

Medical Marijuana: Legal Challenges under the Workers Compensation Framework?



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The Opioid Crisis: Marijuana options to treat workplace injuries?

“States that have implemented medical marijuana laws have a 25 percent lower annual rate of opioid overdose deaths than states without medical marijuana laws.”

Marcus A Bachhuber, MD. *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States, 1999-2010*, JAMA Internal Med. 2014, 174 (10): 1668-1673



Twenty Three States and DC

- Medical Marijuana is legal in 23 states and the District of Columbia.
- But still a Schedule I illegal drug under federal law.
- Few states' workers compensation boards have addressed whether carriers have to pay for medical marijuana.



Obstacles to Coverage

- State law may expressly provide that health insurers do not have to reimburse for medical marijuana.
- No FDA approval.
- No large scale Human Trials to prove “efficacy.”
- Currently, not included in any workers compensation treatment guidelines, such as the Official Disability Guidelines (ODG) and the American College of Occupational & Environmental Medicine (ACOEM) Practice Guidelines.



Other Obstacles...

- Is it “reasonable and necessary”?
- “Prescription” or “service”?
- What is the reimbursement rate?
- Are workers compensation carriers “health insurance” carriers under the state law?



State Law Eligibility/Cross Border

- Does the injured worker have a “debilitating condition” under the state’s medical marijuana statute?
- Which state’s law applies if the employee lives and works in different states?



Reported Decisions:

- Few states have reported decisions addressing medical marijuana in the workers compensation context
- New Mexico
- California
- Maine



California

- *Cockrell v. Farmers Insurance and Liberty Mutual Insurance Company*
- Cockrell I (2011): Marijuana use is not covered by Medical Treatment Utilization Schedule (MTUS).
- Cockrell II (2012): Workers Compensation Judge and Panel of Three Commissioners awarded **reimbursement** to worker of an amount not to exceed the lower of the fee schedule for drugs replaced, not to exceed actual cost of the marijuana. ADJ504565, ADJ2584271) (Panel Decision, September 2012)

Cockrell continued....

- Cockrell III: Rescinded and remanded with this question: Does a workers' comp insurance carrier fall under the definition of a "health insurance provider" or a "health care service plan"?
- Likely will go back to the WCAB, then to the Court of Appeal, and finally to the Supreme Court of California

New Mexico

- Three decisions:
 - *Vialpando v. Ben's Automotive Services and Redwood Fire Casaulty*, No. 32,920 (N.M. Ct. of Appeals May 19, 2014)(court of appeals affirmed w.c. board decision to direct pay medical marijuana)
 - *Maez v. Riley Industrial*, 33, 154 (N.M. Ct. App. 2015)(reversed w.c. board finding that medical marijuana was not “reasonable and necessary;” no prescription required).
 - *Lewis v. American General Media*, 355 P.3d 850 (NM Ct. App. 2015)(Workers established “reasonable and necessary medical care).



New Mexico: Pending Legislation

- Effective January 1, 2016, the N.M. Workers Compensation Administration began requiring employers and insurers to reimburse claimants up to \$12.02 per gram of marijuana up to 226.8 grams per year.
- In response, legislation was proposed, and the New Mexico House of Representatives has voted 33-29 in favor of HB 195 to expressly provide that injured workers need not be reimbursed for medical marijuana.



Maine

- *Burgoin v. Twin Rivers Paper Co.*, WCB No. 89-01-36-55 (3/16/15): ALJ found marijuana was compensable). In December 2015, oral argument before Workers' Compensation Board Appellate Division.
- *Noll v. LePage Bakeries, Inc.*, W.C.B. 12-00-003547B (9/18/15): ALJ denied claim because health insurers cannot be required to reimburse medical marijuana , but on reconsideration reversed because employer was “self insured” and w.c. is a “casualty” loss.

Returning the Worker to Employment?

- Workplace Policies: No tolerance, drug testing, reasonable accommodation?
- Employees have not fared well in the courts.
- Even in New Mexico....*Garcia v. Tractor Supply Company*, No. CV 15-00735 (D. N.M. 2016)(upheld employee termination for positive drug test; no duty of employer to accommodate).
- ADA: No duty to accommodate
- State disability law? Most states expressly do not require workplace accommodation for medical marijuana.

Impairment?

- No current test for “impairment”
- Stays in the blood a long time for a positive test, even if not “impaired.”
- Employer liability for negligent retention?
- First Massachusetts workplace has suit filed:
Baruto v. Advantage Sales and Marketing
1:15-CV-13574 (Suffolk. Superior)



Ethical Issues

- Lawyers and doctors both have ethical risks relating to advising clients/patients regarding use of medical marijuana
- Doctors: Federal drug licenses at risk and participation in federal reimbursement programs threatened
- Attorney Ethical Opinion: “Participation in this endeavor [advising a client under the Medical Marijuana Act] involves a significant degree of risk which needs to be carefully evaluated.” Maine Prof. Ethics Committee Opin. No. 199 (7/7/10)

NAJJAR EMPLOYMENT LAW GROUP, P.C.

- **Debra Dyleski-Najjar** founded the Najjar Employment Law Group, P.C. in April, 2008 as a labor, employment and benefits boutique law firm providing top quality legal advice, as well as litigation expertise, for employers. Ms. Najjar is a graduate of Boston University School of Law, third in her class, and a magna cum laude graduate of Wellesley College. She is admitted to practice in the state and federal courts of Massachusetts, Maine and New Hampshire as well as the United States Supreme Court. Ms. Najjar is a fellow of the College of Labor and Employment Attorneys, a certified member of the American Society of Pension Professionals and Actuaries, AV rated by Martindale Hubbell, and recognized as a New England Super Lawyers for ten consecutive years. Over her 30 year career, Ms. Najjar has advised many employers regarding workplace accommodations and successfully defended ADA claims before state and federal agencies as well as in the courts.