

Maine's Supreme Court Rules Workers' Compensation Does Not Have to Pay for Medical Marijuana

Maine's highest Court ruled that employers and insurers cannot be compelled to pay for an injured worker's medical marijuana. In a 5-2 decision, the Maine Supreme Court ruled that federal law takes precedence in the case of a former Madawaska millworker (*Gaetan H. Bourgoin vs. Twin Rivers Paper Co.*). This ruling overturned lower courts' decisions that the respondent was responsible for the cost of the employee's medical marijuana.

Writing for the majority, Justice Jeffrey Hjelm said the federal Controlled Substances Act (which categorizes marijuana as a Schedule I banned substance) tops the Maine Medical Use of Marijuana law. Citing the Supremacy Clause of the U.S. Constitution, the majority noted it "unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." The Court's opinion goes on to do a thorough analysis of the Controlled Substance Act (CSA) and determined that the respondent would be in violation of federal law if it were required to subsidize the employee for the cost of the marijuana. More specifically, citing the Supreme Court of the United States' decision in *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014) it determined that requiring a respondent to pay for the cost of marijuana would require the respondent to be aiding and abetting in the commission of a crime even "*without proof that he participated in each and every element of the offense.... Therefore, were Twin Rivers to comply with the administrative order by subsidizing Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all the elements of criminal aiding and abetting as defined in section 2 (a).*"

The Court also discussed the role that the Department of Justice's (DOJ) prior policy under the Ogden Memo played in the Appellate Court's decision to have the respondent pay for the cost of marijuana. Since the Appellate Court's decision the DOJ rescinded its hands off approach set forth in the Ogden and Cole memos. Attorney General Jeff Sessions repealed those policies in January and it was anticipated that the change in policy might impact future Court rulings. Some will argue it has, in light of this decision, however the Court addresses this in its opinion and provides strong arguments why the Ogden memo did not provide protections from possible future federal prosecution regardless of the memo's directive.

Comment: Respondents and carriers around the country in states where medical marijuana is legal have been faced with this same issue. Many have chosen to pay for the cost of medical marijuana rather than deny it based on a cost savings analysis when considered in light of the cost of opiate-based pain medications. The Appellate Division in New Mexico has ordered respondents on three occasions since 2014 to reimburse an injured worker for the cost of marijuana finding that there is no direct violation of the CSA in doing so. If you are operating in Maine, this decision means you have no obligation to pay or reimburse an injured worker for the cost of medical marijuana. If you are operating in another state, the Maine decision is not controlling, but is likely to be influential on courts around the country considering this issue. To date we have heard of no prosecutions brought by the DOJ and are unlikely to at least for the duration of the next fiscal year as the DOJ's budget continues to be defunded by Congress preventing it from pursuing such prosecutions. That budget protection, however, could change when the next budget comes up if it is not again included.