GRASS ISN'T ALWAYS GREENER IN WORKERS' COMPENSATION

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Thirty-seven states, as well as three territories and the District of Columbia, have enacted state legislation allowing for the medical use of cannabis ("medical marijuana") by qualified individuals. Estimates reveal that nearly three million people nationwide are enrolled in state medical marijuana programs. The most common conditions being treated by medical marijuana include chronic pain and post-traumatic stress disorder, conditions which are commonly diagnosed in reference to work-related injuries.

In recent years, there has been a growing number of litigated cases involving the use of medical marijuana in the context of workers' compensation claims. One specific issue which has emerged in workers'

compensation litigation is whether state workers' compensation laws can compel an employer or insurer to reimburse an injured employee for the cost of medical marijuana. Of the 41 jurisdictions that have legalized the use of medical marijuana, as of the writing of this article, only 12 states have expressly addressed this issue of reimbursement through either a state court decision, legislation, or administrative rule. Of those 12 states, four have addressed the issue of reimbursement at their respective Supreme Court levels, with an even split between them regarding whether or not reimbursement of medical marijuana is preempted by federal law.

The preemption issue focuses on the fact that marijuana remains federally illegal, as it continues to be classified as a Schedule I drug in the Controlled Substances Act ("CSA"), and the debate rages on as to whether states have the ability to regulate the use of medical marijuana, particularly in the context of workers' compensation reimbursement.

Parties who are against reimbursement argue that a judicial order compelling an employer to reimburse an employee's purchase of medical marijuana would subject the employer to criminal liability for aiding and abetting the possession of marijuana under federal law. In light of this dichotomy, with medical marijuana being legal under state law, yet illegal federally, their position is that it would be impossible for an employer to comply with both federal and state law. Due to this conflict, and in accordance with the Supremacy Clause in the United States Constitution, a federal law with respect to the legality of marijuana, specifically the CSA, would preempt any state law mandating reimbursement for the purchase of medical marijuana.

On the other side of the argument, those who are of the opinion that reimbursement would not conflict with federal law, largely base their argument on Congress's actions since 2015 involving appropriation riders. Since 2015, Congress has included provisions in their yearly appropriation acts that prohibit the United States Department of Justice from spending federal funds to prosecute persons who use medical marijuana consistent with their state laws. Therefore, it is argued that these actions by Congress demonstrate the federal government's "purpose" to not interfere with the operation of state medical marijuana programs and workers' compensation laws. Further, parties for reimbursement argue that employer's actions of merely reimbursing for an employee's past purchase of medical marijuana would not satisfy the intent required for aiding and abetting under the CSA. To that end, parties argue that employers would not and could not be federally prosecuted for complying with an order requiring reimbursement of medical marijuana as authorized under a state law.

These arguments were recently presented to the Minnesota Supreme Court in the case of *Musta v. Mendota Heights Dental Center,* 965 N.W.2d 312 (2021). The Minnesota Supreme Court ultimately overturned a workers' compensation order mandating the employer to reimburse the costs of the employee's medical marijuana. The Court explained that requiring the employer to reimburse the costs of medical marijuana would, in fact, subject them to criminal liability for aiding and abetting the possession of marijuana under the CSA. Therefore, it would be impossible for the employer to comply with both federal and state law, so to that end, the Minnesota workers' compensation law requiring reimbursement was preempted by federal law. Maine's Supreme Court also has taken a similar stance on this issue, in that reimbursement of medical marijuana cannot be legally required.

By contrast, the New Hampshire and New Jersey Supreme Courts have held the opposite - that the CSA does not preempt state medical marijuana laws, so that employers can be legally ordered to reimburse injured employees for the cost of their medical marijuana. In light of this equal split among state Supreme Courts and the unpredictability of this issue among all other states with legalized medical marijuana, the United States Supreme Court was petitioned in November of 2021 to review and make a final decision on the matter. In June 2022, the United States Supreme Court declined to review the matter, whereby leaving us with this same ongoing uncertainty.

Unfortunately, the quandary doesn't stop there. Not only can we expect to see more cases involving the use and reimbursement of medical marijuana in the context of workers' compensation, but we can also anticipate issues arising in reference to the use and reimbursement of alternative medications which use the byproducts found in marijuana, such as medical cannabidiol (commonly known as "CBD").

Earlier this year, in January 2023, the state of Maine's Workers' Compensation Board heard an appeal in the case *Bourgoin v. Twin Rivers Paper Company,* Case No. App. Div. 21-0022, Decision No. 23-2, State of Maine Workers' Compensation Board (January 6, 2023), where an injured employee sought reimbursement for CBD gummies purchased from a medical marijuana retailer. In accordance with the state of Maine's Supreme Court decision holding that reimbursement for medical marijuana was not required as marijuana remained federally illegal, the workers' compensation administrative law judge determined that the employer, in this case, was also not required to reimburse the costs of purchasing CBD gummies. The administrative law judge explained that since the gummies had not been approved for use by the U.S. Food and Drug Administration and the retailer of the CBD gummies did not grow the products it sold, they were unable to verify whether the CBD gummies had less than .3% Tetrahydrocannabinol ("THC"), which would exempt it from prohibition under the CSA. As a result, reimbursement was not permitted as the injured worker did not meet the burden of proof.

As we await definitive medical research pertaining to the health benefits of medical marijuana while jurisdictions continue to pass, expand and interpret existing medical marijuana laws, the issue of reimbursement will, unfortunately, continue to plague employers, insurance companies, and their counsel. Until the United States Supreme Court decides to resolve this issue once and for all, or the federal government decides to either reschedule marijuana in the CSA or pass federal legislation allowing for the individual states to make the decision as to whether private parties can be required to reimburse the purchase of medical marijuana, we can expect continued litigation on this issue. For the vast majority of jurisdictions that do not have caselaw on this issue, employers and insurers are essentially left to roll the dice as to how their respective states will interpret these issues.

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