

N.J. Court Requires Reimbursement for Marijuana Use as Part of Workers' Compensation Case

By Jonathan Miller

In *Hager v. M & K Construction*, A-0102-18T3 (N.J. App. Div. January 13, 2020) the New Jersey Appellate Division ruled that an employer was required to reimburse its former employee for his marijuana use as part of his workers' compensation case. The Court ruled that to deprive the former employee of the only relief from the constant pain he experienced would eviscerate the principals of the workers' compensation system. The court continued by stating that the use of marijuana was justified in light of the ongoing opioid crisis.

Under federal law, marijuana is a Schedule I controlled substance. See 21 U.S.C. § 812(c), Schedule I(c)(10); 21 C.F.R. § 1308.11, Schedule I(d)(23), (31). The Controlled Substances Act ("CSA"), passed in 1970, placed marijuana in Schedule I, the most restrictive of categories, defining it as a drug with a high potential for abuse, no currently accepted medical use for treatment, and lacking acceptable safety uses even under medical supervision. See 21 U.S.C. § 812(b)(1). However, many states have legalized the drug on a medical basis, a recreational basis, or both. In this case, New Jersey enacted the Medical Marijuana Act in 2010. That statute, N.J.S.A. 24:6I-6, in pertinent part notes that "[s]tates are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law; therefore, compliance with this act does not put the State of New Jersey in violation of federal law, [furthermore] [c]ompassion dictates that a distinction be made between medical and non-medical uses of cannabis. Hence, the purpose of this act is to protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes."

In what was a case of first impression, the court was asked whether the reimbursement for payments of medical marijuana for chronic pain violated federal law which made it a crime to "manufacture, possess or distribute marijuana." Notably, the employer also raised the question of whether marijuana was a reasonable and necessary form of treatment under their workers' compensation act, a standard very similar to *Miller* here in Ohio. The court ultimately ruled that because the employer was neither manufacturing or distributing marijuana, there was no violation of federal law. The reasonableness standard was satisfied by the employee's vast history which included multiple lumbar surgeries, opioid use, chiropractic treatment, and many other modalities.

The employee was originally injured in 2001, while working as a construction worker. The injury occurred when a truck delivering concrete dumped its load onto him. Among his injuries was an L5-S1 disc which lead to laminectomy and decompression in 2003. In 2006, due to severe nerve damage, a two-level fusion was recommended. The employee's case was fiercely litigated, which delayed the

fusion. During this time, the employee took Oxycodone for his ongoing pain. In 2011, the employee underwent a two-level fusion. The second surgery was also unsuccessful in relieving pain. Plaintiff's physiatrist subsequently prescribed OxyContin, Oxycodone, Valium, Lyrica, and other medications without relief. In 2016, the employee was referred to a Dr. Liotta, who had been certified by the State of New Jersey to prescribe marijuana. Dr. Liotta diagnosed the employee with post laminectomy syndrome (failed back syndrome). The employee found the use of marijuana curbed his pain and led to better sleep. He was smoking up to two ounces of marijuana a month, a total of \$616.00. Dr. Liotta testified that the potential side effects of marijuana use included, "some memory loss, losing emotional highs and low and potential lung damage from smoking the drug. Conversely, the long-term use of opioids can cause flash pulmonary edema, fatal arrhythmia, persistent itching, a higher risk of addiction, constipation, hemorrhoids, and fissures."

In July of 2018, the lower court ordered the employer to reimburse the employee for the costs of his marijuana, and any related expenses. The employee was presented with only two options for managing his pain: opioids or marijuana. The court ruled that it was really no option at all. The employee and his physicians testified that marijuana use successfully curbed the employee's pain, whereas opioids did not. The employee, who had previously been addicted to opioids was now opioid free for several years. The court concluded that reasonableness had been satisfied by the fact that the employee was no longer taking opioid medications. The court states:

"For over eighteen years, petitioner has endured chronic disabling pain resulting from a work-related injury. He has undergone multiple unsuccessful lumbar surgeries and pursued all recommended modalities of treatment – nothing relieved his pain. Petitioner and Dr. Liotta testified as to the beneficial effects medical marijuana can achieve for chronic pain and specifically for petitioner's pain level. Its use has also allowed petitioner to cease using opioids. That achievement, by itself, considering the opioid crisis in existence today, should suffice as a rationale for the reimbursement of medical marijuana."

This raises multiple questions for Ohio employers. If enacted and approved, will use of marijuana form a basis to stay on temporary total benefits? How will a worker return to work under the influence of marijuana if there is a drug-free workplace policy? If the policy is reversed, how will employees under the umbrella of federal law participate, e.g., truck drivers? Conversely, does the possibility of a reduction in chronic pain medications justify a second look at Ohio's marijuana laws?

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