MEDICAL MARIJUANA

AND THE

PENNSYLVANIA WORKERS' COMPENSATION ACT

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I. Introduction

The Medical Marijuana Act ("MMA"), passed April 17, 2016, and administered by the Pennsylvania Department of Health ("Department"), brought to our Commonwealth both new treatment options for patients and new questions for business. Few industries were more immediately impacted by this seismic shift than that of insurance and law, tasked suddenly with interpreting the redrawn contours of the law and the requirements for compliance.

More than two years following enactment, significant uncertainty remains as to the interplay of the MMA, the Pennsylvania Workers' Compensation Act ("Act"), and federal law. To date, no judicial rulings have provided any guidance, much less binding instruction, for the many critical questions which present. Accordingly, workers' compensation insurance carriers across the Commonwealth, in tandem with their counsel, are left to formulate their independent interpretations and strategies in the management of claims involving medical marijuana.

While a complete understanding of the nuances and complexities of this topic requires extensive analysis and commentary beyond the scope of this paper, the following seeks to provide a summary of the most significant issues and questions which have been identified by leading legal scholars, litigators, and medical professionals as it pertains to the access, usage, and liabilities of medical marijuana in Pennsylvania. It is cautioned that specific cases will necessarily demand the expertise of skilled counsel, and that the discussion contained herein represents but a generalized survey of broad and common inquiries.

II. The Medical Marijuana Act[1]

Perhaps most critically for workers' compensation insurance carriers and self-insureds, the MMA expressly provides that "[n]othing in this act shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide coverage

[1] 35 P.S. §§ 10231.101-10231.2110.

for medical marijuana."[2] The Act further states, in consideration of the federal-state conflict in this area of the law, that "Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law."[3] Thus, these provisions make clear that an insurer will *not* be held responsible for the direct payment of monies to entities distributing medical marijuana (i.e., dispensaries).

However, where an injured worker purchases medicinally-recommended marijuana with their own personal funds, the MMA is silent as to the reimbursement liabilities of carriers. Accordingly, in these situations, the risks and liabilities of insurers and employers currently remains uncertain.

A. Patient Eligibility under the MMA

To accurately conceptualize the scenario wherein reimbursement may ultimately be compelled by law, it is critical to understand the typical process by which an injured worker obtains access to medical marijuana.[4]

As a threshold matter, the individual must be a resident of the Commonwealth. If such residency exists, the patient begins by registering with the Department as a medical marijuana patient. The Department maintains an active list of all individuals so applying, known as the "Medical Marijuana Registry." After registering, the patient selects a physician from the Commonwealth's list of doctors who are approved to recommend medical marijuana. Pursuant to an evaluation, the doctor determines whether the patient suffers from any one of the enumerated conditions under the MMA, and whether cannabis presents as a beneficial treatment modality. If indeed the doctor believes medical marijuana would provide safe and appropriate relief, a "patient certificate," or "recommendation," rather than a prescription, is offered.

After receiving certification by a practitioner, a patient must register for, and obtain, a "medical marijuana ID card." Only then may the patient actually retrieve the recommendation as details in their physician-provided certification. The patient's marijuana ID card is thereafter valid for up to one year, however, practitioners must issue a new patient certification at each renewal interval for continued eligibility.

Notably, the particular strain or formulation of marijuana ultimately provided to the patient is determined not by the physician, but, instead, by the licensed medical professionals employed by the *dispensary*. The patient – in this case, the injured worker – pays for the marijuana in cash, and is limited to a one-month supply.

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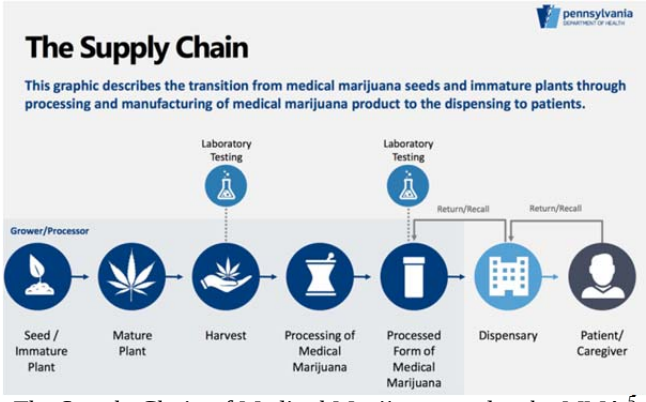
[2] 35 P.S. § 10231.2102.
[3] 35 P.S. § 10231.2103(b)(3).
[4] *See* Jenifer Dana Kaufman, *Medical Marijuana and Workers' Compensation: Burning Questions that Need Answers*, THE LEGAL INTELLIGENCER, May 23, 2018. *See also Pennsylvania's Medical Marijuana Program*, PENNSYLVANIA DEPARTMENT OF HEALTH, Presentation of Rachel Levine, MD, June 8, 2018 (available at: https://www.dli.pa.gov/Businesses/Compensation/WC/conferences/Documents/2018%20Handouts/Keynote%20Address%20-%20Medical%20Marijuana.pdf.)

At the time of its passage, the MMA included 17 "serious medical conditions" for which medical marijuana could be permissibly recommended as a treatment option; these included such illnesses as ALS, Crohn's disease, epilepsy, Glaucoma, HIV/AIDS, IBS, Multiple Sclerosis, Parkinson's, PTSD, and sickle cell anemia. On May 17, 2018, the MMA was revised to add a number of additional covered maladies, including neurodegenerative diseases and "opioid use disorder."

Perhaps of most significant relevance to workers' compensation carriers, Section 103(16) of the MMA includes a "catch-all" provision, which sanctions the use of medical marijuana for "severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective." Given the ubiquitous nature of chronic neuropathic pain in workers' compensation matters, it is expected that this particular proviso may serve to form the basis of extensive litigation.

B. Facilities, Regulatory Oversight, and Physician Qualifications

Under the MMA, growers and processors may only manufacture those forms of medical marijuana expressly delineated by the statute. Similarly, a dispensary may only purchase permitted forms from an approved grower or processor, and are restricted to dispensing those forms to approved patients or caregivers. At present, the forms permitted by statute are limited to vaporization or nebulization, tincture, dry leaf, pill or capsule, liquid suspension, oil, and topical. Notably, *smoking is not a permitted form of usage*. Statewide, 27 entities have been issued permits to operate as dispensaries, and 12 entities licensed as growers and processors. Over 41,000 patients, and more than 4,000 caregivers, have registered with the Commonwealth; nearly 21,000 patients are certified by a qualified practitioner, and more than 45,000 patient-dispensing activities have been recorded. Further, more than 1,000 physicians have registered, with over 650 having completed the required training to become "approved practitioners."



The Supply Chain of Medical Marijuana under the MMA.[5]

Growers and processors licensed under the MMA are subject to strict oversight by the Department. Employees operate within secure facilities monitored by video surveillance and

[5] *See infra* Pennsylvania's Medical Marijuana Program at 4.

accessible only by those with a valid badge. Department officials regularly conduct unannounced visits to ensure statutory and regulatory compliance. Within the facilities, employees are tasked with monitoring the accuracy of chemical labeling and dosages, in addition to collecting samples for testing of contaminants and potency.

To lawfully prescribe medical marijuana, a physician must hold a valid Pennsylvania license to practice medicine and exhibit proper qualifications for treating "serious medical conditions." The physician is required to apply to the Department for registration under the program, and ultimate authority to issue "patient certifications" (i.e., patient recommendations for usage) is dependent upon completion of a four-hour course, administered by the Department itself.

As it pertains to dispensaries, each facility must employ a medical professional who has completed the aforementioned four-hour training, and is appropriately registered with the Department. In the event a dispensary operates in multiple locations, a physician's assistant or certified registered nurse practitioner may serve as the requisite medical professional overseeing operations, provided they have properly registered with the Department and completed all required training. Notably, neither a practitioner nor physician may issue a patient certification *at the dispensary facility itself.*

Under the MMA, a patient may designate up to two caregivers to obtain medical marijuana products on their behalf. A caregiver must be at least 21 years old, registered with the Department, undergo a background check, and be issued their own individual medical marijuana ID card. Patients under the age of 18 are barred from being issued ID cards; rather, a designated caregiver will be assigned (e.g., parent, legal guardian, etc.) by the Department.

III. The Pennsylvania Workers' Compensation Act

The Pennsylvania Workers' Compensation Act is devoid of any reference to medical marijuana, and, to date, no case or statutory law has directly addressed the compensability of such treatment. Accordingly, and until new guidance is provided, legal practitioners are left to apply traditional analytical frameworks to the modern challenges posed by medical marijuana.

A. Utilization Review; Reasonableness and Necessity

Well-known to attorneys and carriers alike, the Utilization Review provisions of the Act serve as the frontline defense to claims involving the use of medical marijuana.[6] As with any other disputed medical treatment, an employer may file for retrospective review within 30 days of receipt of the corresponding invoice. In cases of medical marijuana, such "invoices" are likely to take the form of a claimant's request for reimbursement.

It is indeed foreseeable that claimants' attorneys will simultaneously file both *prospective* Requests for Utilization Review and Petitions to Review Medical Treatment on behalf of

[6] Section 306(f.1)(5)-(6) of the Act, 77 P.S. § 531(5)-(6).

claimants seeking to obtain medical marijuana, so as to establish both the causal relationship and reasonableness and necessity of such treatment.

Unfortunately, significant uncertainty presents with regard to precisely how Workers' Compensation Judges ("WCJ") may rule on such issues. It is expected that, in the absence of controlling law, each WCJ will render decisions according to their subjective and independent interpretations of the MMA, Act, and Cost Containment Regulations (addressed below), in addition to their individualized judicial sensibilities. With a lack of any controlling precedential or statutory authority, WCJs will be bound only by the traditional legal standards for addressing medical treatment disputes, while otherwise left to their own device in rendering decisions.

Accordingly, the defense of a medical marijuana claim – whether based upon causal relationship or reasonableness and necessity – will, for the foreseeable future, mirror that of a traditional medical treatment dispute under the Act. Customized strategies will necessarily include the use of qualified medical specialists, as well as creative and aggressive legal arguments applying existing statutory law, case law, and regulations.

B. Fee Review; Timeliness and Amount of Payment

In a case where medical marijuana treatment is determined to be reasonable, necessary, and causally related to a worker's accepted injury, employers and carriers retain secondary defenses via the fee review provisions of the Pennsylvania Workers' Compensation Medical Cost Containment Regulations.[7]

Treatment under the Regulations must be provided by a "health care provider," pursuant to Section 127.3. In consideration of the MMA's requirement that medical marijuana dispensaries operate under the oversight of licensed medical professionals, it is foreseeable that such facilities will indeed be considered "health care providers." However, the Regulations address the payment of "prescription drugs," for which no definition is provided. Thus, persuasive arguments can be made that medical marijuana does not fit within the typical understanding of this term; to wit, rather than an actual "prescription," physicians directing a patient's usage of medical marijuana only provide *certifications*. Only then does a dispensary select the strain and form appropriate for the patient. This, it may be argued, is materially different in nature from the traditional model of written prescriptions, whereby a physician dictates and authorizes the precise type and dosage of medication.

The Regulations further address, at Sections 127.131 through 127.135, the payment of "pharmaceuticals," which are directed to be reimbursed at 100% of out-of-pocket expenses. Pharmaceuticals are defined, for purposes of the Regulations, as treatment "related to medicinal drugs." While it remains to be seen whether adjudicating bodies consider medical marijuana to fall within the scope of this definition, the same is indisputably broad and expansive, and will likely result in at least some carriers being compelled to reimburse claimants for their cash-purchase of physician-certified cannabis.

[7] *Id.*

Finally, Section 127.109 of the Regulations pertain to "Supplies and Services Not Covered by Fee Schedule." Though the term "supplies" is provided no definition, if an adjudicator determines that medical marijuana so qualifies, reimbursement may ultimately be compelled at 100% of the cost if an adjudicator determines that payment is to be made *directly to a claimant*, rather than a provider (which would only be entitled to 80%). Given the provisions of the MMA so stating, a carrier operating in Pennsylvania shall not be compelled to make payments related to medical marijuana directly to dispensaries – in this case, the "provider." Accordingly, as the only plausible payment would then be made to a claimant directly in reimbursement of their out-of-pocket purchase, a carrier would be liable for 100% of associated costs.

The common denominator pervasive throughout the above analysis is that of *uncertainty*. Until judicial or statutory developments provide greater clarity, each and every case pertaining to the payment of medical marijuana will necessarily turn on its specific facts, with strategies for an aggressive defense tailored to the precise scenario which may present. The current state of the law provides robust opportunity for persuasive argument, and will inevitably result in varied interpretations and conclusions regarding the coverage and reimbursement of medical marijuana under the Act and its applicable regulations.

IV. Conflict with Federal Law; Foreign Jurisdictions

The passage and implementation of the MMA operates against the backdrop of a federal system which continues to view the possession of marijuana, regardless of form or usage intent, unlawful. Pursuant to the federal Controlled Substances Act ("CSA"), marijuana remains a Schedule I controlled substance, placing it within the same category as cocaine, heroin, LSD, and ecstasy.[8] Accordingly, under both the Medicare and Medicaid programs, medical marijuana remains unequivocally outside the scope of coverage. This dichotomy, of course, generates a myriad of questions regarding the interplay of conflicting state and federal law.

A number of other jurisdictions have confronted these issues, from which guidance may be drawn and applied to the Pennsylvania experience. In 2015, a New Mexico appellate court determined that no practical conflict existed between state and federal law. [9] The court rejected the argument that the CSA "trumped any requirement that the employer subsidize the costs of medical marijuana," as enforcement memos drafted by the Department of Justice had "rendered the prospect of prosecution under the CSA to be speculative."

Conversely, in a June 2018 case, the Supreme Judicial Court of Maine held that the federal-state conflict *bars payment* of medical marijuana by a workers' compensation insurance carrier.[10] In so finding, the court rejected any reliance upon the Obama-era memorandum by the Department of Justice, which assigned low priority to the prosecution of medical-marijuana-based violations of federal drug laws. The court stated, "Any reliance on this internal

[8] 21 U.S. Code § 812.
[9] Lewis v. American General Media, 355 P.3d 850 (N.M. Ct. App. 2015).
[10] Bourgoin v. Twin Rivers Paper Co., 2018 WL 2976309 (Maine S. Ct. 2018).

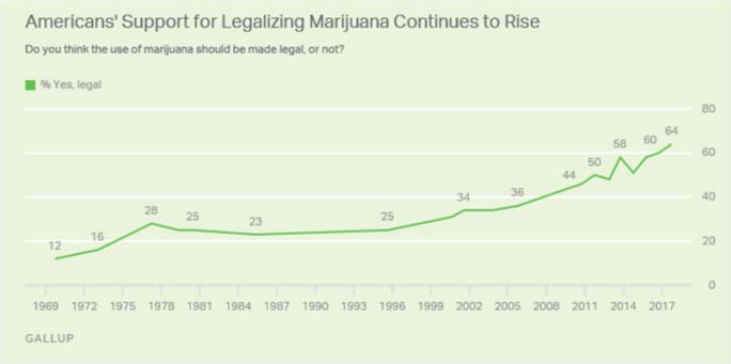
departmental policy is entirely misplaced. Such a policy is transitory, as irrefutably demonstrated by its recent revocation by the current administration."

While the above-referenced cases have no direct applicability to Pennsylvania law, they are exemplary in revealing that individual jurisdictions will assuredly arrive at competing conclusions; thus, uncertainty reigns, and ambiguity, for the moment, prevails.

V. The Opioid Crisis

The consistent growth in support of legalized marijuana is necessarily informed and contextualized by the ongoing national opioid epidemic. While the effects have been felt in communities across the country, areas of Appalachia and New England, comparatively, have been disproportionately ravaged.[11] Indeed, in 2016, nearly 116 people in the United States died of an opioid overdose *every day*, resulting in a total of 42,249 relatable deaths that year.[12] And while 948,000 individuals used heroin in 2016, more than 2.1 million Americans misused opioids.

As the nation continues to seek relief from the grip of opioids, medical marijuana has emerged as a leading treatment alternative, with support of the same rapidly growing amongst the public. Central to this trend is the evolving perception of the typical medical marijuana patient. In this respect, the cultural image of an indolent and lackadaisical individual, choosing to forego laborious and capitalistic pursuits in favor of a subsidized life of leisure, has eroded with an increased awareness of chronic pain, mental health, and the tragic impact of widespread opioid abuse amongst friends, families, and neighbors. Indeed, a greater number of individuals than ever before are now familiar with someone who has found relief from the usage of medical marijuana.



Americans' Support For Legalizing Marijuana, 2017.[13]

[11] R. Ghertner and L. Groves, *The Opioid Crisis and Economic Opportunity: Geographic and Economic Trends*, ASPCE RESEARCH BRIEF, Last revised September 11, 2018, available at: https://aspe.hhs.gov/system/files/pdf/259261/ASPEEconomicOpportunityOpioidCrisis.pdf.

[12] *The Opioid Epidemic by the Numbers*, DEPARTMENT OF HEALTH AND HUMAN SERVICES, updated January 2018, available at: https://www.hhs.gov/opioids/sites/default/files/2018-01/opioids-infographic.pdf.

[13] Gallup Poll, published October 25, 2017. Available at: https://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx.

Now, with Pennsylvania law expressly permitting the use of cannabis for medicinal purposes, public approval for the same is only expected to rise. These changing norms, accelerated by changing laws, inevitably mean that medical marijuana will increasingly present as a medical component of workers' compensation claims. Accordingly, it will be the prerogative of employers, carriers, and attorneys alike to acclimate to this changing landscape, and approach the issue from a medical perspective, rather than cultural. Of course, a variety of methods continue to exist whereby claimants suspected of exaggerated behaviors or malingering may be identified – including, but not limited to, surveillance. However, the mere fact that an injured worker utilizes medical marijuana will be unlikely to influence adjudicators of secondary gain, as such usage is now expressly permitted by law, and supported by a not-insignificant percentage of trained medical professionals. One is pressed to consider that an adjudicator or appellate body may well be persuaded that the usage of medical marijuana is *less suspicious* than the prolonged usage of opioids.

The collective American exasperation caused by the opioid epidemic has left legislators, physicians, adjudicators, academics, and citizens alike desperately searching for answers and alternatives. While the long-term prospects of medical marijuana as that solution remains unknowable, it is clear that articulable and demonstrable medicinal benefits have been found in its regulated usage, and that Pennsylvania, alongside 30 other states and the District of Columbia, has determined that the observed benefits outweigh the accepted risks.

VI. Conclusion

The MMA has injected new, and, at times, unfamiliar and uncomfortable issues into the Pennsylvania workers' compensation landscape. Long-held viewpoints have been slowly cast aside in the face of new medical developments, changes in public perception, and a willingness to explore all promising alternatives to narcotics. The precise interplay of the MMA with the Workers' Compensation Act has yet to be established, and may remain uncertain for some time to come. Thus, a comprehensive knowledge of the controlling statutes and regulations, coupled with persuasive arguments, remains the strongest defense in claims involving the compensability of medical marijuana. Further, understanding both the experience of neighboring jurisdictions and leading academic theories serves to enrich the Pennsylvania perspective, and allows for the development of creative, compelling, and effective defenses.

Time will assuredly provide greater clarity to the many questions now posed to the legal and insurance industries across the Commonwealth. In an effort to help shape these sought-after answers, the attorneys of Thomas, Thomas & Hafer will continue to present well-informed and aggressive defenses, where appropriate, to ensure that the coverage of medical marijuana under the Act is adjudicated in a fair, thoughtful, and medically-responsible manner.