



New Jersey Supreme Court Holds Employer Responsible for Paying Medical Marijuana Costs

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In a case of first impression, the New Jersey Supreme Court recently held that an employer is responsible for payment of medical marijuana used to treat pain caused by a workplace accident. *Vincent Hager v. M&K Construction*, No. A-64, 2021 WL 1380984 (N.J. April 13, 2021). Claimant Hager was employed by M&K Construction and suffered a back injury while in the course and scope of his employment, when a truck carrying concrete overpoured its load into Hager's wheelbarrow, forcing him into the air. He suffered from sharp back pain that radiated down his legs. After an MRI revealed spinal disc herniations and bulging, Hager underwent a laminectomy and decompression of nerve roots in his back, and later underwent a two-level lumbar fusion. He was prescribed opioid medication but was subsequently prescribed medical marijuana as an alternative treatment and in an effort to wean him off the opioids; the marijuana cost him over six hundred dollars each month.

The parties reached an agreement as to payments and benefits, and litigated the nature and extent of Hager's permanent disability and future treatment. Medical experts testified on Hager's behalf that he was permanently disabled and would need the medical marijuana to manage his pain for the remainder of his lifetime, and the workers' compensation judge ultimately ordered that M&K reimburse Hager for the cost of the medical marijuana. M&K appealed, the appellate division affirmed, and M&K then appealed to the supreme court, advancing the following three arguments:

1. M&K fits within an exception to the Compassionate Use Act and is therefore not required to reimburse Hager for his marijuana costs;
2. New Jersey's Jake Honig Compassionate Use Medical Cannabis Act (Compassionate Use Act or Act) is preempted by the federal Controlled Substances Act (CSA), and compliance with the order would subject M&K to potential federal criminal liability for aiding-and-abetting or conspiracy;
3. Medical marijuana is not reimbursable as "reasonable or necessary treatment" under the New Jersey Workers' Compensation Act (WCA).

Success Story from the Children's SSI Project

(Continued from Page 5)

Advocates like Jeff are always needed to help with children's SSI appeals and other matters. Jeff volunteered for his first children's SSI case in 2010 and has supported this project ever since, winning cases for children throughout our service area. Jeff had no prior experience in this area of the law but was willing to learn and help where needed. He organized a training program at his firm and got others involved. He continues to obtain favorable decisions for many children and we are very grateful for his help. The SJLS Private Attorney Involvement Program plans to have a CLE in July to train volunteers to handle Children's SSI appeals and Jeff will be a part of this training. Please look for details on the SJLS Facebook page. If you or your firm would like to join the effort to make a difference in the life of a child, please contact **Michelle T. Nuciglio**, Esquire, Director of Pro Bono Services, at (856) 964-2010 ext. 6229 or at mnuciglio@lsnj.org.

As to the first argument, M&K asserted that it was subject to an exception in the Compassionate Use Act stating that reimbursing an employee for the cost of medical marijuana is not required by a government medical assistance program or a private health insurer. N.J.S.A. 24:61-14. The supreme court did not agree, finding that M&K did not fit into either category, and that the legislature could have included workers' compensation insurance in the exception and specifically did not do so.

With regard to the second argument, the court found that there was no conflict between the CSA and the Compassionate Use Act. The court noted that New Jersey's marijuana laws were "undergoing a titanic shift." The court engaged in a preemption analysis, and examined congressional intent, finding that Congress has, for seven consecutive fiscal years, prohibited the DOJ from using funds to interfere with state medical marijuana laws through appropriations riders. This congressional prohibition has not yet run, and the DOJ cannot enforce the CSA in such a manner that it interferes with activities compliant with the Compassionate Use Act. Thus, the court held that there is no "positive conflict" between the CSA and the Compassionate Use Act, and the laws can coexist as applied to the order of the compensation court.

The court also addressed M&K's argument that compliance with the compensation court's order would subject it to aiding-and-abetting and conspiracy liability under federal law, as it would be assisting in Hager's possession of marijuana. The court held that M&K could not be liable under the CSA because it was complying with a court order, against its will, to reimburse Hager, and the requirement of intent was not met.

M&K also argued that medical marijuana is not a "reasonable and necessary treatment" for which the WCA provides coverage. The court disagreed. It reviewed the legislative history of the WCA, which requires employers to provide "such medical, surgical and other treatment . . . as shall be necessary to cure and relieve the worker of the effects of the injury" incurred in the course of employment, and specifies that all fees for the "treatment shall be reasonable." N.J.S.A. 34:15-15. The court concluded that medical marijuana may be found, subject to competent medical testimony, to constitute reasonable and necessary care under the WCA. The court made note of the potential harm that might be inflicted on Hager by the alternative treatment of opioids and a "likely path . . . [of] worsening addiction and ultimately death." The court also acknowledged evidence by way of medical testimony of marijuana's ability to relieve pain.

This case evidences the refusal of courts in New Jersey to allow the CSA, and its scheduling of marijuana as an illegal substance, to preempt state medical marijuana laws. This is an area of law that is changing rapidly, so state laws should be reviewed prior to advising client employers as to how to deal with employees using medical marijuana.

NOTE:

We have started a cannabis law committee and if anyone is interested in joining, please contact me at elizabeth.dalberth@sweeneyfirm.com.