CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

ADVANCING ETHICS, COOPERATION AND EDUCATION

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MARIJUANA IN WORKERS' COMPENSATION – MEDICAL AND LEGAL CHALLENGES

I. MEDICAL OVERVIEW

A. ***Marijuana and cannabinoids – What are they? What do they do?***

The hemp plant (*Cannabis sativa*) has been used as a source of psychoactive substances for thousands of years. Dried materials from the plant (leaves, stems and seeds) are known as marijuana, whereas the resin of the plant is known as hashish. These substances have over 70 psychoactive compounds (cannabinoids), two of which have been studied more extensively than the rest: delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD). In addition to the derivatives of the hemp plant, there are around 30 synthetically produced cannabinoids, that is, chemicals that resemble THC. Two of them are legal in the USA: nabilone (Cesamet®), a THC analog, and dronabinol (Marinol®), a synthetic THC. Sativex®, a mixture of THC and CBD, is available legally in Canada, New Zealand and Europe. Many other synthetic cannabinoids are illegal products such as K2, spice, Mr. Smiley and others.

Cannabinoids can be ingested (as a solid food or infusion), inhaled (via smoking or vaporizer) or absorbed through mucous membranes. Inhalation produces quicker absorption and effects.

When a cannabinoid binds and interacts with a human nervous system receptor, psychoactive effects are produced: euphoria, time distortion, anxiety, paranoia and impaired thinking and memory. Other physical effects ensue: increased heart rate, increased blood pressure, eye redness, dry mouth and increased appetite.

Marijuana and hashish are Schedule I drugs under the Controlled Substances Act, meaning that there is no currently accepted medical use and a high abuse potential. Nabilone is a Schedule II drug (accepted medical use but high abuse potential) and dronabinol is a Schedule III drug (less abuse potential).

B. ***Evidence for harm***

Chronic use of cannabinoids has been documented to cause

- Impaired lung function
- Chronic obstructive pulmonary disease (COPD)
- Lung infections
- Heart disease (irregular rhythm, heart attack)
- Psychosis
- Addiction
- Apathy (in the adolescent population)

[Leung L. Cannabis and its derivatives: review of medical use. *JABFM*. 2011;24(4): 452-462.

In addition, marijuana use has been associated with an increased risk of fatal vehicular crashes, especially if combined with alcohol.

Even though marijuana has four times the tar and one-and-a-half times the number of carcinogens that tobacco has, to date there is no established cancer causal relationship.

C. *Evidence for medical use*

Cannabinoids have been used for spasticity caused by multiple sclerosis and there is some evidence for its effectiveness in this condition. Sativex (not available in the USA) has been shown to be effective in the relief of neuropathic pain caused by multiple sclerosis.

Even though cannabinoids may be helpful in the short-term relief of cancer treatment associated nausea, they may cause nausea and vomiting when used long term.

The use of cannabinoids has been advocated to reduce intraocular pressure in glaucoma. However, the American Glaucoma Society has stated that, due to its short duration and side effects, there are better pharmaceuticals available for the treatment of glaucoma.

Although approved for wasting in HIV-AIDS, a 2013 Cochrane study concluded that the effect of cannabinoids on wasting is unclear. [Lutge EE, Gray A, Siegfried N. The medical use of cannabis for reducing morbidity and mortality in patients with HIV/AIDS. *Cochrane Database Syst Rev*. 2013 Apr 30;4:CD005175.]

The most positive study to point in the direction of efficacy of cannabinoids in the treatment of non-cancer pain was a meta-analysis that reviewed 18 trials and found reduction in pain and improvement in sleep with no serious adverse effects. The study concluded that further large studies of longer duration are required. [Lynch ME, Campbell F. Cannabinoids for treatment of chronic non-cancer pain; a systematic review of randomized trials. *Br J Clin Pharmacol*. 2010; 72(5): 735–744.]

D. *The problem with studies*

It is difficult to conduct valid and meaningful clinical trials when a substance (a) is illegal, in most situations; (b) has multiple forms and routes of delivery, with varying degrees of absorption; (c) has no standardized dosing or concentration of active ingredient; and when results (d) rely on self-reports; and (e) trials depend on a self-selecting population.

II. LEGAL IMPLICATIONS

A. ***Medical marijuana in worker's compensation cases – trending?***

In my part of this presentation, the emphasis in the title is on the question mark. The answer to the question depends on how you look at it. Medical marijuana *is* trending. We are reading about the legalization of medical marijuana just about every day. Medical marijuana is legal in 23 states and there are bills pending in many more. We are also starting to see the decriminalization and legalization of recreational marijuana .

What about medical marijuana in workers' compensation cases? Is that trending? Numerous articles in workers' compensation industry publications suggest that it is. And, in the past year, there have been two cases from the New Mexico Court of Appeals that suggest that medical marijuana in workers' compensation cases is trending. But whether it truly is or not right now is almost not the issue. The real issue is if the workers' compensation industry will be prepared for medical marijuana in workers' compensation claims if and when it is trending.

B. ***Legislative and political landscape***

As mentioned, medical marijuana is legal in 23 states. There are bills pending in many other states. In fact, in my home state of Pennsylvania, the legislature is very close to making medical marijuana legal.

Medical marijuana is still considered a Schedule I drug by the federal government. There is therefore obvious conflict between federal law and state law. Politically, though, the current administration has taken a "hands off" approach towards enforcement. In January of this year, tucked away inside a Congressional spending bill was a provision that prohibits federal drug agents from raiding retail operations. That said, in December of 2014, attorneys general of Nebraska and Oklahoma filed a lawsuit with the United States Supreme Court arguing that Colorado's marijuana initiative was interfering with their state's operations. This pertains to recreational marijuana, but nonetheless demonstrates that the legalization of marijuana, medicinal or otherwise, is shaping up to be the subject of a potentially fierce political battle.

In the states where medical marijuana is legal, the laws tend to limit its use for specific conditions. As we will see when we analyze the recent cases from New Mexico, the condition for which it was used there was chronic pain from a work injury.

C. ***New Mexico Court Of Appeal Cases***

Vialpando v. Benz Automotive Services and Redwood Fire & Casualty*, 331 P.3d. 975 (N.M. Ct. App. 2014), cert. denied, 331P.3d 924 (2014)* In this case, the employer appealed from an Order from a Workers' Compensation Judge finding that a claimant's use of medical marijuana under New Mexico's Compassionate Use Act, was reasonable and necessary medical care. The Judge ordered the clamant to pay for the medical marijuana through the program and the employer, and their workers' compensation carrier, to reimburse him. Employer appealed arguing that the Judge's Order was illegal and unenforceable under federal law as well as public policy; and that the Worker's Compensation Act Regulations did not recognize reimbursement for medical marijuana. The New Mexico Court of Appeals affirmed the Judge' Decision, and held that medical marijuana reimbursement was authorized under their state's Workers' Compensation Act.

The facts of this case are worth exploring. The claimant sustained a work related low back injury. He underwent a number of surgeries. About 8 years after the injury, a Judge found that he had reached maximum medical improvement. The claimant was taking multiple, narcotic based pain medications and multiple anti-depressants. Claimant later filed an Application for approval by the WCJ for treatment with medical marijuana. Claimant had been certified by his healthcare provider and another doctor, based on severe chronic pain that was debilitating. With respect to the arguments made by the employer to the New Mexico Court of Appeals, the Court was not persuaded by the argument that the continued illegality of marijuana under the Controlled Substances Act made the reimbursement of medical marijuana a federal crime.

Miguel Maez v. Riley Industrial and Chartis, In this case, the New Mexico Court of Appeals was again faced with the issue of whether a claimant's use of medical marijuana for a work injury was reasonable and necessary medical treatment. This time, a Workers' Compensation Judge found that it was not, since the provider/physician in question did not prescribe the medical marijuana to the worker. The claimant appealed to the extent that the Judge did not award medical benefits for the claimant's use of medical marijuana for pain management. Naturally, in support of his appeal, the claimant cited the New Mexico Court of Appeals Decision in *Vialpando*, which we just discussed. The Court found that the pivotal issue on appeal was whether there was evidence to support the WCJ's conclusion that medical marijuana was not reasonable and necessary medical care. After reviewing the evidentiary record, the Court concluded that there was not substantial evidence to support the Judge's Decision and reversed it. According to the Court, the evidence indicated that the claimant's physician

considered traditional pain management that failed and thereafter, developed a plan to treat the claimant with medical marijuana.

Interestingly, the facts of the case show that the claimant's treating physician did not initiate or recommend medical marijuana to the claimant. Rather, the claimant's treating physician discovered that the claimant was already taking medical marijuana and after doing so, suggested that he qualify under New Mexico's Compassionate Use Act so that medical marijuana could be used for treatment of the work injury in the future. These were two points that the employer emphasized to the New Mexico Court of Appeals, but the Court of Appeals did not find them to be dispositive. According to the Court, whether or not the treating physician was active or passive didn't matter, since the physician adopted a treatment plan that called for medical marijuana. The Court also analyzed New Mexico's Compassionate Use Act Program, noting that an individual is not qualified simply because they make a request. Certification by a professional is necessary.

***Takeaways*.**

As a workers' compensation defense attorney in the state of Pennsylvania, these two cases raise my antenna. According to the facts of both, the injured workers were using medical marijuana under New Mexico's medical marijuana law to treat for chronic pain from work injuries. Additionally, according to the cases, other pain management measures had failed. The main issue in both cases was whether the use of medical marijuana was reasonable and necessary medical treatment. In my state, that is an issue that we deal with all of the time in our Utilization Review process. Most of the time, when a Utilization Review case gets to the Judge level, a Judge will conclude that treatment is reasonable and necessary. Basically, if a claimant testifies that ongoing pain management measures, such as the use of narcotic medications, result in pain relief, even on a limited basis, a Judge will find that the treatment is reasonable and necessary.

D. *Other (Cases and Issues)*

The legalization of medical marijuana will not only have an effect on workers' compensation law, but will impact other areas of law as well. For example, in a 2011 case from the state of Washington (*Rowe v. TeleTech Customer Care Mgmt.(Colorado) LLC*, 257 P 3d. 586, 588 (Wash. 2011)), the plaintiff filed a wrongful termination action claiming she should not have been fired because she was using medical marijuana in accordance with the Washington State Medical Use Of Marijuana Act. The employer had rescinded a conditional offer of employment made to the plaintiff as a result of her failing a drug test. The Court held that the Act did not regulate the conduct of a private employer or protect an employee from being discharged because of the authorized use of medical marijuana.

In a case from the state of Montana (*Johnson v. Columbia Falls Aluminum Co., LLC 2009 MT 108N (Mont. Mar. 31, 2009*)), the plaintiff filed a wrongful discharge case against the employer. The employer fired the plaintiff after he failed to inform them that he was using medical marijuana, failed a drug test and declined to sign a "last chance" agreement. The employer had a policy that provided that an employee would be subject to discipline for testing positive for certain substances, such as marijuana. As a result of work injuries, the plaintiff began using medical marijuana for pain. He limited his usage to after work hours. He tested positive for marijuana following a fitness for duty evaluation. The employer then sent a letter agreement to the plaintiff outlining the conditions under which he could return to work, including that he test non-positive for marijuana. The plaintiff never signed the agreement and was suspended. The plaintiff alleged that the employer failed to accommodate his marijuana utilization in violation of Montana's Medical Marijuana Act. The Court held that the Act specifically provides that even though marijuana is decriminalized for medical purposes, it cannot be construed to require employers to accommodate the medical use of marijuana in any work place.

An Oregon case from 2004 (*Freightliner, LLC v. Teamsters Local 305), 336 F. Sup. 2d 1118 (D. Or. 2004)* concerns work place intoxication. The plaintiff worked as a materials handler and his duties involved operating a forklift. The plaintiff's operation of a forklift caused an accident which the employer found was preventable. The plaintiff was given a drug test. The same day plaintiff had the drug test, he told the employer he had a prescription for medical marijuana pursuant to the Oregon Medical Marijuana Act. He admitted to smoking one to two marijuana cigarettes each night. The plaintiff was suspended after the results came back as positive for a high degree of THC concentration. Plaintiff was given a new employment agreement which included participation in a drug treatment program and a consent to future drug tests. The plaintiff refused to sign the agreement and was terminated.

Plaintiff filed a grievance under Terms of the Collective Bargaining Agreement. An arbitrator found that the employer could not terminate the plaintiff for being under the influence simply by proving that he had drugs in his system. According to the arbitrator, the company needed to show some level of physical or mental impairment. The arbitrator also concluded that in light of Oregon's Medical Marijuana Act, an employee could not be disciplined who ingests marijuana pursuant to a valid prescription, does so on his own time and reports to work in an unpaired state of being. The Court held that the plaintiff was eligible for termination because he was under the influence within the meaning of the Collective Bargaining Agreement.

In an Oregon case from 2010, (*Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industry), 230 P. 3d 518 (Or. 2010)*), the company, a manufacturer of steel products, hired an employee on a temporary basis as a drill operator. While working for the company, employee used medical marijuana one to three times per day to help with anxiety. Knowing he was being considered for permanent employment and he would not pass a drug test, the employee advised the company that he regularly used medical marijuana. One week later he was fired. He filed a complaint, alleging discrimination. Formal charges were filed against the company, alleging that it had discharged the

employee, a person who was disabled. The Administrative Law Judge ruled that the plaintiff was a disabled person and his discharge was due to his marijuana use, which was permissible, but the employer's failure to reasonably accommodate the employee was impermissible. Eventually, the company filed a Petition for Review with the Supreme Court of Oregon. The Supreme Court of Oregon held that a medical marijuana user was not entitled to a reasonable accommodation under Oregon law. The Court also held that the Medical Marijuana Act was preempted by the Federal Controlled Substances Act and that the employer was authorized to discharge the employee because he engaged in illegal drug use.

In a Florida case from 1997, (*Recchi America Inc. v. Hall, 692 So. 2d 153, 1997 Fla. LEXIS 301 (FL 1997),* the employee sustained work-related injuries during the course of his employment. Despite undisputed evidence that the employee was not responsible for his injuries, the Judge denied the employee's workers' compensation benefits pursuant to Fla. Stat. ch. 440.09(3) because a urine test administered shortly after the accident revealed the presence of inactive marijuana metabolites in appellee's system. That statute provided that no compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee. The statute created a presumption that if there was at the time of the injury 0.10 percent or more by weight of alcohol in the employee's blood, or if the employee has a positive confirmation of a drug as defined in this act, it shall be presumed that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee. This presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury. The Court held that the presumption portion of Fla. Stat. ch. 440.09(3) violated due process. The court declared the presumption unconstitutional, reworded the statute, and awarded benefits to the employee.

III. IMPACT ON CLAIMS MANAGEMENT

A. Brief History of Marijuana in the United States

The history of Marijuana in America can trace its beginnings even prior to the Revolutionary War. In fact, in 1619 the Virginia colony enacted legislation requiring all farmers to cultivate hemp, and George Washington and Thomas Jefferson were still growing the crop in 1789 when Washington was first inaugurated. It was not until the turn of the century that Marijuana began to have a negative connotation surrounding it. In 1911, Massachusetts banned cannabis and in 1925 the League of Nations restricted its use to scientific and medical purposes. But it was not until 1937 that production and sales of cannabis were banned via the signing of the Marijuana Tax Act by FDR. Urged on by the Federal Bureau of Narcotics Commissioner Harry Anslinger, and driven by several propaganda vehicles including a movie known as *Reefer Madness*, the Marijuana Tax Act is the original catalyst of the murky waters we find ourselves in as a country today. Since then, the debate has raged on with research, critics and commissions both siding for and against the legalization and/or decriminalization of Marijuana. As it stands today, 23 states plus Washington DC have legalized medical marijuana. DC however, also finds

itself on the short list of states in the U.S. that have voted to allow the recreational use of marijuana. The other 4 are Colorado, Washington, Oregon and Alaska.

B. Indications of Marijuana

Picking up steam in the last several decades of the Marijuana debate has been the medical legitimacy of the drug. In fact, when the state of California legalized marijuana for medical use in 1996, they were the first to do so. Legitimate indications for cannabis vary widely depending on the source of the information. Not only is the medical community strongly divided, but states create their own guidelines surrounding approved conditions, and so while PTSD may be a listed and acceptable diagnosis to prescribe for in Arizona, it is not in Illinois.

Most indications however, will not directly affect our efforts within the workers compensation industry. It is not often that a payer is responsible for AIDS, cancer or Parkinson's Disease, but diagnoses such as RSD, CRPS, chronic pain, PTSD and nausea (amongst others) are ones that the industry sees on a daily basis. And with the decisions coming down in favor of marijuana in states such as New Mexico the question is no longer what to do IF marijuana is present on a claim, but rather what to do WHEN you see marijuana on a claim.

C. Industry Call to Action

The lines have sufficiently been blurred and in just one short year after legal recreational sales of marijuana began in Colorado, the number of recreational states has doubled and workers compensation has seen a legal decision concluding that a carrier is responsible for the marijuana use on its claim. Times, they are a' changing and moving forward it is going to be very important to know how to manage the complexity that weed can bring to a claim. It is therefore imperative that each claim is looked at individually and a "one size fits all" solution is not instituted across the board. Instead, those claims professionals who have had the most success in dealing with this issue, are those who have implemented the following guiding principles:

1. **Be Proactive.**

   In work comp we deal with 50 states with 50 different sets of rules and regulations. The tricks of the trade in Virginia are not going to work in California and if you try to explain what an IMR is to someone who only works in Minnesota, they are going to look at you funny. It may seem daunting, but putting together a list of important legislation, case law, best practices, etc. for each individual state will go a long way in the medical management of your claims. Such a document can serve as a quick reference guide for claims and legal teams alike. Both can find utility in knowing that states such as Colorado, Michigan, Montana and Vermont, despite the level of marijuana legalization, all have statutes on the books that will prohibit a work comp carrier for paying for marijuana.

2. **Be Aggressive.**

   Understandably, there are many payer organizations that have a somewhat jaded view in favor of risk aversion. When it comes to dealing with cannabis on your work comp claims however, it is important to be as aggressive as possible. All too often, treating physicians are turning a blind eye to the fact that their patients are

smoking weed in addition to taking the drugs prescribed to them. It's not because they are bad doctors, but typically they either don't know what to do about it, or simply do not understand the subject matter enough to opine either way. In these situations, doctors are looking for someone else to be the bad guy and it is okay for the carrier to do so. Besides, it is a flip of a coin at this point as to whether or not pot is legal in the state you are working within.

3. **Test.**
   In most states with medical treatment guidelines and all of those that have adopted ODG, urine drug monitoring (UDM) is a best practice for any injured worker being prescribed medications. Typically, 1 to 6 tests a year is adequate depending on the circumstances, but testing is a key part of compliance and holding the injured worker accountable. Physicians and claims professionals need to ensure they are using the resulting information however, and if a patient is not taking his prescribed medications or if she tests positive for illicits, it is imperative that action is taken. Overall, UDM is the only way to tell whether or not a claimant is using marijuana.

D. What is in Store?

As it stands today, 11 states have pending legislation to legalize marijuana and that includes traditionally conservative states such as Kentucky, Tennessee and Georgia. We have only begun to scratch the surface of this issue and in the coming years there is potential for marijuana to be legal federally – something that people would have laughed at you for even mentioning just 10 years ago. But as Wall Street begins to recognize the industry (30+ publicly traded companies), specialized venture capital and accounting firms begin to pop up everywhere and very intriguing studies are released that claim marijuana can slow the development of and even kill cancer cells (Anticancer Research October 2013).