

## NEW MEXICO APPEALS COURT AFFIRMS THE USE OF MEDICAL MARIJUANA IN A WORKERS' COMPENSATION CASE

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In a decision dated May 19, 2014, in the case of *Gregory Vialpando v. Ben's Automotive Services and Redwood Fire and Casualty*, the Court of Appeals of the State of New Mexico ruled that medical marijuana is considered reasonable and necessary medical care.

The employer argued that the use of marijuana was not reasonable and necessary, and that marijuana should be classified as a drug. Since a drug can only be distributed by a licensed pharmacist, the employer argued that marijuana could not be considered reasonable and necessary under the Workers' Compensation Law. The employer also argued that the order by the workers' compensation judge was illegal because the employer would be required to violate federal law in reimbursing the worker for the medical marijuana expenses (under New Mexico law, the employee himself would have to pay for the marijuana and the insurer would then reimburse the employee for the expenses).

The court acknowledged that marijuana was scheduled under the Federal Controlled Substances Act (CSA) as a Schedule I controlled substance and that it was generally illegal to use it or possess it except as related to federally approved research. The court also acknowledged there was no exemption under federal law for medical uses.

In addition, the court acknowledged that the Supremacy Clause dictated that any conflict between federal law and New Mexico law should be resolved in favor of federal law. However, the court then went on to state, "The employer does not cite to any federal statute it would be forced to violate and we will not search for such a statute." In this sentence, it appears that, although the court acknowledged the Controlled Substances Act, it did not acknowledge that reimbursing an employee who is purchasing marijuana is a violation of the Act.

The court also seemed to rely on the fact that, currently, the Justice Department has a selective enforcement policy regarding the CSA. Eight identified areas of enforcement were listed within the decision based on a memorandum from James M. Cole, Deputy Attorney General, to all United States attorneys, issuing guidance regarding marijuana enforcement (August 29, 2013).

This is more than likely the first in a series of cases that we will see dealing with medical marijuana. Therefore, it may be incumbent on employers to have strict work rules regarding drugs, including marijuana and any other controlled substance. Random drug testing policies should be instituted, if possible, and a strict employer policy of no tolerance must be enforced. This author would suggest that notices of the employer's drug policy be enclosed in employees' paychecks to provide emphasis and remind employees that the strict drug policy and random drug testing are part of the employer's work rules.

In this way, a violation of work rules may prevent a successful claim for workers' compensation benefits. ■



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