for repeal Jan 1, 2018]

Montana Mont. Code Ann. §§ 50-46-301 to 50-46-344
MT LEGIS B.M. 182 (I-182) (2016)

“Nothing in this part may be construed to require ... a government medical assistance program, a group benefit plan that is covered by the provisions of Title 2, chapter 18, an insurer covered by the provisions of Title 33, or an insurer as defined in 39-71-116 to reimburse a person for costs associated with the use of marijuana by a registered cardholder. Mont. Code. Ann. § 50-46-320(4)(a).

Vermont Vt. Stat. Ann. Tit. 18, §§ 4471 to 4474m

“This chapter shall not be construed to require that coverage or reimbursement for the use of marijuana for symptom relief be provided by: (1) a health insurer as defined by section 9402 of this title, or any insurance company regulated under Title 8; (2) Medicaid or any other public health care assistance program; (3) an employer; or (4) for purposes of workers' compensation, an employer as defined in 21 V.S.A. § 601(3).” Vt. Stat. Ann. Tit. 18, § 4474c(b).

Washington Wash. Rev. Code. §§ 69.51A.010 to 69.51A.903

“Nothing in this chapter establishes a right of care as a covered benefit or requires any state purchased health care as defined in RCW 41.05.011 or other health carrier or health plan as defined in Title 48 RCW to be liable for any claim for reimbursement for the medical use of marijuana. Such entities may enact coverage or noncoverage criteria or related policies for payment or nonpayment of medical marijuana in their sole discretion.” Wash. Rev. Code. § 69.51A.060.

States Where Reimbursement of Medical Marijuana is Impliedly Limited

Alaska Alaska Stat. Ann. §§ 17.37.010 to 17.37.080

“A governmental, private, or other health insurance provider is not liable for any claim for reimbursement for expenses associated with medical use of marijuana.” Alaska Stat. Ann. § 17.37.040(c).

Arkansas AR Const. Amend. 98 § 1 to 23 eff. Nov. 9, 2016

“This amendment does not require ... A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana unless federal law requires reimbursement.” AR Const. Amend. 98, § 6

California Cal. Health & Safety Code §§ 11362.5. and 11362.7 to 11362.9

“Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.” Cal. Health & Safety Code §11362.785(d).”

Colorado Colo. Rev. Stat. §§ 12-43.3-101 to 12-43.3-106,
18-18-406.3 and 25-1.5-106.
Colo. Const. art. XVIII, § 14
5 Colo. Code Regs §§ 1006-2:1 to 1006-2:13

“No governmental, private, or any other health insurance provider shall be required to be liable for any claim for reimbursement for the medical use of marijuana.” Colo. Const. art. XVII, § 14(10)(a).

Connecticut Conn. Gen. Stat. §§ 21a-408 to 21a-408p
Conn. Agencies Reg. §§ 21a-408-1 to 21a-408-70

“Nothing in sections 21a-408 to 21a-408n, inclusive, or section 21a-243 shall be construed to require health insurance coverage for the palliative use of marijuana.” Conn. Gen. Stat. § 21a-408o.

Delaware 16 Del. C. §§ 4901A to 4926A

“Nothing in this chapter requires: ... A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana.” 16 Del. C. § 4907A.

District of Columbia D.C. Code §§ 7-1671.01 to 7.1671.13

“Nothing in this chapter shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the use of medical marijuana.” D.C. Code § 7-1671-12.

Hawaii Haw. Rev. Stat. §§ 329-121 to 329-128.

“This part shall not be construed to require insurance coverage for the medical use of marijuana.” Haw. Rev. Stat. § 329-124.

Maine Me. Rev. Stat. tit. 22 §§ 2421 to 2430-B
10-144 Code Me. R. ch. 122, § 1-11

“This chapter may not be construed to require ... A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana.” 22 M.R.S.A. § 2426(2)(A).

Massachusetts Mass. Gen. Laws Ann. Ch 94C App., §§ 1-1 to 1-17
105 Mass. Code Regs. §§ 725.001 to 725.800
114.3 Mass. Code Regs. § 40.00

“Nothing in this law requires any health insurance provider, or any government agency or authority, to reimburse any person for the expenses of the medical use of marijuana.” Mass. Gen. Laws Ann. Ch 94C App., § 1-7.

Michigan Mich. Comp. Laws §§ 333.26421 to 333.26430;
Mich. Admin. Code R. §§ 333.101 to 333.133

“Nothing in this act shall be construed to require ... A government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marijuana.” Mich. Comp. Laws §333.26427 Sec. 7(c)(1).

Minnesota Minn. Stat. §§ 152.22 to 152.37

“Nothing in sections 152.22 to 152.37 require the medical assistance and MinnesotaCare programs to reimburse an enrollee or a provider for costs associated with the medical use of cannabis.” Minn. Stat. § 152.23(b).

Update (Dec. 2, 2015): Minnesota Health Commissioner added intractable pain to the list of qualifying conditions for our medical cannabis program. [CITE THE REG]

Nevada Nev. Const. Art. 4, § 38; Nev. Rev. Stat. §§ 453A.010 to 453A.810;
Nev. Admin. Code §§ 453A.010 to § 453A.240

“The provisions of this chapter do not ... Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana.” Nev. Rev. Stat. 453A.800(1).

New Hampshire N.H. Rev. Stat. §§ 126-X:1 to 126-X:11

“Nothing in this chapter shall be construed to require: ... Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis.” N.H. Rev. Stat. § 126-X:3(III).

New Jersey N. J. Stat. Ann. §§ 24:6I-1 to 24:6I-16
N.J. Admin. Code §§ 8:64-1.1 to 8:64-13/1

“Nothing in this act shall be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana...” N.J. Stat. Ann. § 24:6I-14.

New York N.Y. Pub. Health Law, Article 33, Title V-a §§3360 to 3366

“Nothing in this title shall be construed to require an insurer or health plan under this chapter or the insurance law to provide coverage for medical marihuana. Nothing in this title shall be construed to require coverage for medical marihuana under article twenty-five of this chapter or article five of the social services law.”
N.Y. Pub. Health Law § 3368(2).

Oregon Or. Rev. Stat. §§ 475B.400 to 475B.525
Or. Admin. R. 333-008-0000

“Nothing in ORS 475B.400 to 475B.525 requires ... A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana...” Or. Rev. Stat. § 475B.413.

Pennsylvania 35 Pa. Stat. Ann. § 10231.101 to 10231.2110

“Nothing in this act shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide coverage for medical marijuana.” 35 Pa. Stat. Ann. § 10231.2102.

Rhode Island R.I. Gen. Laws §§ 21-28.6-1 to 21-28.6-13
R.I. Admin. Code 31-2-7:1.0 to 31-2-7:11.0

“Nothing in this chapter shall be construed to require ... A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana.”

States Where Reimbursement of Medical Marijuana is not Addressed

Florida	Fla. Stat. Ann. § 381.986, eff. Jul, 1, 2016
Louisiana	La. Stat. Ann. § 40:1046 to § 40:1047
Maryland	Md. Code Ann., Health-Gen. § 13-3301 to 13-3311 Md. Code Regs. T. 10, Subt. 62, Ch. 01 to Ch. 35
N. Dakota	N.D. Cent. Code Ann. §§ 19-24-01 to 19-24-13
Ohio	Ohio Rev. Code Ann. § 3796.01 to § 3796.30

Section 3. Selected Cases and Administrative Decisions

States Where Reimbursement was Ordered

Connecticut

David Petrini, Claimant-Appellee, 6021 CRB-7-15-7, 2016 WL 6659149 (Conn. Work. Comp. Com. May 12, 2016)

Compensation Review Board (CRB) upheld a trial commissioner's order that an employer must pay for the cost of an injured employee's medical marijuana going forward as prescribed by the claimant's physicians and to reimburse the claimant for his out-of-pocket medical marijuana expenses. The CRB found no basis for concluding that the current lack of FDA approval for medical marijuana compelled the trial commissioner to find that the claimant's use of medical marijuana failed to satisfy the "necessary or reasonable" standard. The employer also unsuccessfully argued that, because the monthly cost of the claimant's recommended marijuana dosage was more than three times the cost of his prescription medications, the use of medical marijuana was therefore neither reasonable nor necessary.

Iowa*

Mary Mckinney, Claimant, FILE NUMBER: 5005302, 2002 WL 32125774 (Nov. 14, 2002)

Deputy Commissioner held that, under Iowa's alternate medical care provision, an employer was liable for medical marijuana ordered by an Oregon physician for benefit of an Oregon patient after he relocated to Oregon from Iowa. The petition was granted despite the fact that cannabis is not legal for any purpose in Iowa.

Maine

Gaetan H. Bourgoïn v. Twin Rivers Paper Co., Case No.: 89-01-36-55N, 2015 WL 1811598 (ME. Work. Comp. Bd. Mar. 16, 2015) aff'd App. Div. 16-26 (Aug. 23, 2016)

Administrative Law Judge ordered the employer/insurer to reimburse injured employee for his out of pocket expenses to obtain medical marijuana. The employer unsuccessfully argued that, in addition to being inconsistent with the federal Controlled Substances Act, the implementing statute in Maine protects "private health insurers" from being required to provide coverage for medical marijuana. However, the ALJ determined that that implementing statute did not apply because the employer and its insurer are not private health insurers but rather "casualty insurers" per the plain language of the Maine Worker' Compensation Act. Appellate Division affirmed, en banc. Maine Supreme Judicial Court sitting as the Law Court declined to accept the case for review.

Anne Dugal v. Twin Rivers Paper Co., Case No.: 08-03-71-13B, 2015 WL 1757616 (ME. Work. Comp. Bd. Mar. 25, 2015) aff'd App. Div. 17-2 (Jan. 10, 2017)

ALJ denied injured employee's request for a finding that medically prescribed marijuana was necessary and proper to treat work injuries in this case. The employee failed to meet her burden to show that the prescribed medical marijuana was for intractable pain associated with a work injury that has not responded to other forms of treatment. Additionally, the ALJ noted that medically prescribed marijuana was not a proper treatment for depression. Appeal pending before the Maine Law Court.

Maine (continued)

Donald H. Doten, (Employee), Case No: 09-02-37-96C, 2015 WL 4920122 (ME. Work. Comp. Bd. July 8, 2015)

ALJ ordered the employer/insurer to reimburse injured employee for his purchases of medical marijuana. The employer unsuccessfully argued that because marijuana is illegal under federal law, the insurer cannot be compelled to reimburse employee. The ALJ noted that "as long as the policy of the Department of Justice remains that actions in compliance with existing state laws for medical use of marijuana shall not be prosecuted ..." there is no reason to deny reimbursement for lawfully prescribed medical marijuana.

Michael Crandall, (Employee), Case No: 08-00-33-14B, 2015 WL 4920103 (ME. Work. Comp. Bd. July 15, 2015)

ALJ ordered the employer/insurer to pay or reimburse injured employee for purchases of medical marijuana. The ALJ noted that, under the facts of this case and DOJ's stated enforcement priorities, employer's argument that it would risk federal prosecution for reimbursing employee for physician-certified purchases of medical marijuana was not realistic.

Gary A. Noll, (Employee), WCB File No.: 12-003547B, 2015 WL 9267593 (ME. Work. Comp. Bd. Nov. 2, 2015)

ALJ ordered self-insured employer to reimburse employee for the costs of (1) a medical evaluation required to obtain a medical marijuana certification, (2) medical marijuana, and (3) a vaporizer to administer the medical marijuana. The ALJ rejected the employer's argument that it should be considered a "private health insurer" exempt from reimbursement obligations under enabling provision of the Maine Medical Marijuana Act. In absence of plain language in the Act or persuasive evidence of legislative intent to alter the obligations of workers' compensation insurance carriers and self-insured employers, the employee's petition for reimbursement was granted.

Tammy Mitchell Genest, (Employee), Case No.: 05-029180J, 2016 WL 950637 (ME. Work. Comp. Bd. Feb. 4, 2016)

ALJ denied injured employee's request for a finding that medically prescribed marijuana was "reasonable and proper" medical treatment for her work injury based upon sufficiency of evidence. The ALJ found that the employee failed to establish on a more probable than not basis that use of medical marijuana is "reasonable and proper" medical care.

Arthur Hewes, (Employee), Case No.: 87-000810M, 2016 WL 950639 (ME. Work. Comp. Bd. Feb. 24, 2016)

ALJ ordered employer to reimburse employee for the costs of medical marijuana which he testified had replaced his use of narcotic pain medication. The employer unsuccessfully argued there had been a change in the employee's circumstances and that the medical marijuana was not reasonable, necessary or causally related to the work injury.

Massachusetts*

No Reported Cases

In materials presented at a New England Worker's Comp Seminar on Oct. 14, 2016, Massachusetts-based attorney Edward Moriarity, Jr. indicated that two claims involving compensability of medical marijuana were making their way through the adjudication process at Massachusetts Department of Industrial Accidents (DIA). In both instances, the Judge issued Conference Orders directing reimbursement of the injured workers' costs for medical marijuana. *Under local procedures, the Orders were issued in advance of a formal adjudicatory hearing with testimony. Appeal pending.

New Jersey*

UNPUBLISHED Division Level Decision (#200915740) (Claimant: Andrew Watson)

Public reporting indicates that on December 15, 2016, a New Jersey administrative law judge ordered an insurance company to pay the costs of medical marijuana for an injured worker who su ~~ffers from~~ extreme sensitivity to light touch, and swelling in his one of his hands after an accident while using a power saw at an 84 Lumber outlet in 2008. *see: <http://lwd.dol.state.nj.us/labor/wc/legal/cases/index.html>.

New Mexico

Vialpando v. Ben's Auto. Servs., 2014-NMCA-084, 331 P.3d 975

The Court held that the state's Workers' Compensation Act authorizes reimbursement of medical marijuana and declined to hold that an order to an employer to reimburse would require the employer to commit a federal crime. The Court noted that the Act requires an employer to provide an injured worker "reasonable and necessary health care services from a health care provider." The court rejected the employer's argument that a doctor who dispensed the medical marijuana was not a "health care provider" and dispensed with the apparent conflict with federal law by noting that the "[e]mployer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute."

Maez v. Riley Indus., 2015-NMCA-049, 347 P.3d 732

Reversing a workers' compensation judge compensation order that medical marijuana was not reasonable and necessary medical care for a claimant's compensable injuries, the Court of Appeals held that, despite ambiguities in the testimony by the treating physician, the evidence was sufficient to support a conclusion here that medical marijuana constituted reasonable and necessary medical care. The Court favorable cited its prior holding in Vialpando.

Lewis v. Am. Gen. Media, 2015-NMCA-090, 355 P.3d 850

In the third in a series of consistent rulings, the Court found that a claimant's use of medical marijuana constituted reasonable and necessary medical care and ordered reimbursement by the employer. Unlike the employer in Vialpando (*infra*), counsel for the employer here identified the specific federal statute that would be violated by the reimbursement. In rejecting the employer's argument for preemption, the Court found the argument speculative in view of existing Department of Justice (DOJ) memoranda and federal policy. The Court also noted the 2015 budget directed that funds made available DOJ may not be used to prevent states enumerated in the budget Act from implementing their own laws related to medical marijuana.

States Where Reimbursement was Denied

California

Cockrell v. Farmers, ADJ2584271, 2015 WL 1577995 (Mar. 13, 2015)

A Workers' Compensation Judge awarded the applicant reimbursement for the self-procured medically-recommended marijuana. The Judge determined that the Workers' Compensation insurance carrier, was neither a "health insurance provider" nor a "health service plan" and thus, was not an entity exempted from compensation liability under the provisions of Health & Safety Code Section 11362.785(d).

After reconsideration, the Workers' Compensation Appeals Board (WCAB) instructed the WCJ on remand to "analyze whether there is any rational basis for treating occupational and non-occupational insurers differently with regard to reimbursement for medical marijuana." The case appears to have been settled without further reporting.

Pedro de Dios v. Carroll's Tire Warehouse, ADJ528481, ADJ602408

In September 2013, the WCAB found that the workers' compensation carrier was not liable for reimbursement of medical marijuana because the carrier was expressly excluded from any obligation to provide medical marijuana to an injured worker under an exemption in Health & Safety Code Section 11362.785(d). See Cockrell (*supra*). http://news.workcompacademy.com.s3.amazonaws.com/2013/de_Dios_ADJ528481.pdf (last visited Jan. 27, 2017).

New Hampshire

Michael Nutting v. Benchmark Electronics, CAB Docket # 2015-L-0475 (Feb. 24, 2016)

Claimant sought reimbursement for the use of medicinal cannabis (THC). Insurer denied his request on the basis that an insurer in NH is not required to pay for a drug that is classified as illegal under federal law. Claimant moved from NH to AZ post-injury, creating a choice of law question. Appeals Board ultimately held that the claimant failed to establish that THC is a reasonable, medically necessary, and casually related to his injury.

Section 4. Recreational Legalization Developments

As of November 2016, eight (8) states and the District of Columbia have legalized adult use of recreational marijuana. The journey from compassionate to recreational use of marijuana has significant ramifications in the workers' compensation arena, particularly where a post-injury drug screening reveals the presence of marijuana.

Colorado

Colorado remains a bellwether for marijuana legalization. The Colorado Supreme Court recently considered the intersection between marijuana legalization and the state's off-duty activity statute in Coats v. Dish Network, LLC, 2015 CO 44, 350 P.3d 849. In a noteworthy decision, the Colorado court held that an employer could terminate an employee for his authorized use of medical marijuana as permitted under the state's constitution. The Court reasoned that the employee's "use" was not a "lawful activity" under the state's lawful activities statute as marijuana use remains prohibited under federal law. In its statutory analysis, the Court noted that nothing in the language of Colorado's off-duty activity statute limits the term "lawful" to state law. Instead, the term is used in its general, unrestricted sense, indicating that a "lawful" activity is that which complies with applicable "law" including state and federal law.

Arizona

Arizona residents recently rejected a recreational legalization ballot initiative by a margin of 51.3% to 48.7%. Of the five states with recreational marijuana on the ballot in November 2016, Arizona was the only state where the initiative failed. Many public news sources noted the existence of a well-funded opposition campaign. The tight margin of victory signals the potential for an electoral rematch or potential legislative effort to pursue statutory legalization. Employers and insurers in Arizona will undoubtedly need to monitor further developments.

Section 5. Intoxication, Dosing, and Functional Impairment

Delta-9 THC (THC), the psychoactive constituent of cannabis, has multiple pharmacological effects including distorted perception, difficulty in thinking and problem solving, and loss of coordination. Multiple scientific and medical studies have concluded that marijuana use reduces attentiveness, vigilance and perception of time and speed.⁹

The quantitative impact of a psychoactive substance is frequently presented in terms of the increased frequency of an individual being involved in a motor vehicle accident (as the vehicle driver) if the blood alcohol level of that substance is measured at a particular level. In a report written by Andrew Sewell M.D. and others¹⁰ it was concluded that marijuana causes impairment in every performance area that can reasonably be connected with driving a vehicle. In the case of alcohol (ethanol), accident frequency increases with increasing blood alcohol level. In contrast, the odds ratio for being involved in an automobile accident with THC in the

⁹ Andrew Sewell, M.D., James Poling, Ph.D., Mehmet Sofuoglu, M.D., Ph.D. (2009) The effect of cannabis compared with alcohol on driving. *The American Journal on Addictions*. 18:185-193.

¹⁰ *Id.*

blood is more complex.¹¹ With low levels, the odds ratio actually decreases to approximately 0.6 or 60% when the blood THC level is approximately 3 ng/mL. Above 3 ng/mL, the odds ratio begins to increase and at approximately 5 ng/mL, the odds ratio is again 1, or equal to that of the same person who has an undetectable blood THC level. Above 5 ng/mL, the odds ratio increases more exponentially. At a blood THC level of 10 ng/mL, the odds ratio is approximately 4. Currently in Colorado, drivers are assumed to be impaired if their blood alcohol level is 5 ng/mL or higher.

The number of objective, scientific studies linking THC blood levels to relative impairment in selected tasks is extremely limited. Low levels of THC are thought to decrease automobile accident frequency as drivers with low levels can perceive their reaction time has decreased and therefore they drive more slowly. Marijuana users can frequently compensate for the effects of low THC levels by restricting their activities to simple, familiar tasks performed more slowly. This capacity can mask the appearance of intoxication to observers. However, even low THC levels could increase chances that an individual might be a) the victim of or b) cause of an automobile or industrial accident if unexpected circumstances intervene. Even low levels of THC could decrease the chances that an individual could avoid an unanticipated dangerous situation.

Several complex issues remain to be studied. As discussed above, the specific activity involved in an accident is a factor as is the history of marijuana use, the mode of exposure (second hand smoke) and individual differences in drug metabolism. Combinations of substances remain a complex issue and very little objective data exists. It is highly likely that the combination of THC and ethanol erase the "decreased" odds ratio at low levels of THC, and that this combination would increase accident incidence at any level.

Section 6. Conclusion

The panoply of enabling provisions in state workers' compensation statutes, the unresolved conflicts between state and federal law, and the recent momentum of voter ballot initiatives favoring legalization of recreational marijuana will continue to generate uncertainty in medical marijuana reimbursement liability for employers and their insurers. Employment law practitioners should continue to monitor federal legislative efforts to amend the Controlled Substances Act to reschedule (or de-schedule) marijuana as well as future state ballot initiatives. Finally, further advances in medical research could also inform this unsettled area of law.

For further research see:

- California Workers' Compensation Institute, *Working through the Haze: Implications of Legalized Marijuana for California Workers' Compensation System*, Nov. 2016.
- The Illinois Association of Defense Trial Counsel, *IDC Quarterly: A Primer on Recent Cases Impacting Workers; Compensation Defense* (Monograph_, Vol. 26, No. 3, 2016.

¹¹ Id.

BIOGRAPHIES



Moderator Beth Smith is Counsel at Verrill Dana, LLP, a full service law firm with a regional presence in the Northeast with offices from Maine to Washington, D.C. She is a member of the National Workers' Compensation Defense Network (NWCDN) and an American Bar Association College of Workers' Compensation Lawyers Fellow. She has handled cases at all stages of litigation before state and federal trial courts, state and federal administrative agencies and the Maine Supreme Judicial Court sitting as the Law Court. Beth has a particular depth of knowledge in workers' compensation law, including the Longshore and Harbor Workers' Compensation Act.



Panelist R. Todd Lundmark has been a member of the State Bar of Arizona since 1981. He received his B.A., *summa cum laude*, from the University of Arizona in 1978, and his J.D. in 1981 from Arizona State University College of Law. Certified by the Arizona Bar as a workers' compensation specialist since 1991, he is a co-editor and co-author of the [Arizona Workers' Compensation Handbook](#) (State Bar of Arizona, 1992). Todd was named a Fellow to The College of Workers' Compensation Lawyers in 2014.



Panelist Lawrence Sowers, PhD, is Professor and Chair, Department of Pharmacology & Toxicology, at The University of Texas Medical Branch. His research has involved the chemistry and biology of DNA damage resulting from both carcinogens and cancer chemotherapy agents. More recently, Dr. Sowers has focused upon damage to DNA resulting from reactive molecules generated by activated inflammatory cells including eosinophils and neutrophils.



Panelist Kim Starr joined Ritsema & Lyon in 1993 and is a shareholder in the Fort Collins office. He obtained his Colorado license in 1988. From 1988 to 1991 Mr. Starr focused his practice on general liability insurance defense. Since 1992 he has devoted his practice to workers' compensation defense and subrogation. He is committed to a strong, client-centered approach and is readily accessible to each client. Mr. Starr obtained his undergraduate degree from the University of Nebraska in 1984 and graduated from South Texas College of Law in Houston, Texas, in 1987. Mr. Starr is also licensed in Nebraska. Mr. Starr was named a Fellow to The College of Workers' Compensation Lawyers in 2016. Mr. Starr serves clients from the Fort Collins office.



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