American Academy of Actuaries

Issue Brief

Navigating Workers' Compensation and Medical Marijuana

APRIL 2023

Key Points

- Medical marijuana can impact workers' compensation before, during, and after a workplace injury.
- There is significant complexity involved with:
  - The interpretation of workers' compensation law when medical marijuana use intersects with workers' compensation claims; and
  - The research on medical marijuana use, reimbursement of claims, and treatment options.
- Workers' compensation actuaries should work closely with claims professionals to understand the potential implications of medical marijuana laws on their projections.

Introduction

For many years, marijuana has been on the "hot topic" list for workers' compensation, and the landscape continues to evolve as more states approve it for medical and recreational use. The U.S. Drug Enforcement Administration ("DEA") classifies marijuana as a Schedule I drug,[1] making it illegal at the federal level. Due to the federal classification, research on marijuana, including its impact on the mind/body and dosing guidelines, is extremely limited. The majority of available information in the U.S. is from voluntary surveys conducted by independent research firms. (Other countries including Canada and Israel have studied medical marijuana, but international activities are outside the scope of this issue brief.) However, a recent bill (H.R.8454[2]), signed into law on December 2, 2022, has opened the door to allow for research on medical marijuana.

Individual states' treatment of marijuana use ranges from fully illegal to fully legal with a plethora of variations in between. As of December 2022, 38 jurisdictions including the District of Columbia have medical marijuana programs; of these, 27 have decriminalized cannabis or have full adult recreational-use programs.

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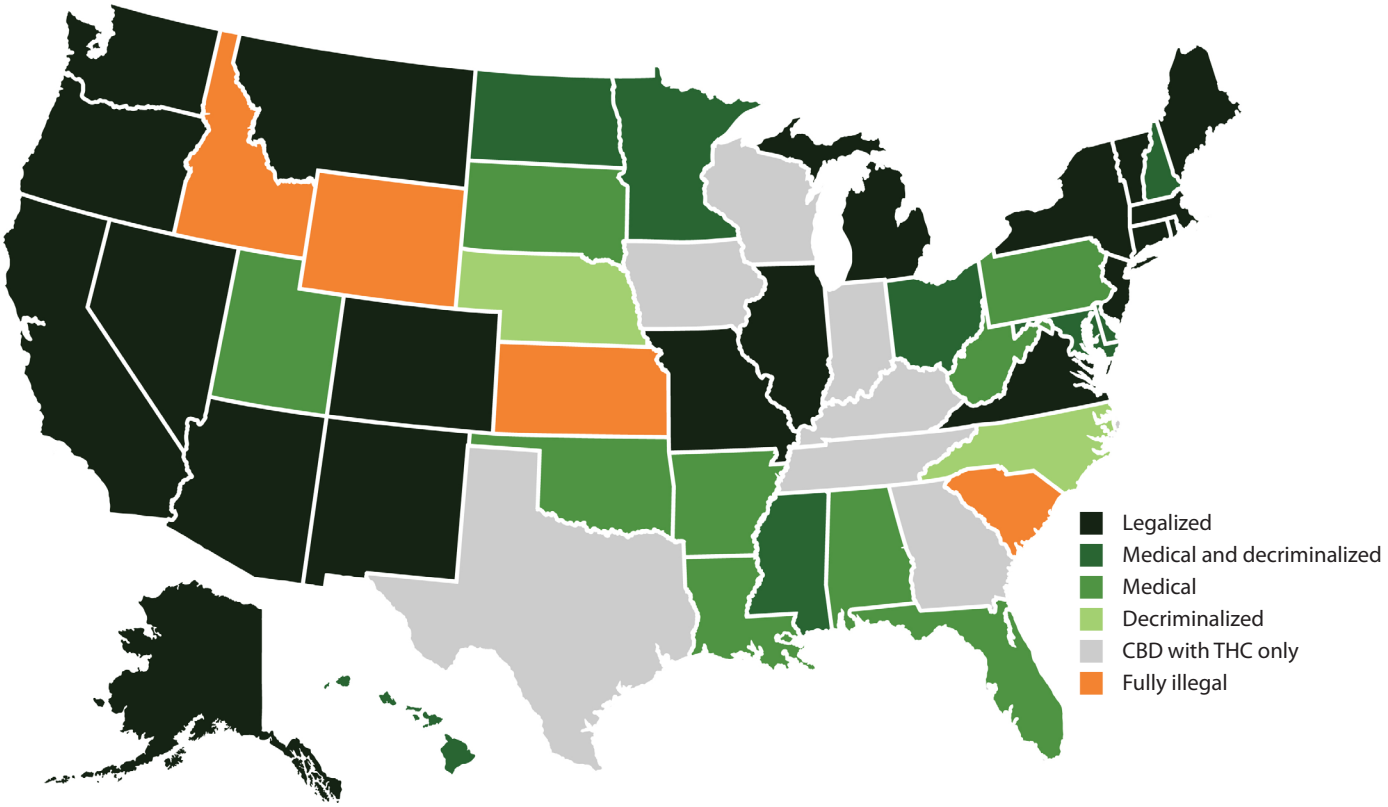
1 Per the DEA, Schedule I drugs typically have a high potential for abuse and the potential to create severe psychological and/or physical dependence.

2 https://www.congress.gov/bill/117th-congress/house-bill/8454

Figure 1 provides the latest picture of state laws pertaining to marijuana legalization.

Figure 1



https://disa.com/map-of-marijuana-legality-by-state

The issues surrounding marijuana and workers' compensation are diverse and challenging to navigate. Medical marijuana can impact workers' compensation before, during, and after a workplace injury. As of October 2021, six states (CT, MN, NH, NJ, NM, NY) explicitly allow for workers' compensation insurance reimbursement for an injured worker's medical marijuana use either under a court or administrative ruling or pursuant to an administrative rule. Another six states (ME, MA, FL, ND, OH, WA) expressly prohibit workers' compensation reimbursement for an injured worker's medical marijuana use. In addition, 14 states (AZ, AR, CA, CO, DE, IL, LA, MI, MO, NV, OR, PA, UT, VT) explicitly provide, either through statute, court decision, or administrative

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ruling, that insurance carriers cannot be required to reimburse for an employee's medical marijuana use, leaving the possibility that such reimbursement might be provided voluntarily in some cases.[3]

In this issue brief, the American Academy of Actuaries Workers' Compensation Committee will address several issues for employers when considering the impacts of medical marijuana. This brief will discuss how existing statutes and case law impact drug testing for initial employment, the compensability of an injured worker legally using marijuana, the reimbursement of expenses when medical marijuana is recommended by a physician for an injured worker, and the impact of medical marijuana use on employment.

Navigating the WC Medical Marijuana Discussion

This section includes several of the more recent court cases involving workers' compensation claims and the use of medical marijuana and the resulting outcomes. These cases highlight the difficulties for all involved when deciding on treatment, coverage, and payment for these claims. Details of these cases are provided in the appendix.

Three overarching themes or questions reviewed by the courts in these cases were:

1. Do federal drug laws like the Controlled Substances Act (CSA), 21 U.S.C.S. supersede state laws that compel insurers and employers to reimburse an employee for the cost of medical marijuana used in response to pain arising from a work-related injury? Is an employer that pays for medical marijuana aiding and abetting a crime? The cases below highlight the differing answers to these questions. The federal government and the U.S. Supreme Court continue to be asked to review the classification of marijuana as a Schedule I substance under the CSA, but no final decisions have been made as of the date of this publication.

    a. New Hampshire, March 2021—Appeal of Andrew Panaggio
    b. New Jersey, April 2021—Vincent Hager v. M&K Construction
    c. Minnesota, October 2021—Bierbach v. Digger's Polaris and Musta v. Mendota Heights Dental Center
    d. U.S. Supreme Court, June 2022—The Supreme Court denied reimbursement for medical marijuana in workers' compensation cases.

3 "Workers' Compensation Reimbursement for Medical Marijuana Usage Reviewed"; LexisNexis; Oct. 21, 2021.

2. Was medical or recreational marijuana use the proximate cause for an employee injury? Testing for marijuana versus alcohol is different in that marijuana can register on a drug test long after the drug has been taken. A worker's positive test for marijuana does not necessarily mean the worker was impaired and unable to do their job safely. Also considered are states with Rebuttable Presumption of Intoxication which allows for the denial of a workers' compensation claim if the worker tested positive for marijuana at the time of injury.

    a. Florida, June 2018—Brinson v. Hospital Housekeeping Services
    b. Kentucky, July 2018—New Workers' Compensation Intoxication Rebuttable Presumption

3. Did the attending physician use other treatments before prescribing medical marijuana to treat the claimant? Was medical marijuana a reasonable and necessary medical treatment for the injuries sustained?

    a. Maine, June 2018—Gaetan H. Bourgoin v. Twin Rivers Paper Company, LLC, et al.

The cases above highlight the complexities of interpreting workers' compensation law when medical marijuana use intersects with workers' compensation claims. It is anticipated that case law will evolve over time as employers and insurers grapple with these challenges. Once cases make it to the courts, they typically take a long time to work through the system and many times, as noted above, involve appeals that may or may not change the original decision. Until and unless the federal government changes the classification of marijuana, the conflict between state and federal laws and regulations will continue to be navigated through the court system.

Managing Medical Marijuana Reimbursement for Workers' Compensation Claims

Given the complexities surrounding the legality and prevalence of medical marijuana policies across states, it should be no surprise that insurers face challenges in determining how (or if) to process reimbursements related to medical marijuana. While 38 jurisdictions including D.C. have legalized medical marijuana, only six of those 38 jurisdictions require workers' compensation carriers to reimburse for medical marijuana. In contrast, six of these jurisdictions explicitly prohibit the reimbursement of medical marijuana in workers' compensation cases. The most common reason for prohibiting reimbursement relates to medical marijuana not being an FDA-approved treatment

(and variations thereof). Of the remaining states, some have specifically said that reimbursement is not mandated, while others have been silent on the matter.

This gray area creates confusion for carriers and third-party administrators (TPAs). When not mandated, many TPAs deny coverage in order to not run afoul of federal regulations and avoid creating an inadvertent liability. Additionally, TPAs' clinicians cite medical marijuana's possible contraindications as the reason why they do not recommend it as a treatment. TPAs will follow standard payment and reimbursement rules per the state and payments are typically made on a cash basis directly to the injured worker. To date, TPAs have seen relatively few requests for reimbursement and few employers are advocating the use of medical marijuana for treatment, so TPAs have not yet faced many difficulties when determining how to handle it.

The position of an individual employer/insured can also impact how a TPA handles medical marijuana reimbursement. Employers in a safety-sensitive industry (or with safety-conscious risk managers) may be less likely to support a treatment that is not widely accepted. Further, employers with federal contracts or federal funding will balk at using a non-federally approved drug or treatment. On the other hand, in industries where injured workers cannot return to work while using either opioids or medical marijuana, the employer may be more willing to allow medical marijuana treatment based on perceived cost savings or long-term benefits (when compared to opioid use).

Impact on Employment

The impact of medical marijuana use on a worker's employment will depend on a variety of issues that include the nature of the job and employer; the state where the worker resides and the protections afforded to medical marijuana users for off-the-job use; the legality and reliability of drug testing of active workers; the degree of ease/difficulty employers have in recruiting/retaining workers; and societal views of marijuana use. Overall, medical marijuana use has created many constraints on employers' ability to control the employment dynamic with respect to adverse employment decisions, though there continue to be certain situations in which the employer maintains full control.

The nature of the worker's job responsibilities is one variable that may enable or possibly require employers to act when workers use medical marijuana, even when the drug is used in accordance with physician recommendations. For example, all federal agencies, federal grantees, and companies with federal contracts of $100,000 or greater are required to maintain drug-free workplaces per the Drug-free Workplace Act of 1988. While many states treat certified medical marijuana use as a disability, thus affording certain

protections to workers, there are exceptions when the protection would otherwise conflict with federal requirements. Similarly, safety-sensitive industries such as oil and gas and transportation (aviation, railroads, trucking) that are federally regulated also must maintain drug-free workplaces.

For workers in other industries, laws related to medical marijuana and the protections afforded to users vary widely by state. As noted above, many states treat workers who qualify for medical marijuana as having a disability, and thus medical marijuana users are protected against discrimination related to its use. For example, New York's Compassionate Care Act and Human Rights Law requires employers to make accommodations for workers who use marijuana for medical reasons. New York and New Jersey do not allow employers to discriminate against workers who use marijuana recreationally. Court decisions in other states such as California and Colorado, which have medical marijuana laws that do not directly define restrictions on employer actions against workers who use marijuana, have frequently supported employers even when workers have used marijuana outside of work hours.

Complicating the issue for employers is the uncertainty associated with drug testing for marijuana use. Testing focuses on levels of tetrahydrocannabinol (THC), and detection of THC varies with the kind of test (blood, hair, saliva, urine) and the frequency of recent usage. While drug tests reflect varying degrees of success in detecting the presence of THC, there are no reliable tests that accurately identify the timing of the last drug usage (i.e., during off-hours or on the job). It is similarly difficult to measure the level of impairment for an employee as additional variables such as body fat / muscle mass and the degree of dehydration also influence how quickly the body metabolizes THC.

In addition to the difficulty employers face in testing workers for impairment related to marijuana use, the decision to take adverse employment actions, including termination, may be impacted by the labor market and societal views. Following the pandemic, many employers have experienced a shortage of qualified applicants for open positions. As a way to expand the pool of potential new hires, it is common that pre-screening for drugs now excludes THC. This is likely due in part to the increasing acceptance of marijuana for recreational and medical use or significant needs to hire in certain industry sectors.

Medical Marijuana vs. Opioids

Neither science nor popular opinion has concluded whether medical marijuana is a better treatment option for pain than opioids. There are conflicting thoughts and limited research to aid in determining whether the use of medical marijuana is an effective

and less detrimental treatment option for managing chronic pain from workplace injuries. Opioids, on the other hand, have been studied at length for both their positive and negative impacts on injuries and to individuals. With the recent enactment of the *Medical Marijuana and Cannabidiol Research Expansion Act,* there is an expectation that research regarding the effectiveness of an alternative source of treatment will be forthcoming.

While medical marijuana use is commonly compared to opioid use with the benefit of being less addictive, it is not a simple comparison. While there has been much research on opioid use in the areas of dosages, side effects, and interactions, the same is not true for medical marijuana. In fact, physicians do not provide recommendations on marijuana strains or dosage. That is left to the injured worker and the medical marijuana dispensary. In addition, there is no FDA testing of medical marijuana and the potency labeling of products is not regulated.

A May 2018 article[4] noted that:

> "A study done in January 2017 by the National Academy of Sciences, Engineering and Medicine found substantial evidence that marijuana was an effective treatment for chronic pain and for the nausea and vomiting associated with chemotherapy. We do not know more about the effectiveness of marijuana as a treatment because it is classified as Schedule I by the [DEA]. This limits how much study can be done on it and the strain legally available for study is much less potent than what is available in commercial dispensaries.
>
> Should we be considering medical marijuana in workers' compensation? Any drug therapy is a passive treatment for chronic pain and it is unlikely to increase function. The impairment caused by marijuana will inhibit your ability to drive a car or work. Marijuana should not be considered the primary treatment for any condition in workers' compensation.
>
> It is possible that the use of marijuana to treat pain in workers' compensation could decrease opioid use. Studies have shown a significant decrease in opioid prescriptions and deaths in states with legalized medical marijuana. We know the significant side effects of the opioid medications, so marijuana may be a better alternative for some people.
>
> What we need right now is more studies on whether marijuana is indeed an effective treatment option for certain conditions. The first step in this is rescheduling it from a Schedule I to Schedule II so that it can be studied and prescribed.

4 "Marijuana and Opioids in Workers' Compensation"; Safety National; May 17, 2018.

A July 2019 article from the National Institute on Drug Abuse (NIDA)[5] noted that more research needed to be done on the effect of medical marijuana laws on opioid overdose deaths and cautioned against drawing a causal connection between the two. It stated that "early research suggested that there may be a relationship between availability of medical marijuana and opioid analgesic overdose mortality." One of NIDA's funded studies published in 2014 showed that opioid deaths had decreased in states with medical marijuana laws, but extending the data through 2017 showed a reversal in that trend. NIDA's conclusion is that more research is still needed on the benefits of cannabis or cannabinoids.

A 2018 article from *PropertyCasualty360*[6] noted that opioid abuse has cost employers $18 billion a year and individual workers may face a personal toll of potential job loss, family and legal problems, and addiction. So, pursuing options that are less addictive and equally or more effective than opioids, with fewer side effects, is warranted. The article noted that "marijuana is thought to be significantly less addictive, and doesn't lead to overdoses, according to medical experts. A recent study revealed that 93% of respondents found marijuana to be a more effective treatment[7] and one that produced fewer side effects than opioids, while other research has found it to be less costly."[8]

Where is some of this research being done? One high-profile industry is the National Football League Players Association, which recently agreed to allow the research of marijuana use as an alternative to painkillers.[9]

While studies are not universally available in the United States, interviews with professionals in the field indicate that there is a potential reduction in the usage of opioids. However, opioids are still prescribed in many claims and are not being fully replaced when medical marijuana is recommended.

There are legal and cultural hurdles and research to be done to better understand the effectiveness of using medical marijuana to treat workplace injuries and to determine whether it is a less addictive and less harmful treatment than opioids. Further developments in this area or other pain management treatments may provide clarity on effective treatments for pain management for injured workers.

5 "Medical Marijuana Laws and Opioid Overdose Rates"; National Institute on Drug Abuse; National Institutes of Health; July 5, 2019.
6 "Using medical marijuana to treat construction workplace injuries"; *PropertyCasualty360*; Jan. 29, 2018.
7 "93% of Patients Prefer Cannabis Over Opioids For Managing Pain, According to New Study"; Science Alert; June 30, 2017.
8 "Medical Marijuana Lowers Prescription Drug Costs"; Pain News Network; July 6, 2016.
9 "NFL offers to work with players' union to study marijuana for pain management"; *Washington Post*; July 31, 2017.

Conclusion

The relationship between marijuana and workers' compensation is evolving. States continue to legalize marijuana for medical and recreational use, the federal legislature continues to debate decriminalization and full legalization, and courts continue to weigh in on the impact to the workers' compensation system. This patchwork of sometimes contradictory laws has resulted in frustration across the industry (both on the side of the providers and injured workers) as they navigate this complex environment.

States are left to battle the marriage of state and federal laws without adequate research on the impact of marijuana use to an individual or ultimate expected costs.

Carriers and TPAs are charged with navigating when and how to reimburse injured workers and have frequently denied coverage unless mandated to do so.

Injured workers and doctors are having to determine which treatment options are the most appropriate and effective without an ability to fully test results. They are also faced with limited guidance on appropriate dosing where medical marijuana is recommended.

Given this rapid and constant evaluation, it is challenging for the committee to establish any concrete conclusions to benefit actuaries in their day-to-day work. Workers' compensation actuaries should work closely with claims professionals to understand the potential implications of medical marijuana laws on their projections.

Appendix

Court Cases and Updated Workers' Compensation Laws

1. U.S. Supreme Court, June 2022—*Declined to hear workers' compensation cases related to medical marijuana.* Two cases from Minnesota were sent to be reviewed by the high court but were denied due to fewer than four justices feeling that the legal challenges were merited. However, in 2021, Justice Thomas denounced the federal government's inconsistent approach to marijuana policies and suggested that outright national prohibition may be unconstitutional. It will take more time though to see how things may be handled at the federal level.

   U.S. Supreme Court Denies Medical Marijuana Workers' Compensation Cases| Marijuana Moment

2. Minnesota. October 2021—*Bierbach v. Digger's Polaris* and *Musta v. Mendota Heights Dental Center*. In both cases, employees were seeking reimbursement for medical marijuana treatment due to suffering injuries on the job. These workers were certified as eligible to participate in Minnesota's medical cannabis program. In the Musta case the parties stipulated that Musta's use of medical marijuana complied with the THC Therapeutic Research Act (THC Act), Minn. Stat. §§ 152.21-.37 (2020) and was reasonable and medically necessary, and causally related to the work injury.

   In both cases however, a divided Supreme Court of Minnesota held that the state's Workers' Compensation Court of Appeals (WCCA) lacks jurisdiction to decide whether federal law preempts Minnesota law that requires an employer to furnish medical treatment when the treatment for which reimbursement is sought is medical cannabis. The court said that "the federal Controlled Substances Act (CSA), 21 U.S.C.S. §§ 801-971, preempts an order made pursuant to the state's Workers' Compensation Law requiring an employer to reimburse an injured employee for the cost of medical cannabis used to treat a work-related injury. The Court stressed that the state cannot force an employer to facilitate an employee's unlawful possession of cannabis, either through work accommodations or reimbursement for its purchase."

   MN Supreme Court Says No to Mandatory Reimbursement for Medical Marijuana | The WorkComp Writer

3. New Hampshire, March 2021—*Appeal of Andrew Panaggio*. In this case, the injured worker appealed the initial decision of the New Hampshire Compensation Appeals Board, which found that the insurance company did not have to pay to reimburse for the medical marijuana treatment. The Board concluded that the reimbursement would be aiding and abetting the petitioner in the commission of a federal crime given the status of marijuana under the Federal CSA.

   However, on appeal the New Hampshire Supreme Court rejected that argument and found in favor of the injured worker. The court specifically found that the insurer is not "impossibly preempted" by the CSA in reimbursing the petitioner for their expenses related to medical marijuana. The court drew on decisions from other jurisdictions to conclude that the "knowingly" requirement of the crime of aiding and abetting is not met by the insurer when the insurer is required by New Hampshire law to reimburse the petitioner.

   Appeal of Andrew Panaggio | Supreme Court of New Hampshire | 03/02/2021 | www.anylaw.com

4. New Jersey, April 2021—*Vincent Hager v. M&K Construction.* In this case, the Supreme Court of New Jersey ruled that an employer may be required to reimburse the costs of an employee's medical marijuana. It further held that such a requirement does not conflict with the federal Controlled Substances Act. The initial decision to require payment was appealed, but the Supreme Court of New Jersey upheld the decision to reimburse, citing a number of arguments. The final conclusion was that "medical marijuana may be found, subject to competent medical testimony, to constitute reasonable and necessary care under New Jersey's workers' compensation scheme." Justice Solomon wrote "Marijuana's ability to relieve pain has been expressly recognized by the Legislature in the Compassionate Use Act. N.J.S.A. 24:6I-2(a), -3. Thus, competent evidence relating to medical marijuana's ability to restore some of a worker's function or, as in Hager's case, relieve symptoms such as chronic pain and discomfort, is sufficient to find such a course of treatment appropriate."

   The next issue before the New Jersey Supreme court was whether the CSA makes it illegal for employers to comply with state law. The conclusion of the court was as follows:

   > The CSA, as applied to the Compassionate Use Act, is effectively suspended by the most recent appropriations rider, in which Congress prohibited the DOJ from using allocated funds to prevent states, including New Jersey, from implementing their medical marijuana laws. Because DOJ enforcement of the CSA may not, by congressional action, interfere with activities compliant with the Compassionate Use Act, the court found that there was no "positive conflict" and that the CSA and the Act may coexist as applied to the court's Order.

   Based on this conclusion, the court rejected the employers reasoning that compliance with the order would be aiding and abetting a crime.

   New Jersey Supreme Court Orders Employer to Cover Costs of Medical Marijuana | scarincilawyer.com

5. Florida, June 2018—*Brinson v. Hospital Housekeeping Services—Rebuttable Presumption of Intoxication*. In this case, a Florida-based home health care worker was injured and taken to a hospital, where a urinalysis test was administered. The test revealed traces of THC, and the workers' compensation claim was denied based on the intoxication defense. Bonita Brinson appealed, and expert witnesses testified on her behalf that, "the drug tests only detect the presence of drug metabolites, but do not conclusively indicate that drugs are active in the blood stream or have caused impairment."

   The employer in this case had established a drug-free workplace, consistent with the Florida workers' compensation statute. This led to the "clear and convincing" standard to rebut the presentation. Despite the expert testimony, the court noted that Brinson did not offer a plausible alternative cause for the accident, nor did the expert witnesses have an opinion on whether Brinson was impaired at the time of the accident. The court found that the clear and convincing standard was not met, and the workers' compensation claim was denied.

   In a dissenting opinion, Judge John J. Makar noted that by the Florida statute, Brinson's employer may require a drug test of an injured employee only if the employer has reason to suspect that the injury was caused primarily by the use of a drug. The dissenting judge did not believe that this requirement was met based on the evidence presented.

   Bonita Brinson vs Hospital Housekeeping Services, LLC et al. | 2018 | Florida First District Court of Appeal Decisions | Florida Case Law | Florida Law | US Law | Justia

6. Kentucky, July 2018—*New Workers' Compensation Intoxication Rebuttable Presumption.* The Kentucky Legislature enacted Senate Bill 2, which brought changes to the entire workers' compensation system. This is the new rebuttable presumption that may bar benefits to a claimant who is intoxicated at the time of injury. This is important to the use of medical marijuana where levels of THC can stay in the system much longer than alcohol and while an employee may test positive for THC it may not mean they are or were impaired at the time of injury.

   Statute KRS 342.610(3)-(4) states that "if an employee voluntarily introduced an illegal, nonprescribed substance or a prescribed substance in excess of prescribed amounts into his or her body *detected in the blood,* in an amount that *could*

cause a disturbance of mental or physical capacities, **it shall be presumed that the illegal or nonprescribed substance caused the injury.** This is a fairly low threshold because it only requires that the amount *could* cause impairment, not that it actually did cause impairment."

This new statute shifts the burden to the employee to show one of the following two things for compensation:

1) The substance did not cause an impairment, or
2) The impairment did not cause the injury.

Kentucky's New Workers' Compensation Intoxication Rebuttable Presumption | Frost Brown Todd

7. Maine, June 2018—*Gaetan H. Bourgoin v. Twin Rivers Paper Company, LLC, et al.* In this case, the worker was given medical marijuana to treat chronic back pain after other types of treatment did not work. The plaintiff initially won the petition to have the employer pay for the treatment, however, on appeal this decision was overturned.

   The employer argued that requiring payment of the employee's medical marijuana was barred by the federal CSA even if the use was permitted by the Maine Medical Use of Marijuana Act (MMUMA). The Maine Supreme Court vacated the initial decision that the employer had to reimburse for the medical marijuana and held that "(1) in the narrow circumstances of this case, there was a positive conflict between federal and state law; and (2) consequently, the CSA preempts the MMUMA as applied here."

   BOURGOIN v. TWIN RIVERS P | 187 A.3d 10 (2018... | 20180614217| Leagle.com

   Bourgoin v. Twin Rivers Paper Co., LLC | 2018 | Maine Supreme Judicial Court Decisions | Maine Case Law | Maine Law | US Law | Justia