

UPDATE



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Must New Jersey Employers Reimburse Medical Marijuana Costs Under Their Workers' Compensation Plans?

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On December 15, 2016, a New Jersey Judge of Workers' Compensation issued a decision requiring an employee's medical marijuana expenses to be reimbursed by his employer's workers' compensation insurance carrier. As one of the first decisions in the country holding medical marijuana costs to be compensable by a workers' compensation insurer, the case gathered substantial national attention in the popular media. It made New Jersey the fourth state, along with Maine, Minnesota and New Mexico, in which a workers' compensation insurer has been ordered to pay for medical marijuana for an injured worker. Advocates of medical marijuana applauded the decision. And although the decision is not binding on other courts, one commentator suggested that the decision will nonetheless be "studied by other judges and practitioners given that there are few trial decisions in New Jersey on the use of medical marijuana for workers' compensation treatment."¹

But was the decision correct? The Judge of Workers' Compensation appeared not to address the express provision of New Jersey medical marijuana statute that protects private health insurers from being compelled to reimburse medical marijuana costs. It therefore is not clear that a workers' compensation award compelling reimbursement of medical marijuana costs would survive an appeal to the courts. Employers confronted with demands for reimbursement of medical marijuana costs must remember this viable defense.

WHAT DID THE WORKERS' COMPENSATION JUDGE DECIDE?

For a decision that supposedly will be "studied by other judges and practitioners," it has proven devilishly hard to obtain a copy of it. Workers' compensation decisions are not published in the same manner as court decisions. This particular workers' compensation decision has not been posted on Westlaw or on the website of the New Jersey Division of

¹ Geany, John, *New Jersey Judge of Compensation Orders Employer to Pay Costs of Medical Marijuana Program and Costs of Filling Prescriptions*, New Jersey Workers' Comp Blog, <http://njworkerscompblog.com/> (December 29, 2016).

Workers' Compensation, despite the widespread interest in it. The Judge of Workers' Compensation who issued the decision declines to make copies available to the public, and the attorneys involved in the case did not return our multiple requests for a copy. By necessity, this summary is based on media reports, not a reading of the decision itself.²

The employee, Andrew Watson, worked for 84 Lumber and was injured on the job in 2008, sustaining a serious injury to his left hand while using a power saw. He required ongoing pain management treatment, and at one point had been prescribed 120 oxycodone tablets per month. In 2013, Watson consulted with his treating physician about medical marijuana, claiming that the narcotic medication he had been taking was not effective. The treating physician's partner, who is certified to perform medical marijuana evaluations, diagnosed Watson with neuropathic and complex regional pain syndrome, a prime candidate for medical marijuana treatment. Successful medical marijuana treatment would also reduce Watson's use of narcotics.

After receiving the appropriate documentation, Watson began purchasing medical marijuana from authorized dispensaries in 2014, paying the costs out his own pocket in cash. He submitted the invoices and proof of cash payments to 84 Lumber's workers' compensation insurance carrier for reimbursement. The carrier refused, thus forcing Watson to return to prescription opiates. Watson then filed a motion with the New Jersey Division of Workers' Compensation to compel the carrier to cover the medical marijuana. Following an evidentiary hearing, Compensation Judge Ingrid L. French, an Administrative Supervisory Judge of Workers' Compensation, agreed with Watson that his medical marijuana was a necessary medical expense and should be reimbursed. Watson was "an appropriate candidate for New Jersey's medical marijuana program." Medical marijuana allowed Watson to manage his pain without the debilitating effects of opiates such as oxycodone. Not incidentally, the cost of medical marijuana is substantially lower than the cost of prescription opiates.

Compensation Judge French acknowledged that the use of medical marijuana is controversial, but concluded that "whether or not it should be prescribed for a patient in a state where it is legal to prescribe it is a medical decision that is within the boundaries of the laws in the State of New Jersey." It is not clear, however, whether she considered whether the "laws in the State of New Jersey" require private insurers to reimburse medical marijuana costs.

NEW JERSEY'S MEDICAL MARIJUANA EXCEPTION FOR PRIVATE HEALTH INSURERS

New Jersey's medical marijuana law allows a limited category of qualified patients and their qualified caregivers to purchase and utilize limited amounts of marijuana for specified debilitating medical conditions. Medical marijuana may be purchased only from State-certified alternative treatment centers. Eligible patients, qualified caregivers, alternative treatment

² These sources include the Geaney article cited above and the following: Hostler, Fred, *Judge Says Workers' Comp Must Pay For Medical Marijuana*, Safety and OSHA News, <http://www.safetynewsalert.com> (January 16, 2017); Bess, Jeff, *Cannabis Case Summary: New Jersey Judge Orders Coverage for Medical Marijuana*, Harris Brickley Canna Law Blog, <http://cannalawblog.com> (January 20, 2017); and, Livio, Susan, *N.J. Man's Medical Marijuana Should Be Paid By Workers' Comp, Judge Says*, NJ.com, <http://www.nj.com> (January 7, 2017).

centers, physicians, and other persons acting in accordance with the law are immune from criminal liability and civil or administrative penalties under New Jersey law pertaining to the use of marijuana.

Contrary to what is often inaccurately stated, neither New Jersey nor any other state has “legalized” marijuana for medical purposes. Possession, sale and use of marijuana for any reason remains a federal crime. All that any state may do is to exempt medical marijuana users from criminal prosecution and civil penalties under *state* law. Any patient, caregiver, or provider who deals with medical marijuana, and any physician who prescribes medical marijuana, does so with at least the implicit recognition that he or she is subject to potential federal prosecution. Further, he or she recognizes that he or she is acting in violation of federal civil regulations pertaining to marijuana use, and may jeopardize federal grants and loans he or she may be receiving, and federal contracts to which he or she may be a party.

Taking note of this unique status of medical marijuana, the Legislature included a specific exclusion for health insurance providers.. Specifically, nothing the medical marijuana law “shall be construed to require a government medical assistant program or private health insurer to reimburse a person for the costs associated with the medical use of marijuana.” N.J.S.A. 24:6I-14. No court has yet interpreted this provision, but its plain terms are crystal clear: Private health insurers are not required to cover costs related to medical marijuana.

SO WAS THE COMPENSATION JUDGE CORRECT?

Compensation Judge French determined that medical marijuana was an effective treatment for Watson’s injury, and that it was permissible for his medical professionals to prescribe it. But she apparently did not consider the express provision of New Jersey’s medical marijuana law that excuses private health insurers from mandatory reimbursement of medical marijuana costs. Had she done so, she may have been compelled to reach a contrary conclusion. The statute is clear. Health insurers cannot be required to reimburse medical marijuana expenses. The plain language of the statute cannot be overcome by finding that marijuana is an effective treatment, that it is less costly than prescription opiates, or that it has fewer adverse side effects than oxycodone.

If this appears to be a harsh conclusion, it reflects the reality that marijuana use remains a criminal offense under federal law. Any entity that participates in a state medical marijuana program runs the risk of incurring federal criminal liability, losing federal contracts, and jeopardizing any federal assistance it receives or federal programs in which it participates. Forcing a private health insurer to reimburse medical marijuana costs would place that insurer under a substantial risk of adverse federal action that the insurer did not voluntarily assume.

Note that the statute prohibits private health insurers from being *required* to cover medical marijuana costs. The statute does not prevent a private health insurer from *choosing* to covering those costs voluntarily. That may have been the case in the Watson matter. The private health insurer may have willingly accepted the reimbursement obligation once it was determined that medical marijuana was effective in treating Watson’s medical condition. That could explain why the statutory prohibition against mandatory reimbursement was not discussed. However, an insurer that chose not to accept the obligation to reimburse would still be able to rely on the statutory prohibition against compelled reimbursement.

Thus, Compensation Judge French's decision may not have the impact that media reports suggest. Any future effort to compel private workers' compensation health insurers to reimburse an employee's medical marijuana expenses will collide with the statutory exclusion barring mandatory reimbursement.

AND WHERE DOES THIS LEAVE NEW JERSEY EMPLOYERS?

An employer confronted with a demand to reimburse medical marijuana costs needs to work in close contact with its insurance carrier to determine its position on the issue. Both employer and the carrier first need to be assured that medical marijuana would be an effective treatment for the employee. If this threshold showing is made, the employer and the insurance carrier need to consider whether to reimburse the cost voluntarily. If either the employer or the insurance carrier decides that it does not want to assume this obligation, perhaps out of fear of jeopardizing its federal contracts or being disqualified from participation in federal programs, the statutory defense provided by New Jersey's medical marijuana law should be asserted.

Even if the worker's compensation insurance carrier chooses to reimburse the cost of medical marijuana treatment, the employer is still not required to accommodate medical marijuana usage at work. The same statute that bars private health insurers from being required to reimburse medical marijuana expenses also bars employers from being required to accommodate the medical use of marijuana in any workplace.

Our firm advises clients drug-related issues in the workplace and is available to assist employers with issues related to medical marijuana, or any other issue pertaining to substance abuse.

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