

Given the Federal Ban, Must an Employer Pay for an Injured Worker's Medical Marijuana?

A 2-2 split among four states' high courts (including New Jersey) has muddied the waters in answering this question. This article looks at developments in this area and what might come next.

By John C. Kutner | July 07, 2022



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The movement to legalize marijuana dates back to 1970 when Congress passed the Controlled Substance Act (CSA), 21 USC 812, classifying marijuana a Schedule 1 drug along with LSD, heroin, and ecstasy. The Schedule 1 classification means these drugs have no accepted medical use, not even under medical supervision, and have a high potential for abuse. Despite this, in 1996, California voters passed Proposition 215, legalizing marijuana for medical use. Thus beginning the debate in earnest, over whether state level marijuana legalization is a violation of federal law and should be struck down under the Supremacy Clause of the Constitution, U.S. Const. Art. VI, C2.

Over the next 13 years the medical marijuana industry grew in California, permitting those operating in compliance with the law to do so without fear of being criminally prosecuted by the State. Yet, the federal government continued pursuing prosecutions of those involved in the medical marijuana industry. But in 2009 the Department of Justice (DOJ) changed course when Deputy Attorney General David W. Ogden sent a memo to all U.S. Attorneys directing them not to prosecute those operating in "compliance with existing state laws providing for the medical use of marijuana." This policy was expanded upon in another memo in 2013, by then Deputy Attorney General James Cole (the "Cole Memo"), further deprioritizing the marijuana ban on the federal level. Despite a brief recession of the policy in 2018 by Attorney General Jeff Sessions, it was reinstated shortly after his departure from office and remains the DOJ's policy today. Notable, is the CSA provides the United States Attorney General the power to reschedule or de-schedule marijuana.

Meanwhile, in 2014, signaling their own change of heart on the issue, Congress included an amendment to the federal budget (the Rohrabacher-Blumenauer amendment) that prohibits the DOJ from using funds to prosecute those operating legally under their states' medical marijuana programs. This amendment has now been included in every federal budget since 2015, essentially protecting the industry. It should be noted that it needs to be included in each year's budget, which fails to provide any long-term assurances to those relying on it for protection. Congress, however, is attempting to change the law on the federal level. On April 1, 2022, The US House of Representatives, for a second time in two years, passed the MORE Act. This legislation would end marijuana prohibition by removing it from the list of scheduled drugs. However, it died in the Senate the first time, and supporters aren't optimistic it will fare any better this time around.

Undoubtedly, these policy changes on the federal level have contributed to well over half of the country now having some form of legalized medical marijuana. Yet the Schedule 1 classification remains, leaving many employers and workers' compensation carriers scratching their heads. The concerns being how to navigate amidst this seeming federal contradiction of policy and law and the patchwork of state laws. We see this issue come up time and again when an injured worker, in a workers' compensation case, seeks reimbursement for the cost of the drug and the carrier denies it, arguing Schedule 1. The obvious concern of carriers and employers is, will they be prosecuted by the federal government for paying for the cost of a Schedule 1 drug. Fortunately, we now have four states' Supreme Courts, including New Jersey, that have ruled on this issue; unfortunately the courts are split.

On April 13, 2021, the Supreme Court of New Jersey joined the fray in addressing this question, when they handed down their decision in *Hager v. M&K Construction*, 246 N.J. 1 (2021). On the issue of federal preemption, the court found no conflict between the NJ Compassionate Use Act and the CSA. Thus, they affirmed the lower court's rulings, ordering the carrier to reimburse the injured worker for the cost of their medical marijuana. The court joined the New Hampshire Supreme Court in this position. *See, The Appeal of Andrew Panaggio N.H. Comp. Appeals Bd., 174 N.H. 89 (2021).*

The New Jersey Supreme Court in *Hager*, reviewing the language of the CSA, found there was no direct conflict. They noted the law specifically prohibits one to "possess with intent to manufacture, distribute, or dispense a controlled substance," and ordering a workers' compensation carrier to reimburse an injured worker for the cost of their medical marijuana doesn't constitute any one of the above. The court in *Hager* went on to focus on the federal budget amendment, holding that the result of the amendment is "the CSA,

applied to the Compassionate Use Act ... is effectively suspended.” Addressing Congress’ intent in adding the budget amendment, the court points out that the appropriations rider is suspended, not repealed, thus acknowledging the amendment is temporary and “confined to a particular fiscal year.” Addressing the argument that reimbursement constitutes aiding and abetting, the court found the respondent lacked the “specific intent” necessary to commit this crime since they are being ordered to do so by the court, “reimbursing Hager under court mandate can hardly be interpreted as M&K ‘electing’ to aid in Hager’s possession of marijuana, contrary to federal law. Rather, it is being compelled to do so by the Order.”

Meanwhile, the Supreme Court of Minnesota, in two cases, *Musta v. Mendota Heights Dental Center*, 965 N.W.2d 312, 2021 Minn. LEXIS 560; *Bierbach v. Digger’s Polaris*, 965 N.W.2d 281, 2021 Minn. LEXIS 559, joined the Maine Supreme Court, in *Bourgoin v. Twin Rivers Paper Co.*, 2018 ME 77, 187 A.3d 10 (Me. 2018), holding the exact opposite, or that this is a violation of federal law. More specifically, the Maine and Minnesota Supreme Courts ruled that ordering for reimbursement would be requiring the party to aid and abet in the commission of a federal crime since they are knowingly paying for the cost of what is a Schedule 1 drug. Notable about the Maine Supreme Court’s decision in *Bourgoin* is its timing. It came just after Attorney General Sessions rescinded the Cole Memo policy, with the court stating, “Any reliance on this internal departmental policy, however, is entirely misplaced. Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration.” Several appellate level state courts, including Maine’s, seemingly relied on the hands-off policy by the DOJ when ordering reimbursement, citing to it in their opinions.

Unfortunately, instead of clearing things up, the 2-2 split among the four states’ high courts only seems to have muddied the waters, even being referred to as a “hazy thicket” by the Solicitor General of the United States (SG). For a moment this year it appeared the U.S. Supreme Court may weigh in and resolve the issue, as both petitioners in the Minnesota cases appealed to the U.S. Supreme Court for review. But these requests were denied on June 21, 2022. Prior to their decision, at the court’s request, the SG submitted an amicus brief in May 2022. The SG recommended the court not hear the cases, arguing the issue is not yet fully developed and thus should not be taken up by the Supreme Court. Specifically, claiming the states’ high courts have not “meaningfully considered all the possible grounds for preemption” that would warrant a review.

Thus, employers and workers’ compensation carriers in New Jersey are left with few defenses when faced with the issue of paying for an injured worker’s medical marijuana. One possible argument is whether marijuana is a reasonable and necessary treatment. This is a fact-specific inquiry that will need to be addressed on a case-by-case basis. Since most patients in the Garden State are qualifying due to chronic pain, respondents will want to establish that a medical expert has deemed this pain to be chronic in nature, and ensure that this is not used as the first line of treatment.

Next, the issues surrounding the dangers of opioid use frequently play a role in these cases. Evidence at trial of an injured worker substituting marijuana for opioids appears so influential on judges that it is unclear many of these decisions would have come out the same way without it. The *Hager* case was no different. Addressing the two options Mr. Hager had to treat his pain—marijuana or opioids—the judge stated, “Marijuana is the clearly indicated option.”

Another issue often raised is how much marijuana is necessary to treat each petitioner. To date, this appears to be an issue left up to the patient. Since marijuana is not an FDA approved drug, doctors aren’t prescribing it and pharmacists aren’t filling prescriptions. Rather, doctors are “referring” patients for the drug, and an employee of the dispensary is making recommendations. The one limiting factor in New Jersey is a qualifying patient is only permitted a maximum of three ounces per month.

This is a rapidly developing area of law, and the next major changes will likely come on the federal level, whether it be from the executive or legislative branch.

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