THE SENTINEL

KEEPING WATCH OVER WORK COMP LEGAL TRENDS

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Quarterly Newsletter

MEDICAL MARIJUANA: Summary of Reimbursement Rules

With medical marijuana legislation continuing to be introduced and passed at the state level, many industry participants have raised concerns about the implications of medical marijuana in the workers' compensation space. Issues surrounding fee schedules, medical necessity, proper use, drug monitoring, and implications for drug free workplace policies have all been discussed, but the issue drawing the most controversy is reimbursement.

For a long time, workers' compensation payers in states that permit medicinal use of marijuana have dreaded the day that they would find themselves between the a rock and a hard place – being ordered, under state law, to reimburse an injured worker for purchasing marijuana, which is a crime under federal law. Until now, the primary strategy by defense attorneys has been to rely on the doctrine of "preemption." Essentially, payers have argued that they wouldn't have to pay for medical marijuana as long as it is illegal at the federal level. Unfortunately, that strategy is not always effective.

During the last several months, the courts in New Mexico have dismissed that argument. On two separate occasions, New Mexico courts have said that a payer is required to reimburse an injured worker for the cost of their marijuana, despite the payer's argument that doing so would be in violation of federal law.

This Newsletter includes a detailed look at medical marijuana reimbursement rules and tools available to payers, as well as a brief legislative update.

The workers' compensation cost containment space is constantly evolving. Managing compliance changes across multiple jurisdictions can be a challenging and almost impossible task.

PRIUM has developed a compliance and regulatory consulting group to assist payers and stakeholders in tracking and managing their ongoing compliance efforts.

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In *Vialpando v. Ben's Automotive Service and Redwood Dire and Casualty,* the New Mexico Court of Appeals ordered an employer to pay for medical marijuana to treat an injured workers lower back pain, finding that the medical marijuana program constituted "reasonable and necessary health care services" covered by the Workers' Compensation Act.

Eight months later, in *Maez v. Riley Industrial,* the New Mexico Court of Appeals overturned a WCJ opinion that medical marijuana was not reasonable and necessary, and the Court ordered the carrier to reimburse the injured worker for the cost of his medical marijuana even though the use of marijuana was originally illicit, discovered by the treating physician through a drug screen.

With the growing public support for marijuana-based treatments, doctors in multiple states are recommending their patients for medical marijuana programs, and, in the wake of *Vialpando* and *Maez*, it's clear that the "preemption" argument may not be enough on its own to prevent courts from finding marijuana to be a compensable treatment. As a result, payers are looking for new tools, to contest compensability of medical marijuana.

Thankfully, in many jurisdictions, the needed tools are already available. A detailed look at medical marijuana and workers' compensation laws in each of the 24 medical marijuana jurisdictions results in several jurisdictionally-specific arguments that could be made by payers faced with the question of reimbursement.

Payment Restrictions

The majority of the laws that permit the use of medical marijuana contain provisions that limit certain entities from payment liability under the law. Some of these provisions explicitly limit workers' compensation payers from payment requirements. For example, Vermont has a provision that states:

"This chapter shall not be construed to require that coverage or reimbursement for the use of marijuana for symptom relief be provided by . . . (3) an employer; or (4) for purposes of workers' compensation . . ." Vt. Stat. Ann. Tit. 18, § 4474c(b).

Similar provisions in other jurisdictions do not explicitly contemplate workers' compensation payers, but contain broader language which may include workers' compensation payers. For example, the New York has a provision that states:

"Nothing in this title shall be construed to require an insurer or health plan under this chapter or the insurance law to provide coverage for medical marihuana." NY CLS Pub Health § 3368.

Nevada has a similar provision which states:

"The provisions of this chapter do not: 1. Require an insurer, organization for managed care or any person or entity who provides coverage for a medical or health care service to pay for or reimburse a person for costs associated with the medical use of marijuana." NRS 453A.800.

The weight of the implicit restriction depends on the specific wording of the provision, but generally these provisions use terms such as insurer, health insurer, and entity providing coverage, which can reasonably be construed, in many jurisdictions, to include workers' compensation payers.

The following table categorizes the 24 medical marijuana jurisdictions based on the restrictions contained in their respective medical marijuana laws regarding payment by workers' compensation payers.

Provisions Containing Workers' Compensation Payment Restrictions

Explicit	Implicit		No Restrictions
Michigan	Alaska	Maine	Maryland
Montana	Arizona	Massachusetts	New Mexico
Vermont	California	Minnesota	
Washington	Colorado	Nevada	
	Connecticut	New Hampshire	
	DC	New Jersey	
	Delaware	New York	
	Hawaii	Oregon	
	Illinois	Rhode Island	

Allowable Conditions

In addition to provisions containing payment restrictions, medical marijuana laws may also contain provisions governing which types of conditions marijuana may be used to treat. The types of allowable or approved conditions vary by jurisdiction and no states specifically discuss workers compensation injuries. The most common allowable condition that would have broad implications in workers' compensation is chronic pain. Many jurisdictions specifically include chronic or severe pain in their list of allowable conditions, but several jurisdictions have specifically excluded it.

For example, the District of Columbia provision does not mention chronic pain, it states:

"HIV, AIDS, cancer, glaucoma, conditions characterized by severe and persistent muscle spasms, such as multiple sclerosis, cancer; patients undergoing chemotherapy or radiotherapy, or using azidothymidineor protease inhibitors." DC Code 22C-201.3 – 201.4

While the provision in Arizona is more expansive and specifically includes chronic pain:

"Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions … A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis." ARS 36-2801(3)(a)-(b)

When chronic or severe pain is not included in a jurisdictions list of allowable conditions, a workers' compensation payer should not be required to reimburse an injured worker for their "off-label" medical marijuana use.

Allowable Conditions Provision

Specifically includes chronic pain as allowable condition		No specific mention of use for chronic pain
Alaska	Montana	Connecticut
Arizona	Nevada	DC
California	New Hampshire	Illinois
Colorado	New Jersey	Massachusetts*
Delaware	New Mexico	Minnesota
Hawaii	Oregon	New York
Maine	Rhode Island	
Maryland	Vermont	*Broad - no specific mention of chronic pain, but at physicians discretion
Michigan	Washington	

Medical Treatment Guidelines

Many jurisdictions not only recognize medical treatment guidelines but also give them evidentiary weight by presuming that treatment performed in accordance with the guidelines is correct, reasonable, and necessary. As a result, guidelines can be an effective tool for payers to use when determining if they should pay for medical marijuana.

Not all guidelines contain explicit information about the use of medical marijuana. Those that do discuss it state that it is not recommended for the treatment of pain and that it should not be utilized until further research can be done. For example, the Official Disability Guidelines make the following statement about medical marijuana:

"Not recommended for pain. As of August 2014, 23 states and DC have enacted laws to legalize medical marijuana but there are no quality studies supporting cannabinoid use, and there are serious risks. Restricted legal access to Schedule I drugs, such as marijuana, tends to hamper research in this area. It is also very hard to do controlled studies with a drug that is psychoactive because it is hard to blind these effects. At this time it is difficult to justify advising patients to smoke street-grade marijuana, presuming that they will experience benefit, when they may also be harmed."

In jurisdictions that have mandated evidence based treatment guidelines, medical marijuana should not be reasonable or necessary, and as a result, workers' compensation payers should not be reimbursing injured workers for it. Unfortunately not all jurisdictions have mandated guidelines, or guidelines that are expansive enough to address medical marijuana.

Guideline Restrictions on Medical Marijuana

Specifically restricts use of Medical Marijuana	Medical Marijuana Not Addressed By the Guidelines	No Guidelines mandated
Arizona	Connecticut	Alaska
California	Delaware	DC
Colorado	Hawaii	Maryland
Illinois	Massachusetts	Michigan
Maine	Minnesota	New Hampshire
Nevada	Montana	New Jersey
New Mexico	Oregon	Vermont
New York	Rhode Island	
	Washington	

Summary

While many jurisdictions have recognized medical treatment guidelines, or have limited the compensability of medical marijuana through statutory or regulatory restrictions, how defense attorneys will utilize these provisions remains to be seen.

It should be noted that while New Mexico's workers' compensation regulations recognize the Official Disability Guidelines (ODG), which explicitly do not recognize the use of medical marijuana for treatment of pain, New Mexico is one of the few states with a recent appellate court decision requiring workers' compensation payers to reimburse injured workers for medical marijuana. It should be noted that in the *Vialpando* case, the issue of whether medical marijuana was "reasonable and necessary" does appear to have been contested. Similarly, in *Maez*, though the payer did argue that medical marijuana was not reasonable and necessary, it appears that the ODG were not addressed, and no clinical opinion other than that of the provider was discussed.

As courts begin to recognize marijuana as a "legitimate" form a treatment (in spite of constitutional arguments to the contrary), payers should consider that marijuana is not exempt from the rules surrounding other legitimate treatments in that jurisdiction's claims. Whether the term is "reasonable and necessary" or "medically necessary," each jurisdiction has certain requirements as to the standard of care to be provided to injured workers, and, where the jurisdiction has adopted treatment guidelines; those guidelines are typically referenced in determining which treatments meet that standard. Additionally, while marijuana may be subject to the same limitations as less controversial treatment options, in many states, it is also subject to specific prohibitions and limitations that prevent payers from being compelled to reimburse for marijuana treatment.

The "preemption" argument has not yet seen its final day in workers' compensation courts, and as state laws become more accepting of marijuana as a legitimate form of treatment, the issue of whether state workers' compensation judges may compel employers and insurance carriers to pay for treatment that contradicts federal law will be pushed even more into the spotlight. Even so, the preemption argument has failed before, and it may yet fail again.

Fortunately, there are other tools available.

Regulatory and Legislative Update

California AB 1142 – Introduced 2/27/2015 - Adds Section 5307.28 to the Labor Code requiring the administrative director to establish a prescription medication formulary.

Montana SB 292 – Introduced 2/9/2015 - Amends MCA Section 39-71-727 to require the Department of Labor to establish rules implementing an outpatient prescription formulary by July 1, 2016.

Arkansas Rule 099.30– The AWCC has cancelled the public hearings on the rule changes which would have created a prescription formulary and mandated the use of the ODG as medical treatment guidelines. With the continued delay of the approval of these rules, it is unlikely that they will be effective on July 1, 2015, as stated in the rule.

Tennessee SB 721 & HB 0997 – Introduced 2/12/2015 – Amends TCA Title 50 and Title 56 to allow qualified employers to "opt-out" of the workers' compensation system by providing an alternative benefit plan.

For more information about any of these topics, or for copies of any referenced documents, rules, publications, or laws, please contact PRIUM's compliance team at: compliance@prium.net or reach out to your account executive.

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