

Impact of Marijuana on Maine Workers'
Compensation
March 23, 2017

Nelson Larkins, Esq.

*Nelson Larkins
Preti Flaherty
One City Center
Portland, ME 04112
(207) 791-3222
nlarkins@preti.com*

Marijuana use in the State of Maine has been in a state of flux over the past several years. The introduction of the Maine Medical Use of Marijuana Act, Maine Workers' Compensation Appellate Division decisions, and a recent ballot initiative that approved recreational use of marijuana in Maine have all caused uncertainties in the workplace and among workers' compensation insurers. This presentation will review the general legal status of marijuana at the Federal and State levels, update the current status of Medical Use of Marijuana law, concentrate on the Maine Workers' Compensation Act, and also discuss issues surrounding the use of marijuana in the workplace.

THE BIG PICTURE

As of March 7, 2017 six states now call for the reimbursement of medical marijuana costs under workers' compensation. Those states include Connecticut, Massachusetts, Minnesota, New Jersey, New Mexico, and Maine. Six states have specific laws in place denying the right for medical marijuana reimbursement. There are now eight states and the District of Columbia that allow the recreational use of marijuana. Maine is among those states although there is a current hold in place on recreational sales of marijuana. A total of 28 states and the District of Columbia now allow for the use of medical marijuana. Seventeen other states allow for the use of low THC, high cannabidiol (CBD) products for medical conditions.

Federally, the Controlled Substances Act of 1970 makes possession and sale of marijuana a criminal offense. The drug is considered a Schedule I drug by the U.S. Drug Enforcement Agency (DEA). The reason for its Schedule I classification is that it has a high potential for abuse and there is no current accepted medical use in treatment for the drug in the United States. Interestingly because of this, health care providers that seek to have patients use medical

marijuana “recommend” and do not “prescribe” the drug. In 2015, legislation was introduced in Congress to review marijuana laws, but that legislation has been on hold. The U.S. Drug Enforcement Agency specifically denied a request to reschedule the drug from Schedule I in July 2016. Advisory opinions from the U.S. Department of Justice have indicated the Department does not seek to enforce marijuana laws at the Federal level and will continue to allow individual States to decide policies and considerations. The DOJ has reserved its right to enforce Federal law if State actions are deemed inappropriate.

The net result is that there are direct conflicts between State and Federal laws. Technically, possession and sale of marijuana is still a Federal crime, and this has led to questions about the reimbursement or payment for medical marijuana. There are other factors influencing the Federal level. The Centers for Medicare Services have no standards associated with the drug. There is no national drug code and the use of marijuana is not regulated by the U.S. Food & Drug Administration (FDA). Finally, there are certain international drug treaties the U.S. is a party to that call for marijuana to be designated as at least a Schedule II drug. There are also significant uncertainties about the approach that will be taken by the Trump administration and the Department of Justice. Attorney General Sessions is on the record as being against legalization of marijuana. However, the Drug Enforcement Agency, in August 2016, did make a move to allow more medical research into the use of medical marijuana.

The State of Maine is one of 28 states to allow the medical use of marijuana. This became law through the Maine Medical Use of Marijuana Act (22 M.R.S.A. §2422 and 10-144 CMR, Ch. 122). The Act calls for the use of medical marijuana when individuals are deemed to suffer from certain debilitating medical conditions. There are specific provisions for conditions such as HIV, glaucoma, and, also a “catch all” for chronic pain and other conditions. Medical

use is defined as therapeutic or palliative for conditions or symptoms. Medical marijuana may be recommended by physicians, including osteopaths, and certified nurse practitioners. There are procedures in place to register patients with a certification, certify care-givers through the Division of Licensing and Regulatory Services, and registration of approved dispensaries.

In November 2016 the State of Maine joined eight others in allowing for the recreational use of marijuana. Several cities and towns had already approved such legislation, and this law was approved through a State ballot initiative allowing for the recreational use of marijuana by individuals 21 years of age and older. The legislation was to go into effect during the winter of 2017, but by legislative act, a hold has been placed on the process until the winter of 2018 so rules and regulations can be formulated. The State has significant concerns over taxes and the control and distribution of recreational marijuana. A move is afoot by many municipalities to ensure appropriate ordinances are in place relating to the retail sale or manufacture of marijuana within town limits.

MARIJUANA AND THE MAINE WORKERS'

COMPENSATION ACT

There are now six states that have approved the reimbursement of medical marijuana under workers' compensation. A New Mexico appellate court, in 2013, first ruled an injured worker must be reimbursed for reasonable and necessary medical marijuana costs. It was noted this conflicted with Federal law, but under a Compassionate Use Act, it was deemed appropriate to order reimbursement.

Maine passed the Medical Use of Marijuana Act, but this still did not answer the question of who might be responsible for actual payment for marijuana. Initially, individuals seeking this type of drug were responsible for their own costs, and there is a specific provision in the Act stating a “private health insurer” cannot be required to reimburse the costs.

In 2016, two separate cases came before the Maine Workers’ Compensation Board regarding employee claims for reimbursement for medical marijuana. Maine Workers’ Compensation cases start with a decision by an individual judge, then a decision by a three judge panel at the Appellate Division, and finally an appellate process through the Maine Supreme Judicial Court. Both cases reached the Workers’ Compensation Appellate Division and decisions were issued on August 23, 2016 with most of the controlling language and law contained within *Noll v. LePage Bakery*. The second case was *Bourgoin v. Twin Rivers Paper Co.* It should be noted that the Noll decision was *en banc*, meaning all the Maine Workers’ Compensation judges were a part of the decision. The Maine Supreme Judicial Court has the discretion to review or not review cases appealed to it. The Court has denied the appeal of *Noll* which means the reimbursement of medical marijuana costs is now set law.

The issue in *Noll* was whether a self-insured employer had a duty to reimburse an employee for medical marijuana costs. These costs included the employee’s certification as a registered patient, the actual cost of the product, and the cost of a vaporizer. The employee brought a Petition for Payment of Medical Costs under 39-A M.R.S.A. §207 of the Maine Workers’ Compensation Act. That section defines medical costs and services that are generally available under the Act. The standard is that those services are to be reasonable, proper, and related to the work injury or occupational disease. In this case there was no dispute the medical marijuana was reasonable and proper. The employee suffered from severe chronic pain from a

work injury and long-term opiate use had led to significant side effects. The marijuana helped his symptoms.

LePage Bakery defended the action on two primary bases. First, it was argued that if the Workers' Compensation Board ordered LePage Bakery, as a self-insured entity, to reimburse medical marijuana it would commit a Federal crime under the Controlled Substances Act. Second, the employer argued under the Medical Use of Marijuana Act that it was a "private health insurer" and could not be required to reimburse the costs.

The Appellate Division first found that although Federal law supersedes Maine Law, there is no particular provision in the Controlled Substances Act that would be violated by a self-insured employer reimbursing an employee for the cost of medical marijuana. It was noted that Federal law is quite uncertain at the current time and the Department of Justice policy to allow States to control medical marijuana laws reinforces the concept that there are no provisions in place restricting the reimbursement. The Appellate Division also specifically cited to the 2013 New Mexico Appellate Court decision on reimbursement for medical marijuana costs.

The Appellate Division also ruled LePage Bakery, whether it was a self-insured employer or a workers' compensation insurer, was not the equivalent of a private health insurer. A self-insured employer is defined under "employer" language in the Maine Workers' Compensation Act at 39-A M.R.S.A. §102(12), and insurers are defined at §102(14) as "casualty insurance companies". This is key; under the Maine Insurance Code, health insurers and casualty insurers are differently defined. (24-A M.R.S.A. §704 and 707). Therefore, both self-insured employers and workers' compensation insurers are deemed to be casualty insurance carriers for purposes of the Maine Workers' Compensation Act and cannot use the exclusion contained within the

Medical Use of Marijuana Act, allowing private health insurers to deny reimbursement of medical marijuana costs.

There were also dicta contained in *Noll* and *Bourgoin*. The Appellate Division suggested reimbursement of medical marijuana is generally appropriate because workers' compensation insurance is different than other insurance due to its "no fault" system, and it also noted the Maine Legislature could have clarified the issues and passed legislation if it sought to exclude workers' compensation insurers from having to pay these costs.

Again, the recent denial of the *Noll* appeal to the Maine Law Court means workers' compensation insurers must reimburse medical marijuana costs.

EFFECT OF RECREATIONAL MARIJUANA LEGALIZATION ON MEDICAL MARIJUANA

Although there is a current delay of the enactment of the Recreational Use of Marijuana Law, it will be in place in the future and certain points need to be kept in mind.

- (1) Many individuals will want to remain under the Maine Medical Marijuana standards rather than under recreational use. This will be primarily because of costs. Medical marijuana will not have taxes, individuals can also anticipate a more regulated and consistent product, and for many individuals it may be important that their marijuana use not be seen as recreational.
- (2) We can expect, at least initially, that medical marijuana may be more tightly regulated because it has been in place longer than recreational marijuana.

- (3) There will be issues involving workplace use and testing. Employers may very well have the same rights associated with testing, discipline, and termination in regard to marijuana use in the workplace or residue of marijuana within an individual's system while in the workplace. Although both New Mexico and Colorado have provisions for medical and/or recreational use of marijuana, there still are Federal court decisions in both of those jurisdictions finding individuals can be terminated for outside use of marijuana, or workplace use.
- (4) There will be additional issues involving recreational and medical marijuana use in the workplace. These issues include general workplace drug policies, difficulties with return to work efforts if an individual is on long-term medical marijuana, and comparing medical marijuana use to the use of opiates. The reality is that many individuals already return to the workplace with high levels of narcotics in their systems due to chronic pain or other acute medical conditions, and as a society we will have to develop appropriate and consistent policies and procedures to allow for the return to work of individuals who are using long-term medical marijuana for treatment of acute and chronic medical conditions. Safety in the workplace will be paramount. Production by individuals who are on any kind of medication may be an issue.
- (5) Interestingly, insurance costs may very well go down with the introduction of medical marijuana into the workers' compensation system. Generally speaking, this medication may be cheaper than standard opioids.
- (6) There are uncertainties around coding and fee schedules; some organizations have already taken some tentative steps to try to identify how medical marijuana might be coded. These could include: 1) growing and cultivating medical marijuana/farm;

2) testing/analytical labs; 3) manufacture/bakery and drug manufacturing; and 4) sales/stores and wholesale.

(7) There are no Federal or State fee schedules, but it can be anticipated there may be a fee schedule put into place by the Maine Workers' Compensation Board. Dosage levels will also be an issue.

(8) Finally, there is concern over Medicare Set Aside Allocations and approval of medical marijuana as part of settlements by the Centers for Medicare Services. Right now, because of Federal law, CMS cannot consider medical marijuana as a part of the cost for future medical care. Therefore, any medical marijuana costs would not be included in an MSA for purposes of a workers' compensation lump sum settlement. The cost would have to be included in the general resolution of the claim and would not have to be approved by CMS.