

# In Court: What's New on the Medical Marijuana Front for Workers' Compensation

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The regulatory and legal landscape of medical marijuana continues to shift and as we look to 2023 many questions still need answers. Several states have ruled that medical marijuana is a reasonable and necessary medical treatment for work-related injuries, including neuropathy, chronic pain, and post-traumatic stress disorder.

However, some states are still waiting for their highest courts to provide judicial guidance. The conundrum states face is whether employers/insurers will be required to pay for medical marijuana for injured workers despite marijuana being deemed an illegal Schedule I narcotic under the federal Controlled Substance Act (CSA).

## Various State Regulations

Under Pennsylvania's Medical Marijuana Act (MMA), carriers are not obligated to pay for medical marijuana for injured workers. Section 2102 of the MMA specifically states, "nothing in this act shall be construed to require an insurer or health plan, whether paid for by the commonwealth funds or private funds, to provide coverage for medical marijuana."

The dilemma occurs when insurers (although not obligated) agree to reimburse an employee for medical marijuana expenses, will they run afoul of the federal CSA?

In answering the above question, we can look to *Bourgoin v. Twin Rivers Paper* 187 A.3d 10 (2018) where the Maine Supreme Court held that if an employer is required by order to subsidize an injured worker's medical marijuana, there arises a conflict between state and federal law, and the CSA trumps state medical marijuana laws.

The Maine Supreme Court further reasoned that if the employer were to comply with a judicial order to subsidize medical marijuana, the employer would be engaging in conduct that would meet the elements of criminal aiding and abetting and be subject to penalties under the CSA.

In contrast, on April 13, 2021, the New Jersey Supreme Court issued a unanimous decision in *Hager v. M&K Construction*, 2021 WL 1380984 (N.J. April 13, 2021) where the court affirmed the lower court's ruling requiring an employer to reimburse a petitioner for the costs of medical marijuana prescribed as treatment for the work injury. The NJ Supreme Court found medical marijuana reasonable and

necessary treatment under the New Jersey Workers' Compensation Statute and found no preemption under the supremacy clause.

With conflicting state supreme court decisions lingering, folks were encouraged when, in June 2022, the United States Supreme Court agreed to review Minnesota's Supreme Court decision holding that the CSA preempted Minnesota state marijuana laws, resulting in the denial of coverage for medical marijuana to injured workers.

The Supreme Court denied the Writs of Certiorari filed by the two injured workers in the *Bierbach v. Digger's Polaris and United Fire Group* 965 N.W.2d 281 (Minn. 2021), cert. denied sub nom. Bierbach v. Polaris, 142 S. Ct. 2835 (2022) and *Musta v. Mendota Heights Dental*, 965 N.W.2d 312 (Minn.

2021), cert. denied, 142 S. Ct. 2834 (2022) cases.

## Moving Forward

While current trends suggest medical marijuana is a reasonable and necessary treatment, the U.S. Supreme Court's unwillingness to hear the preemptive issues has left the states to fend for themselves. Without a federal ruling on preemption, employers must adapt and revise policies to stay in state compliance and support a safe environment for injured workers.



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