

NEW MEXICO COURT OF APPEALS LEADS THE NATION IN APPROVING MEDICAL MARIJUANA IN WORKERS' COMPENSATION CASES

Workers' Compensation • January 29, 2015

On January 13, 2015, the New Mexico Court of Appeals issued an opinion finding medical marijuana to be reasonable and necessary medical care for a workers' compensation claimant. This opinion follows a decision issued by the same court on May 19, 2014, ruling that medical marijuana was reasonable and necessary.

In the most recent case of *Miguel Maez v. Riley Industrial and Chartis*, the claimant suffered two compensable injuries to his low back in February and March of 2011. Claimant received payment of temporary total disability benefits through the date of maximum medical improvement and permanent partial disability thereafter. He was also entitled to ongoing reasonable and necessary medical care.

The claimant was treated by a physician who never prescribed medical marijuana for the claimant. The physician was treating the claimant with a number of medications for pain management. During one of the tests given for pain management patients, the claimant tested positive for marijuana. The physician suggested that if the claimant was going to take marijuana, he needed to have a license so that the physician could continue administering other narcotics. Additionally, with a license for medical marijuana, the physician would most likely only prescribe additional non-narcotic pain medication.

Later, the physician saw the claimant for his first medical marijuana evaluation. In his report, the physician said the claimant had failed traditional pain management and was a candidate for the cannabis program. He authorized the claimant for medical marijuana for one year and re-authorized the claimant one year later. The certification signed by the physician qualified the claimant for use of medical marijuana under New Mexico's Compassionate Use Act. In the case before the Workers' Compensation Judge (WCJ), the physician testified that he did not prescribe the marijuana for the claimant and did not recommend or distribute it in any way. Instead, he explained to the claimant that if he was using marijuana, he might as well have a license for it. Consequently, the physician authorized the claimant's use of medical marijuana.

The WCJ found that medical marijuana did not constitute reasonable and necessary medical care because the physician did not prescribe it for the worker. The New Mexico Court of Appeals, however, reversed. Guided by its prior decision in the case of *Vialpando v. Ben's Automotive Services and Redwood Fire and Casualty*, 2014-NMCA-084, 331 P.3d 975, cert.

denied, 331 P. 3d 924 (2014), the court found that medical marijuana is not a prescription drug and that the certification required under the Compassionate Use Act by a person licensed in New Mexico to administer controlled substances is the functional equivalent of a prescription. Additionally, although the court reversed the WCJ's decision because it was based on a faulty premise, it nevertheless addressed the issue of the reasonableness and necessity of medical marijuana as treatment. Recognizing that the physician merely adopted medical marijuana as part of his treatment plan because the claimant started to use it on his own, the court concluded that the physician developed a plan that called for medical marijuana, recommended the claimant receive medical marijuana by certification and did so because traditional pain management was not successful. ■

SIDE BAR

This is the second decision in less than a year from the New Mexico Court of Appeals approving medical marijuana for a workers' compensation claimant. According to the facts set forth in the opinions from the New Mexico Court of Appeals, the claimants were using medical marijuana for chronic pain from their injuries. At present, medical marijuana is legal in 23 states, with bills pending in many other states, including the author's state of Pennsylvania.



Francis X. Wickersham, Esq.
*Shareholder
Workers' Compensation
Practice Group*

620 Freedom Business Center
Suite 300, King of Prussia, PA 19406
Direct: (610) 354-8263
Fax: (610) 354-8299
Email: fxwickersham@mdwgc.com