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High and Dry: How Will Legal Marijuana Impact Workers Comp?

BY JACQUELYN CONNELLY

Scenario 1: An employee sustains a traumatic injury at a jobsite. To treat pain, the physician prescribes medical marijuana instead of an opioid.

Scenario 2: An employee sustains an injury at a jobsite and is asked to take a drug test after the fact. The test comes back positive for the active component of marijuana.

Question: In either scenario, can the employer still expect their workers compensation carrier to pay the associated claim? And if the employer has a drug-free workplace policy in force, do they have the right to fire the employee for using marijuana either recreationally or for medical purposes?

Answer: It depends.

States vs. Feds

As of press time, medical marijuana is legal in 29 U.S. states plus Washington, D.C., and recreational is legal in seven states and D.C. "And there's no end in sight—there will be other states," predicts Peter Burton, senior division executive for the National Council on Compensation Insurance state relations department.

At a time when the opioid crisis continues to make headlines, some doctors are already prescribing marijuana as an alternative to addictive narcotics. Michael Bourque, CEO of The MEMIC Group, knows of a few cases where injured workers have weened themselves off heavy doses of opioids in favor of marijuana, and Burton says some evidence suggests marijuana can be as effective as opioids in addressing issues like epilepsy, glaucoma and some traumatic injuries.

For example, a [study](#)

(http://journals.lww.com/pain/Abstract/2017/07000/Chronic_pain_patients_perspectives_of_medical;

that appears in the July 2017 edition of the Journal of the International Association for the Study of Pain asked medical marijuana patients to rate the effectiveness of medical cannabis in treating their chronic pain. The average score was 74.6% on a scale of 0% (“no relief”) to 100% (“complete relief”). And according to a 2015 [Harvard-led review](#)

(<https://www.ncbi.nlm.nih.gov/pubmed/26103031>) of 28 studies examining the efficacy of drugs

that use cannabis, “use of marijuana for chronic pain, neuropathic pain, and spasticity due to multiple sclerosis is supported by high-quality evidence.” In January 2017, [another report](#)

([http://nationalacademies.org/hmd/reports/2017/health-effects-of-cannabis-and-](http://nationalacademies.org/hmd/reports/2017/health-effects-of-cannabis-and-cannabinoids.aspx)

[cannabinoids.aspx](http://nationalacademies.org/hmd/reports/2017/health-effects-of-cannabis-and-cannabinoids.aspx)) from The National Academies of Sciences Engineering Medicine reached a similar conclusion.

Still, cannabis-related research is in its early stages. And even if marijuana becomes a more mainstream therapy for workers comp injuries, it remains illegal under federal law. That means if a doctor prescribes medical marijuana for an injured worker, the carrier may have grounds to refuse to pay the claim.

Nationwide, for example, does not reimburse medical marijuana treatment except in jurisdictions that mandate it by law. And so far, only five states—Connecticut, Maine, Minnesota, New Jersey and New Mexico—officially require insurers to pay workers comp claims involving medical marijuana. New Mexico was the first in the 2014 case *Vialpando v. Ben’s Automotive Services*, when the state’s Court of Appeals upheld the validity of a workers compensation award directing an employer and insurer to reimburse a worker for the cost of medical marijuana used to relieve pain.

Although such cases have been few and far between so far, as more states legalize marijuana in the years ahead, “it could be a very interesting circumstance, because you could have a state saying yes, you have to pay, and the feds saying no,” Bourque says. “The supremacy clause of the Constitution might suggest the federal government would have precedence, but it could be seen as a states’ rights issue too. It’s just too early to tell—these things are just now making their way through state courts.”

The Drug-Free Workplace

Another issue working its way through the courts: employers deciding to implement drug-free workplace policies, which results in workers comp premium credits in some states. For example, Fitzhugh Powell, Jr., president of Cecil W. Powell & Company in Jacksonville, Florida, says his state offers a 5% credit for a drug-free workplace—compared to a 2% credit for workplace safety.

The goal is simple: Reduce the number of employees who show up at work impaired. If a larger portion of the working population comes to work drunk or high, “that obviously creates exposures and injuries on the job that wouldn’t exist before,” says Larry Corsi, leader of workers compensation at Nationwide. “Of course, this could have happened before with illegal drugs and alcohol. Every state has laws that dictate what an insurer can do if an individual causes injury who was impaired in some way—some allow you to restrict coverage, some allow you to deny the claim altogether.”

Remmie Butchko, CEO of Georgetown Insurance in Silver Spring, Maryland, is a big advocate of drug-free workplace policies. In the 27 years he’s been writing workers comp insurance, “drug testing has been the single most effective strategy for reducing worksite injuries,” he says. “I’ve seen firsthand how effective they are because I’ve helped implement a lot of them.”

In one case, Butchko worked with a concrete company that had an experience mod over 2.0. “He put in a drug testing program, and five years later, it went down to a .75. The only change he made was started drug testing,” Butchko explains. “Now, he’s not paying a fortune for workers comp, and he has fewer problems at the job site.”

But do drug-free workplace policies stand up in states where marijuana is legal, either medically or recreationally? In Michigan, medical marijuana is allowed, “but that doesn’t mean an employer has to tolerate it,” notes Randy Boss, certified risk architect at Ottawa Kent, headquartered in Jenison, Michigan. “If somebody fails a drug test, the employer can terminate them.”

Some states follow the same protocol—in 2015, Colorado courts ruled that “an employer can have a drug-free workplace policy and fire you for testing positive for marijuana, even though it’s legal,” says Kevin Ring, lead workers compensation analyst at the Institute of WorkComp Professionals. “Those two things are not incompatible.”

But in July, the Massachusetts Supreme Judicial Court ruled in *Barbuto v. Advantage Sales and Marketing, LLC* that employees who have legal prescriptions for medical marijuana can sue their employers for disability discrimination if they are fired solely on the basis of using the drug—which means that while employers are free to adopt a zero-tolerance drug policy, they can be held liable for discrimination. The situation is the same in Rhode Island and now in Maine, where a new recreational marijuana law that will take effect in February will not allow employers to test job applicants for marijuana or fire them for a marijuana-positive drug test, unless they can also prove use or impairment on the job.

The Burden of Proof

And that last part may prove trickier than expected: Unlike with alcohol, there’s no reliable way for an employer to determine whether an employee is high at work. A drug test may come back positive, but that could just mean the employee smoked a joint at some point in the last few weeks.

At Owen-Dunn Insurance Services, headquartered in Sacramento, California, a workers comp client’s employee was recently completing a painting job when he fell off a ladder. “He acknowledged he fell out of the ladder because he was pretty high,” says Owen Taylor, president. “He uses medical marijuana for control of Tourette’s syndrome, and the employer was aware that he used medical marijuana because of that. So they had to make accommodations to the kind of work he was doing.”

But short of an injured worker coming clean of their own accord, proving marijuana impairment in the event of an injury is a tall order. “You can’t breathalyze for marijuana,” Ring says. “That’s what makes alcohol so easy. ‘Are you drunk?’ It’s a simple yes or no question that we can test for right this second. But the science hasn’t gotten there for marijuana or even for prescription pain medications. It may never get there.”

“Some studies have tried to tackle THC levels, but what constitutes a level of impairment in one person may not do so in another,” Bourque agrees. “It’s a real concern for employers. If states are going to legalize marijuana, employers are going to need tools to make sure their workplaces are safe.”

The jury’s still out on what that will look like. Boss, who is careful to assist his workers comp clients in maintaining properly written employee manuals and drug policies, personally advocates a drug-free workplace. But some of his clients have expressed concern that if they implemented drug testing, “they wouldn’t be able to get the work done,” Boss says. “There are certain industries where [drug use among employees] is just part of the drill.”

“You have people saying, ‘Why does it matter, as long as I’m not stoned when I come to work? You don’t test to see if I got drunk over the weekend or even if I just had a couple of beers last night—why does it matter what I’m doing in my off-hours?’” Ring points out. “What does a drug-free workplace look like in a world where this drug is legal for adults to use? As this becomes more prolific, we’re going to have to figure out how we deal with that.”

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