

State Courts Split Over Workers' Medical Pot Reimbursements

By **Sam Reisman**

Law360 (January 27, 2020, 7:13 PM EST) -- State courts are increasingly split about whether injured employees can receive reimbursement for medical marijuana, with some jurists finding such claims are barred by federal law and others ruling in favor of the workers.

In a single week in January, a New Jersey appellate court ordered an employer to reimburse an injured worker for medical marijuana, and three days later, Massachusetts' highest court said it would review an appeal of a decision denying a similar claim.

"You have cases with similar fact patterns that are addressed differently depending upon the state you're in, the court that you're in, or even the court that you're in in the state that you're in," said Joshua Horn, co-chair of the cannabis group at Fox Rothschild LLP. "If you get a judge who's anti-cannabis, it wouldn't surprise me that that judge would try to shoehorn his or her decision to their views."

A precedential decision out of the New Mexico Court of Appeals in 2014 set the stage for the current rift. The court established that medical marijuana claims could be reimbursed and that the state's compassionate use law was not preempted by the federal Controlled Substances Act.

In its analysis, the three-judge state appellate panel leaned heavily on then-recent U.S. Department of Justice memos that articulated the Obama administration's enforcement priorities with respect to state-legal marijuana, or what the court described as the department's "equivocal statements about state laws allowing marijuana."

"On one hand, the Department of Justice affirmed that marijuana remains illegal under the CSA ... But, on the other hand, and in the same documents, the Department of Justice identified eight areas of enforcement priority and indicated that outside of those priorities, it would generally defer to state and local authorities," then-Judge James J. Wechsler wrote for the panel.

The panel confirmed that New Mexico's medical marijuana statute authorized reimbursement for an injured worker and ruled that the state law was not preempted by federal policy. The state's Supreme Court declined to review the decision, and one year later, the New Mexico Court of Appeals ruled likewise in a similar case.

In subsequent years, the New Mexico decisions became touchstones in arguments raised in court by

workers seeking compensation for their medical cannabis use in Maine and Massachusetts.

But as federal policy shifted, with former U.S. Attorney General Jeff Sessions' rescission in January 2018 of the earlier department guidance on state-legal marijuana, courts began to take a harder look at the question of preemption.

In June 2018, the Maine Supreme Judicial Court found that any order requiring an employer to compensate a worker for medical marijuana would force a violation of the CSA because the employer would necessarily be aiding and abetting the acquisition and possession of an illegal substance.

The 5-2 decision took aim at a Maine intermediate appellate court that had found in the worker's favor because that court had relied on a 2009 DOJ memo that prescribed lower enforcement priority for violations connected to state-legal medical marijuana.

"Any reliance on this internal departmental policy, however, is entirely misplaced," then-Associate Justice Jeffrey L. Hjelm wrote for the majority. "Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration."

The majority also blasted the reasoning used in the New Mexico cases, writing, "To the limited extent these cases address the merits of the preemption issue, the analysis is less than compelling, and we decline to follow their lead."

Dissenting from his colleagues, Judge Donald J. Alexander put the focus back on plaintiff Gaetan Bourgoin, the paper machine laborer who was disabled by a 1989 workplace injury and began using medical marijuana in 2012.

"The result of the court's opinion today is to deprive Bourgoin of reimbursement for medication that has finally given him relief from his chronic pain, and to perhaps force him to return to the use of opioids and other drugs that failed to relieve his pain and may have placed Bourgoin's life at risk," Judge Alexander wrote.

He noted that federal authorities had apparently taken no enforcement action on entities involved with reimbursement for state-sanctioned medical marijuana, and the majority's reasoning that federal policy could shift was immaterial to Bourgoin's case.

"In this, the court is reaching too far," he wrote, "speculating about the future rather than looking at the present."

Following in the footsteps of the Maine high court, a review board for the Massachusetts Department of Industrial Accidents ruled in February 2019 that requiring an insurer to pay for an injured worker's medical marijuana would compel violation of the CSA.

"We are mindful that, at the state level, the tide is turning in favor of legalizing medical and recreational possession and distribution of marijuana," the board wrote. "However, the CSA clearly and manifestly criminalizes these very same activities as punishable offenses involving this Schedule I controlled substance."

The case was being briefed before the Massachusetts Appeals Court in late 2019, but on Wednesday, the Massachusetts Supreme Judicial Court, the Bay State's highest court, confirmed that it would hear

the appeal instead.

Katherine Lamondia-Wrinkle, an attorney for the worker in the Massachusetts case, told Law360 that the court's determination the CSA preempted state medical marijuana laws had the effect of "denying [patients] a whole level of care and essentially treating them like second-class citizens."

Further muddying the case law, on Jan. 13, the New Jersey Appellate Division broke with Maine's example when it affirmed an order mandating that a construction company cover medical pot costs for an injured worker suffering from chronic pain.

In a published decision, the three-judge panel found the scenario posed no conflict between the CSA and the state's medical marijuana law, in part because the company, M&K Construction, would not be directly purchasing, possessing or distributing the drug, only reimbursing the worker for it.

"The federal offense ... has already occurred," Judge Heidi W. Currier wrote for the panel. "M&K cannot abet the completed crime."

The New Jersey court also downplayed M&K's argument that it could face federal prosecution. Notwithstanding Sessions' retraction of previous DOJ guidance, the court said the company could present no evidence of an insurer or employer being targeted by federal authorities for reimbursing sanctioned medical marijuana use.

The spate of workers' compensation litigation over medical marijuana is just one front in a morass of employment-related court battles playing out as state-legal cannabis policies collide with federal employee accommodation and anti-discrimination laws.

Bob Nichols, an employment partner at Bracewell LLP who has advised clients on cannabis policy, said that, as a general trend, courts were becoming more sympathetic to extending employee protections to medical marijuana users. But the inconsistent rulings will continue to create an untenable situation, particularly for multistate employers, until federal policy evolves, he said.

"This is a godawful mess for employers, and it's going to be for years to come, because the ultimate solution is federal legalization," Nichols said. "There's no indication or expectation that this mess will end anytime soon because it will take federal legalization for that to happen."

--Additional reporting by Jeannie O'Sullivan. Editing by Jill Coffey and Philip Shea.