In a Groundbreaking New Jersey Unpublished Decision, Judge Rules that a Workers' Compensation Carrier Must Pay for Medical Marijuana

A New Jersey Workers' Compensation Judge on December 16, 2016, ordered a workers' compensation carrier to pay for medical marijuana after a trial on the issue. This is the first decision of its kind in New Jersey and most likely not the last.

In 2008, the petitioner sustained an injury to his hand while working for 84 Lumber in Egg Harbor Township. This resulted in complex regional pain syndrome (CRPS). The employee was awarded 33 1/3 percent of partial total for his injuries (apportioned 50 percent of the hand and 12½ percent for the CRPS) in 2012. At that time, the Judge ordered the employer to authorize ongoing treatment with a pain management doctor. The employee was receiving monthly prescriptions of 120 Oxycodone tablets, 800 mg ibuprofen and Lidocaine patches.

The employee had burning and swelling in his hand and on his own experimented with marijuana as a treatment. The employee told a doctor that he felt the marijuana was helpful in addressing his neuropathic pain. The doctor was not authorized in New Jersey to refer patients for medical marijuana so he sent him to another physician who was authorized to prescribe it.

One of the requirements under the statute is that there be a bona fide doctor-patient relationship before a person can obtain a referral for marijuana. Another requirement of the statute is that the petitioner (employee) have one of the listed conditions to qualify for use (HIV/AIDS and related conditions; amyotrophic lateral sclerosis or Lou Gehrig's disease; multiple sclerosis; terminal cancer; muscular dystrophy; inflammatory bowel disease, including Crohn's disease; and any terminal illness with a prognosis less than a year). The new doctor prescribed medical marijuana based on the diagnoses of neuropathic and CRPS in the left hand. It certainly appears that one could take issue with the employee having even qualified for marijuana based on the statutes requirements, and as such, it would appear that the Department of Health is interpreting the statute liberally.

The employee purchased three ounces starting in March 2014 and later on submitted his invoices to the workers' compensation carrier for reimbursement and it was denied. (Under the statute, an employee can purchase one ounce of marijuana per month with the cost being no higher than $520 per ounce).

The employer's counsel then filed an emergent motion to enforce the terms of the Order Approving Settlement from 2012 that required the carrier to authorize treatment with the first doctor. The main issue at trial was whether medical marijuana was a curative treatment. Both doctors refused to testify. A third physician testified that the use of marijuana would reduce the employee's opiate intake. The doctor noted the numerous negative side effects of opiate pain medications.

At the conclusion, Judge Ingrid French found in favor of the employee. In her opinion, the Judge stated that based on the third doctor's testimony, "the effects of the marijuana, in many ways, are not as debilitating as the effects of the Percocet" and "the pharmacy records show that, ultimately petitioner was able to reduce his use of oral narcotic medication. As a result of his improved pain management, he has achieved a greater level of functionality." The Judge went onto say, "While the court is sensitive to the controversy surrounding the medicinal use of marijuana, whether or not it should be prescribed for a patient in a state where it is legal to prescribe it is a medical decision that is within the boundaries of the laws in the state."

Comment: Although this case is not binding on other Judges in New Jersey, it is certainly foreseeable that the reasoning here will be followed by other Judges in the division. To date, the only higher court in the

country that has upheld a lower Court's ruling, ordering a carrier to reimburse an employee for the cost of medical marijuana (rather than directly pay for), is New Mexico's Appellate Division. If the present case should be taken up on appeal, the employer would likely argue that marijuana is a Schedule I banned substance under federal law. Workers' compensation carriers, self-insureds and employers throughout the state will likely be confronted at some point by an employee seeking payment for medical marijuana. At this time, there is very little data on the drug that substantiates it as an effective treatment. Further, there are serious concerns about the potential side effects. As noted by the Judge in this case, however, the use of medical marijuana lowered the employee's opiate intake and as such it could be a cost reducer for the employer.

For more information, please contact John C. Kutner at jkutner@wglaw.com or 973.854.1077.