For PA Employers: Defense Against Medical Marijuana Goes up in Smoke

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Workers' Compensation Alert
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Based on two Commonwealth Court decisions filed on March 17, 2023, medical marijuana is now medical treatment covered by the PA Workers' Compensation Act (WC Act), and failure to pay is a violation of the Act, with up to 50% in penalties.

The Commonwealth Court interpreted the PA Medical Marijuana Act (MMA) in combination with the WC Act to come to this conclusion. The crux of the conclusion is that "***coverage***" is different than "***reimbursement***" (emphasis added) The decisions are very likely to be appealed. They have similar facts and procedural history.

Background

The first decision is *Fegley v. Firestone Tire & Rubber (WCAB)*, No. 680 CD 2021, 2023 Pa. Commw. LEXIS 26 (Pa. Cmwlth. 2023). The employee had a work injury to his low back in 1977. His treatment included two back surgeries, followed by prescribed opiates that included Oxycontin. In 2019, his doctor prescribed medical marijuana, and this eventually resulted in him weaning away from the opiates.

The second decision cites *Fegley* in its reasoning. *Appel v. GWC Warranty Corporation (WCAB)*, No. 824 CD 2021, 2023 Pa. Commw. LEXIS 25 (Pa. Cmwlth. 2023). The employee had a work injury to his low back in 2006, followed by two back surgeries. He started using medical marijuana in 2018, which helped him to wean away from opiates.

Procedurally, the two cases vary slightly. In *Fegley*, there was a Utilization Review determination (UR) in 2019 that concluded medical marijuana use was reasonable and necessary for the employee. There was not a UR in *Appel*. However, since reasonableness and necessity is the employer's burden of proof, the two cases were in the same position, with the treatment deemed to be reasonable and necessary.

The *Appel* case originated with a Review of Medical petition. The *Fegley* case originated with a Penalty petition. In both cases, the court reversed the lower court rulings by the WC judge and the Appeal Board that had denied the relief sought by the employee. Judge Anne E. Covey authored both majority opinions. The dissenting opinions were authored by Judge Christine Fizzano Cannon, joined by Judge Patricia A. McCullough.

With regard to causation and the work injury, this was really not in dispute for both cases. The defenses were that regardless of causation, the employer should not be compelled to pay for treatment that is illegal under federal law.

Reasoning Based on the Statutory Language

The main focus of the court's reasoning in both cases was the language from Section 2102 of the MMA, which states "nothing in [the MMA] shall be construed to require ***an insurer*** or a health plan, whether paid for by Commonwealth funds or private funds, to provide ***coverage*** for medical marijuana." *Fegley*, p. 19-20. (emphasis added)

The employee had argued that a workers' compensation carrier is not an insurer under the MMA because the insured is the employer, and not the employee. The court agreed with the employer that there was no reason to interpret the word, "insurer," differently in the MMA. After all, workers' compensation carriers are assuming the risk of another's loss. Moreover, the WC Act defines workers' compensation carriers as insurers.

The more pivotal dispute arose with the interpretation of "***coverage***." (emphasis added) The employee argued that reimbursement of medical marijuana costs is not the same thing as "coverage," referenced in the MMA provision. In response, the court turned to Black's Law Dictionary for its definitions. It cited "coverage" as "inclusion of a risk under an insurance policy; the risks within an insurance policy." For "reimbursement," the definition is, "1. Repayment. 2. Indemnification." Based on this, the court saw a distinction. The court also looked at the medical marijuana acts in other states that specifically include the word, "reimbursement" in their own provisions about employer obligations. It concluded that if the PA legislature intended to include reimbursement, it would have done so. The court added that the MMA does not "prohibit' an employer from reimbursing the expense.

This author believes that a prohibition was unnecessary to express because the use of marijuana is already prohibited in federal law.

Reasoning Based on Employee's Benefit of the Doubt

Naturally, the court pointed to the humanitarian purpose of the WC Act. In addition to that, the MMA includes a provision in Section 2103 that says no individual "shall be…denied any right or privilege solely for lawful use of medical marijuana". The court applied this to the right of employees to have work-related medical expenses paid by the employer.

The court also looked at language in the MMA that explains the intention is to "mitigate suffering in some patients and also enhance quality of life." (Section 102 of the Act).

Therefore, the humanitarian purpose of the WC Act and its requirement that employers pay for work-related medical expenses, combined with the MMA and its goal to mitigate suffering and not take away employee rights, culminated in the conclusion that employers in PA are required to pay for medical marijuana.

This author believes that the distinction with "coverage" is not consistent with the court's rationale. The court seems to believe that despite this purpose of both acts, it is not required that an employer provide "coverage" for medical marijuana. As the dissent pointed out, "it makes no sense… to argue that reimbursement may be required where coverage may not."

The dissent also explains there was no right to medical marijuana when the WC Act became law, so there are no rights being taken away.

This author also believes that the only source of the right to medical marijuana is the MMA, and because that is the case, the entirety of the MMA must be followed, including where it removes any obligation of the employer.

Appel reiterated the same reasoning by the majority in *Fegley*.

Takeaway

Until there is a reversal of the Commonwealth Court's opinions, it appears to be the law of the land in Pennsylvania that employers are required to pay for medical marijuana use by its employees for their work injuries. A UR request is still an available process to defend against this requirement. A reviewer and the employer's own medical expert may be able to convince a WC judge that in certain claim scenarios, the treatment is not reasonable or necessary. The facts of the two Commonwealth Court cases described above included

very sympathetic scenarios, and a positive outcome with the use of medical marijuana. Not all cases will have that same history.

In response to these decisions, it is important to know that once the employee has established his medical treatment is related to his work injury, the employer is responsible for treatment, including medical marijuana. The only avoidance of this is a UR request. That puts a stay on payments for the treatment until the reviewer decides it is in fact payable. If that becomes the case, the reviewer's conclusions can be challenged with a Review of UR petition filed with a WC judge. The judge at that level has "*de novo*" review (a clean slate) to determine reasonableness and necessity (but payment has to be made until the decision says otherwise). That litigation will take into consideration the particular history of the claim.

If there is not a UR request, and the employee has submitted a request for reimbursement of medical marijuana expenses, after establishing his medical treatment in general is related to the work injury, the employer is considered to be in violation of the WC Act if it refuses to pay. The penalties range up to 50% of the amounts at issue. There is also an avenue for the employee's attorney to receive a "*quantum meruit*" fee for needing to litigate the issue.

In summary, this author recommends a UR if it appears the medical marijuana is not weaning the employee from more dangerous and/or costly prescriptions.

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