

UPDATE: New Jersey Employers Must Pay for Pot

By: Sandra Niemotka
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In January 2020, we reported on a groundbreaking New Jersey Superior Court decision. On April 13, 2021, the New Jersey Supreme Court affirmed the Superior Court's decision in *Hager v. M&K Construction* that required New Jersey employers to reimburse the cost of medical marijuana for injured workers. The cost of reimbursing medical marijuana can be significant in light of the fact that New Jersey does not have any set schedule for re-pricing charges from medical providers. However, if medical marijuana can substitute some more expensive pain management such as opioids, injections and even surgery, there could be a cost saving with this decision. We plan to argue in future cases that this trade-off is needed in order for the marijuana treatment to be considered reasonable and necessary.

Read below for previous decision information.

In a groundbreaking decision, the New Jersey Superior Court decided the outcome of the confusing dispute between federal and state medical marijuana laws when it comes to paying for medical marijuana as a workers' compensation benefit. In *Hager v. M&K Construction*, A-0102-18T3 (App. Div. January 13, 2020), the court held that the federal Controlled Substances Act (CSA), 21 USC §841, does **not** preempt the NJ Compassionate Use Medical Marijuana Act (MMA), NJSA 24:61-1 to 29. In other words, the federal law does not prevent New Jersey from requiring employers to pay for medical marijuana.

Background

To date, there are 33 states that have legalized medical marijuana. Only New Mexico and Maine have decided this issue; New Mexico concluded the state's act is **not** preempted by the CSA, but Maine concluded the state's act **is** preempted by the CSA.

The MMA in New Jersey was enacted in 2010 to "decriminalize" the possession of a certain amount of marijuana for medical use by qualified patients.

In contrast, the 1970 federal CSA defines marijuana in the strictest "Schedule 1" category, claiming it is a drug with "a high potential for abuse" and has "no currently accepted medical use for treatment". 21 USC §812(b)(1). This makes the "manufacture, distribution, or possession" of marijuana a felony. 21 USC §841.

Reasoning

When the NJ court concluded that its marijuana act prevailed, it reasoned that the employer is not engaging in the "manufacture, distribution, or possession" of marijuana when it reimburses an employee's cost for it.

It is also not "aiding and abetting" a violation of federal law, because the employer does not have the "intent" and "active participation" that are required elements for aiding and abetting. That was particularly so in the *Hager* case, where the employer was compelled to provide the reimbursement by an order from the workers' compensation judge. Secondly, and somewhat cleverly, the court reasoned that "one cannot aid and abet a completed crime," which is the case when there is a reimbursement to the employee.

Regardless of the above, the employer in *Hager* argued that New Jersey's legal interpretation of federal law does not absolve it from *potential* federal government prosecution. However, the court concluded that federal prosecution is not a real risk. The court noted that since 2014, Congress has been prohibiting federal prosecutions of marijuana crimes in its appropriation bills for states that have medical marijuana programs. The court also pointed to the fact that there are no known cases of prosecutions against employers who have reimbursed medical marijuana costs in these states.

The employer in *Hager* also argued that it should be treated like a private health insurer which is exempted from the MMA. The MMA specifically states that it should not be construed to require "a government medical assistance program or private health insurer" to reimburse medical marijuana expenses. The court rejected this claim because the definition section for "health insurance" specifically states that it does not include workers' compensation coverage.

Finally, the employer in *Hager* argued that medical marijuana was not "reasonable and necessary," which is required for medical expenses to be covered by the Workers' Compensation Act. This is an argument that the court seemed to recognize will be fact sensitive. In the particular facts that it reviewed, the *Hager* court concluded that the treatment was reasonable and necessary in light of three compelling factors: (1) the employee described severe and chronic low back pain that persisted over 18 years; (2) he had gone through multiple unsuccessful low back surgeries; and (3) he presented medical experts who validated the advantages of medical marijuana in contrast with opioid medication.

TakeAway

In this author's opinion, "reasonable and necessary" is the key to responding to this new employer obligation. Medical marijuana is *not* automatically reasonable and necessary in all cases; the employee must establish that medical marijuana is reasonable and necessary in his or her particular circumstance. The employee in *Hager* had a compelling medical history that led to medical marijuana as a last resort and **not** the first option.

On May 12, 2020, the New Jersey Supreme Court agreed to review the decision, and there may be a reversal.

Meanwhile, employers may want to refuse reimbursement of medical marijuana unless a workers' compensation judge compels it. If an order is needed, there is an additional cost of fees payable to the employee's attorney. If the facts of the claim are persuasive enough as they were in *Hager*, employers may want to direct employees to their own authorized medical marijuana provider. Care should be taken to ensure that there is not an appearance of "aiding and abetting." Therefore, reimbursement is probably safer instead of pre-payment.

For questions or further information, please contact Sandra Niemotka (215.864.6338; niemotkas@whiteandwilliams.com) or another member of the Workers' Compensation Group.

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