

On June 8, 2016, Governor John Kasich signed House Bill 523 into law, making Ohio the 26th state to allow medical marijuana use. The law went into effect on September 8, 2016, but many questions remain regarding the implementation and effects of the new law. With regard to the area of workers' compensation, questions remain as to whether injured workers can expect prescribed medical marijuana to be covered under their workers' compensation claims.

The law currently limits medical marijuana treatment to the following "qualifying medical conditions": acquired immune deficiency syndrome; Alzheimer's disease; amyotrophic lateral sclerosis; cancer; chronic traumatic encephalopathy; Crohn's disease; epilepsy or another seizure disorder; fibromyalgia; glaucoma; hepatitis C; inflammatory bowel disease; multiple sclerosis; pain that is either chronic and severe or intractable; Parkinson's disease; positive status for HIV; post-traumatic stress disorder; sickle cell anemia; spinal cord disease or injury; Tourette's syndrome; traumatic brain injury; and ulcerative colitis. The law does allow for other conditions to be added after consideration by the State Medical Board.

Unfortunately for injured workers, recognition of any of the above conditions under a workers' compensation claim does not mean that their prescribed medical marijuana will be readily covered by the Ohio BWC. The BWC recently published a guideline regarding the impact of the new law, stating that the law does not require the BWC to pay for medical marijuana treatment¹. In support of its position, the BWC noted that 1) the Ohio Administrative Code limits drugs covered by the BWC to those that are approved by the FDA (marijuana remains a Schedule I controlled substance under Federal law, and therefore is not approved by the FDA); 2) BWC-funded prescriptions must be dispensed by a registered pharmacist from an enrolled provider, while the medical marijuana law allows for the drug to only be dispensed from approved retail pharmacies; and 3) the BWC only reimburses drugs that are included on its pharmaceutical formulary. With this publication, the Ohio BWC has essentially declared that requests for coverage of legally-prescribed medical marijuana will be automatically denied at the administrative level.

This likely means that injured workers will be at the mercy of the Ohio Industrial Commission for medical marijuana coverage. However, Rachael Rentas-Black, Chief Legal Counsel for the Ohio Industrial Commission, has confirmed that no policy currently exists with regard to the way that the IC will handle disputes over medical marijuana treatment. Thus, injured workers may face differing decisions from hearing officer to hearing officer, and the matter could eventually find its way to the Tenth District Court of Appeals and the Supreme Court of Ohio.

Other states have faced similar issues with regard to coverage of medical marijuana under workers' compensation claims, and the results have been mixed. Arizona recently passed House Bill 2541, which supplemented its existing Medical Marijuana Act, and exempted workers' compensation insurers and self-insured employers from being required to pay for medical

¹ The BWC's publication can be accessed at <https://www.bwc.ohio.gov/downloads/blankpdf/MedMarijuanaImpact.pdf>

marijuana for injured workers. Montana has similarly taken the position that workers' compensation insurers cannot be compelled to pay for medical marijuana. Notably, Ohio's medical marijuana law is silent with regard to this issue.

To the contrary, the Court of Appeals of New Mexico considered the compensability of medical marijuana in *Vialpando v. Ben's Automotive Services, et al.*, 2014-NMCA-084, 331 P.3d 975. In that case, a workers' compensation judge ordered that a worker could personally pay for authorized medical marijuana that had been determined to be reasonable and necessary to treat the worker's injuries, and that such treatment must be reimbursed by the employer. *Vialpando*, 2014-NMCA-084, ¶ 4. The employer appealed, and the Court of Appeals affirmed the compensability of the treatment *Id.* at ¶ 17. The Court observed that the New Mexico's workers' compensation act did not include a dispenser of medical marijuana in its list of acceptable sources of health care services. However, after considering the legislative intent of the state's medical marijuana law – “to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments” – along with the legislative intent of the state's workers' compensation system – “to allow a worker [to] receive through an employer reasonable and necessary health care services” that are “reasonable and necessary for the evaluation and treatment of a worker” – the Court determined that a worker's treatment that is authorized by the state's medical marijuana law and that has been determined to be reasonable and necessary for the work injury should be covered under the workers' compensation system. *Id.* at ¶ 13.

The *Vialpando* Court also considered the employer's argument that payment for medical marijuana is illegal because the employer would be required to violate federal law in reimbursing the injured worker for his marijuana-related expenses. The Court noted that any conflict between the state's medical marijuana law and the federal Controlled Substances Act (“CSA”) would be resolved in favor of the CSA as a result of the Supremacy Clause. *Id.* at ¶ 15. However, the Court noted that the employer did not present any arguments attempting to challenge the legality of the state's medical marijuana law, nor did the employer cite to any federal statute that would be violated should the employer pay for marijuana-related expenses. *Id.* The Court also discussed a 2013 policy issued by the Department of Justice, in which the DOJ acknowledged that marijuana remains illegal under the CSA, but outlined eight areas of enforcement priority and stated that, outside of these eight identified areas, the DOJ would defer to the state authorities. *Id.* at ¶ 16. None of the eight areas identified concern the use of marijuana for medical purposes or the payment for such marijuana.

While many questions remain, one thing is for certain: a worker's request for coverage of medical marijuana will be met with challenge by the BWC (and more than likely self-insured employers). Without a clear policy for the Industrial Commission to follow, the outcome of these challenges could vary widely, and workers may face a lengthy appellate battle before they can expect coverage for this now legal form of medical treatment.

