POT FOR PAIN

A Cannabis Conundrum in the Courts

By Francis X. Wickersham and Scott Yasko

Marijuana and its derivatives can be traced back centuries in American history. In 1619, a Virginia colony enacted legislation that required all farmers to cultivate hemp, and everyone from George Washington to Thomas Jefferson was still growing it in 1789 when Washington was inaugurated. It wasn't until the turn of the century that American's attitudes on pot began to change, and to this day there still may not be a more divisive topic in our nation. Or is there?

The winds have shifted dramatically over the last few decades. According to the Pew Research Center, only 12 percent of Americans favored legalization in 1969, but that number has increased steadily over time. In January 2018, Pew reported that 61 percent of Americans believe that marijuana should be legal across the board. Perhaps the most evidence in America's attitude change, however, can be found in state legislation that has been passed from coast to coast.

For instance, nine states have legalized recreational marijuana; 32 have legalized medical marijuana; 17 have legalized medical cannabidiol (CBD); 40 have legalized hemp; and 14 have decriminalized marijuana.

Most telling about these numbers is the massive expansion of legalization not just in blue states, but also in some of the most conservative red states. When Mississippi and Georgia are decriminalizing marijuana and legalizing medical CBD respectively, it becomes evident that this is no longer the divisive topic it once was. But even with the full weight of the states behind broad legalization, the federal government continues to drag its feet and muddy the waters.

Attorney General Jeff Sessions seemed to draw a hard line against any further legalization when he took office in 2016, but not even the top cop in the land could slow the momentum toward legalization. Since he took office, 15 state measures have passed. And in June 2018, for the first time in history, the Food and Drug Administration (FDA)—a federal agency, mind you—approved a cannabis-based drug. Called Epidiolex, it is a highly concentrated form of CBD that has been proven to be one of the most effective medications to combat two different types of major seizure disorders. A few weeks later, the FDA rejected a petition from Drug Watch International requesting that marijuana be placed on a list of restricted substances.

What gives? Why does the federal government continue to bury its head in the sand about marijuana? The answer is more complex than it may appear.

Many believe that rescheduling the drug would be the most logical first step in federal legalization, but it's not that simple. Currently, marijuana is a Schedule

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I narcotic, meaning it has no medical efficacy and strong abuse attributes. Changing marijuana to a Schedule II—the same classification as oxycontin and even cocaine—has been batted around for years, but legislation has repeatedly failed since 1972.

Here is the incredible nuance that must be considered: Schedule II drugs have extremely strict guidelines from the FDA that must be adhered to. The FDA would have enormous control over aspects such as marketing and packaging, and it would also have an obligation to oversee manufacturing and processing to ensure consistency in THC and CBD content across marijuana strains. And the marijuana industry could be turned on its head by having to run the same costly and drawn-out medical trials that are required of Big Pharma.

While this dilemma plays out, one thing remains clear: Our state workers compensation systems are heavily opining on this topic, and the result has had vast implications on how the industry treats marijuana.

IMPLICATIONS FOR WORKERS COMPENSATION

As medical marijuana becomes an increasingly popular treatment option for many conditions frequently seen in workers compensation claims, such as neuropathy and chronic pain, employers and insurance carriers are in limbo, waiting to see if there will be an explosion in claims for which they will be asked to pay.

The level of medical marijuana usage will depend on many factors, but it is inevitable that it will be used by injured workers and that they will seek to be compensated for it. Will it be considered reasonable and necessary treatment under a state's workers compensation law? Will insurance carriers be required to pay for it? Right now, it seems that the best way to answer these questions is to shake a Magic 8 Ball. But perhaps a better prediction can be made by analyzing how these issues have been decided by courts in states where medical marijuana is legal. By doing so, we can help employers and workers compensation insurance carriers plan for the inevitable.

STATE-BY-STATE ANALYSIS

About four years ago, a series of opinions from the New Mexico Court of Appeals was issued that addressed the issue of medical marijuana usage and payment in workers compensation cases. At the time, these were the sole decisions the workers compensation community could look to for guidance. In the cases of *Vialpando v. Ben's Automotive Services* and *Redwood Fire & Casualty*; *Miguel Maez v. Riley Industrial and Chartis*; and *Sandra Lewis v. American General Media and Gallagher Bassett Services*, the New Mexico Court of Appeals found that medical marijuana was reasonable and necessary to treat

chronic pain from work injuries and held that employers and insurance carriers had to pay for it. The common thread in all three cases? The court's resounding rejection of arguments made by the employers that they could not pay for medical marijuana due to marijuana's illegality under federal law.

The opinions were important for workers compensation stakeholders, who were tracking the development of medical marijuana's impact on workers compensation law. Legal experts concurred that, based on the New Mexico cases, other courts would likely agree that medical marijuana was indicated for treatment of an injured worker's chronic pain and that the employer or insurer would be obligated to pay for it.

Since the New Mexico decisions, there have been cases from other states around the country that could reasonably be interpreted to say that the outlook is good for treatment of pain from a work injury with marijuana.

For instance, in the Connecticut case *Petrini v. Marcus Dairy Inc. and Gallagher Bassett Services*, the Connecticut Workers Compensation Review Board concluded that the evidence established an injured worker—who had tried a dozen different pain medications and had a non-functioning spinal cord stimulator—required aggressive pain management treatment and ruled that medical marijuana was reasonable. Additionally, the court rejected various public policy arguments raised by the employer, including that marijuana is illegal under federal law.

In Maine, there were two cases that had similar outcomes. In *Noll v. LePage Bakeries Inc. and Cannon Cochran Management Services Inc.*, the Maine Appellate Division found that the plain meaning of the Maine Medical Use of Marijuana Act (MMUMA) did not exclude a self-insured employer from reimbursing an injured employee for costs associated with medical marijuana.

In June 2018, however, *Bourgoin v. Twin Rivers Paper Co. LLC* bucked the trend when a divided Supreme Judicial Court of Maine held that, where an employer is required by order to subsidize an injured worker's medical marijuana, there is a conflict between state and federal law, and the Controlled Substances Act (CSA) trumps the state's medical marijuana law. According to the court, if the employer were to comply with an order from a hearing officer to subsidize medical marijuana under the MMUMA, then the employer would be engaging in conduct that would meet the elements of criminal aiding and abetting and be subject to penalties for violating the CSA.

Meanwhile, in the New Jersey case *Watson v. 84 Lumber*, a judge for the New Jersey Division of Workers Compensation found that an injured worker's use of medical marijuana for neuropathic pain stemming from a complex regional pain syndrome injury was reasonable and necessary. The court also ordered reimbursement of the costs associated with the care.

More recently in a July 2018 case, *McNeary v. Township of Freehold*, another New Jersey workers compensation judge ordered the state's Freehold Township to pay for a municipal employee's medical marijuana. In doing so, the judge cited medical marijuana as a safer treatment option than opioids and rejected the employer's argument that the insurance company could not pay for it due to its illegal status at the federal level.

ROUND AND ROUND

So a New Jersey judge rejects the federal status of marijuana and approves it for treatment of a work injury, while Maine's highest court rejects marijuana as treatment it because it is illegal. We are back on the merry-go-round.

Perhaps the state courts see no point in following the federal government on this issue because they continue to sit on their hands when it comes to the issue. Or maybe the federal government is letting this play out in order to learn from the states' legislative oversights. Perhaps, politically, no one wants to lead the legalization charge. What is clear is that there is so much more to unpack on this issue than what originally meets the eye, and with the stakes being incredibly high, a measured approach seems to be the right one. At the same time, we cannot ignore this country's long history with marijuana, and the undeniable fact that peoples' views have changed. Whatever the future holds for legal marijuana in workers compensation and beyond, one can only hope that lawmakers get it right and are able to provide a safe and controlled environment for all of their constituents. ■