



CLM 2019 Annual Conference
March 13 -15 2019

Weed at Work

I. HOW DID WE GET HERE?

How did we get here?

Congress has been passing legislation controlling or outlawing addictive drugs for over 100 years with limited effectiveness. On Oct 7, 1970, in response to “Summer of Love” in San Francisco (1967) and Woodstock in upstate New York, President Richard Nixon signed the federal Controlled Dangerous Substance Act as a comprehensive approach to what he and Congress viewed as an “epidemic” or “war.” Marijuana was listed as a Schedule I drug meaning that it was both “addictive” and had no medicinal value. It was widely assumed that pursuant to the Supremacy Clause of the United States Constitution (Article VI Clause 2), all state laws to the contrary were pre-empted. Apparently they may not be.

So when is the Supremacy not Supreme?

Starting with California in 1996, and quickly followed in 1998 by Oregon, Alaska and Washington, states started distinguishing the Controlled Substance Act’s pervasiveness first with legislation that appears to directly challenge the federal law and then with judicial decisions nuancing the concept of pre-emption. Now 45 states plus the District of Columbia have statutes permitting medical marijuana use. In spite of President Trump’s call to enforce the CSA and his former Attorney General, Jeff Sessions’ promise to start prosecution more than two years ago, not a single prosecution has taken place. Is it because the Supremacy clause is not supreme? Actually the, it is because the federal Consolidated Budget Act prohibits the Department of Justice from spending funds on prosecuting all growing , distributing, carrying or using pursuant to state law.

Do state laws control the medical marijuana issue?

No. There is a plethora of federal laws that impact the state “safe harbor” medical marijuana laws. Most of the laws are forgotten during the back and forth of federal CSA versus state “safe harbor” laws. Americans with Disabilities Act, federal Consolidated Budget Act, Drug Free Workplace Act, Internal Revenue Code and federal banking laws are the major laws but they are not the only.

Interesting, but that doesn’t help me as an adjuster, now does it? What am I supposed to do?

II. HANDLING THE MEDICAL MARIJUANA CLAIM

How does the medical marijuana claim get initiated?

Generally, it is initiated by a doctor “authorizing” the treatment and the insurance company, TPA or employer denying the treatment. The court must then intervene. Other scenarios involve employees testing positive for marijuana in the course of employment. The issue becomes more complicated when an employee is prescribed marijuana for a work related injury, and wants to return to work.

If the states permit the use of medical marijuana, then why are the decisions all over the place?

There are a number of reasons. First, the court has to decide if there is enough medical evidence to find that the treatment is ordinary necessary and reasonable (each state has its own similar standard). Then, they have to look to see what the highest court in their jurisdiction has ruled if anything. Then there is the wrinkle that courts often find that the law allows medical marijuana but that it does not mean that they will require an insurance company, TPA or employer to pay for it.

So, as an adjuster, how do I value the case?

First you need to understand the court decisions on the issue in the jurisdiction. If the court has said that workers’ compensation court may not order a TPA, insurance carrier or employer to pay for the treatment that will impact the value. If the court says the TPA, insurer or employer has to pay, again the value will change. Then comes the question of how long will the treatment take place. Common belief at this point is that if there is going to be a long term regimen consider trying to buy out the regimen using three arguments: (1) if the matter is appealed to a higher court the employer’s chances of winning are very high at this time, (2) the cost of medical marijuana will come down as supply is now catching up to demand and (3) the present value for the future payments (that will be pushed down by supply and demand) are further reduced for present day value.

What else should I think about while handling a medical marijuana claim?

You need to know your insurance company or employer’s position on the issue. Some companies are more supportive of the issues than others. Some companies have to fear loss of federal contracts. Manufacturers and organizations with a truck or car fleet have to be particularly concerned.

How do I prepare for trial?

Coordinating with your attorney to ensure that you have an expert with proper credentials who can present, not merely that she does not believe that the requested regimen is not appropriate, but that there is a clear alternative.

Doctors cannot “prescribe” marijuana because prescription drugs are regulated by the federal Food and Drug Administration.