



*Medical Marijuana and Workers Comp.*  
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LLC**





# IL Medical Cannabis Act

# Background

- Effective January 1, 2014.
- Illinois' medical marijuana law legalizes the use of marijuana for medical, not recreational, purposes, and will be effective through 2018 as part of a Pilot Program.
- Pilot Program is administered by the Illinois Department of Public Health.
- Not everyone in the State of Illinois will be able to use marijuana – the Act contains several restrictions on who may legally use cannabis for medical purposes. 410 ILCS 130/65.
- Currently, cannabis use, medical or recreational, is prohibited by federal law (schedule I drug).

# Who Can Legally Use Marijuana?

Allows registered qualifying patients in Illinois with debilitating conditions to legally obtain prescriptions for marijuana.

## Definitions:

- **"Qualifying patient"** means a person who has been diagnosed by a physician as having a debilitating medical condition.
- **"Physician"** means a doctor of medicine or doctor of osteopathy licensed under the Medical Practice Act of 1987 to practice medicine and who has a controlled substances license under Article III of the Illinois Controlled Substances Act. It does not include a licensed practitioner under any other Act including but not limited to the Illinois Dental Practice Act.
- Statute also states that the physician shall be currently licensed to practice medicine in "all of its branches." 410 ILCS 130/35.

# Who Can Legally Use Marijuana?

## Definitions:

- “**Debilitating medical condition**” means one or more of the following:

Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn's disease, agitation of Alzheimer's disease, cachexia/wasting syndrome, muscular dystrophy, severe fibromyalgia, **spinal cord disease**, including but not limited to arachnoiditis, Tarlov cysts, hydromyelia, syringomyelia, Rheumatoid arthritis, fibrous dysplasia, spinal cord injury, traumatic brain injury and post-concussion syndrome, Multiple Sclerosis, Arnold-Chiari malformation and Syringomyelia, Spinocerebellar Ataxia (SCA), Parkinson's, Tourette's, Myoclonus, Dystonia, Reflex Sympathetic Dystrophy, **RSD (Complex Regional Pain Syndromes Type I)**, Causalgia, **CRPS (Complex Regional Pain Syndromes Type II)**, Neurofibromatosis, Chronic Inflammatory Demyelinating Polyneuropathy, Sjogren's syndrome, Lupus, Interstitial Cystitis, Myasthenia Gravis, Hydrocephalus, nail-patella syndrome, residual limb pain, **seizures** (including those characteristic of epilepsy), **Post Traumatic Disorder (PTSD)** or the treatment of these conditions;

(2) any other debilitating medical condition or its treatment that is added by the Department of Public Health by rule as provided in Section 45. 410 ILCS 130/10.

# Who Can Legally Use Marijuana?

- The patient must have a bona fide physician-patient relationship with the doctor providing the diagnosis of the debilitating disease. Must conduct physical exam but NOT at a location where cannabis is sold. 410 ILCS 130/35.
- The patient must be under that doctor's care for treatment of the disease.
- The doctor must provide written certification of the disease, that the patient is likely to receive therapeutic benefit from the medical use of cannabis to treat the disease or its symptoms, and that the doctor is providing treatment for the debilitating medical condition.
- Once the individual has received the physician's written certification, the individual must register with the Department of Public Health and be issued a valid registry identification card by the Department before he or she can purchase marijuana from a state-licensed cultivation center.

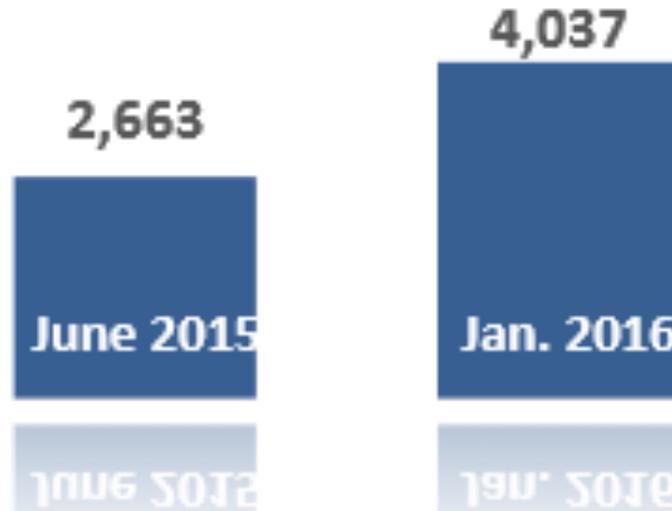


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# IL Medical Cannabis Mid-Year Report 2016

# IL Medical Cannabis Mid-Year Report 2016

## Number of Registered Qualifying Patients



*\* IL Department of Public Health-Division of Medical Cannabis*

# IL Medical Cannabis Mid-Year Report 2016

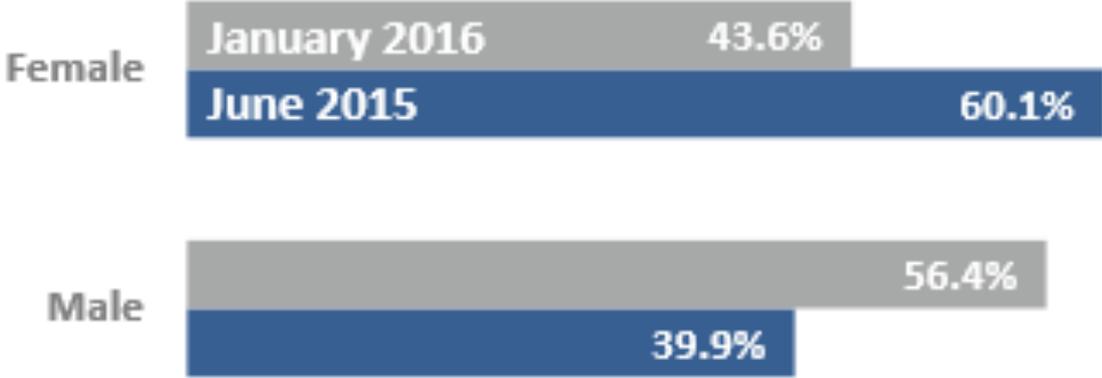
## Top Ten Debilitating Conditions for Qualifying Patients

June 2015		January 2016	
<b>1</b>	Severe Fibromyalgia	<b>1</b>	Cancer
<b>2</b>	Cancer	<b>2</b>	Severe Fibromyalgia
<b>3</b>	Spinal Cord Injury	<b>3</b>	Multiple Sclerosis
<b>4</b>	Multiple Sclerosis	<b>4</b>	Spinal Cord Injury
<b>5</b>	Spinal Cord Disease/Arachnoiditis	<b>5</b>	Traumatic Brain Injury/Post-Concussion Syndrome
<b>6</b>	Traumatic Brain Injury/Post-Concussion Syndrome	<b>6</b>	Rheumatoid Arthritis
<b>7</b>	Rheumatoid Arthritis	<b>7</b>	CRPS
<b>8</b>	CRPS (Complex Regional Pain Syndrome Type II)	<b>8</b>	Crohn's Disease
<b>9</b>	HIV/AIDS	<b>9</b>	Glaucoma
<b>10</b>	Crohn's Disease	<b>10</b>	Spinal Cord Disease/Arachnoiditis

*\*IL Department of Public Health-  
Division of Medical Cannabis*

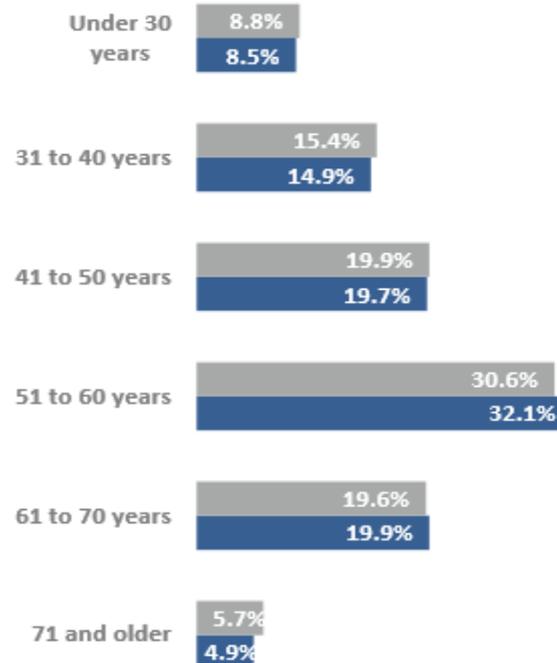
# IL Medical Cannabis Mid-Year Report 2016

## Qualifying Patients Applying for a Medical Cannabis Registry Identification Card



# IL Medical Cannabis Mid-Year Report 2016

## Age of Qualifying Patients Submitting Applications





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# IMPACT ON EMPLOYERS

# Impact on Employers

**Discrimination prohibited.** Registered patients are protected under the Act from “arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by an occupational or professional licensing board, for the medical use of cannabis in accordance with this Act.” Indeed, there is a rebuttable presumption that a registered qualifying patient is engaged in the medical use of cannabis if he or she is in possession of a valid registry identification card and is in possession of an amount of cannabis that does not exceed 2.5 ounces in a 14-day period. 410 ILCS 130/40.

- **Exceptions** (410 ILCS 130/30): Individual can be penalized for undertaking any task under the influence of cannabis when doing so would constitute negligence, or professional malpractice or misconduct. An individual also cannot possess or use cannabis in a school bus; on the grounds of any preschool, primary, or secondary school; or in a daycare or correctional facility. Further, an individual can be penalized for smoking marijuana in a public place where he or she could reasonably be observed by others, in a healthcare facility, or any other place where smoking is prohibited under the Smoke Free Illinois Act. In addition, certain professions cannot use medical marijuana, including active duty law enforcement officers, correctional officers and probation officers, firefighters, and those who have a school bus permit or commercial driver’s license.

# Impact on Employers

**Zero-tolerance policies allowed.** The Act does not prohibit an employer from adopting reasonable regulations concerning the consumption, storage, or timekeeping requirements for qualifying patients related to the use of medical marijuana. It also does not prohibit an employer from enforcing a policy on drug testing, zero-tolerance, or a drug-free workplace, so long as the policy is applied in a “nondiscriminatory manner.” 410 ILCS 130/50.

Employers may discipline a qualifying patient-employee who appears to be **impaired** while working and suffers decreased performance capabilities. However, the Act provides that the employee must be given a reasonable opportunity to contest the basis of the determination that he or she was impaired.

# Impact on Employers

An employer may consider a registered qualifying patient to be impaired when the **employee manifests specific articulable symptoms while working that lessen performance of employment duties**, including the employee's speech, physical dexterity, coordination, negligence or carelessness of operating equipment or machinery...carelessness that results in injury to self or others. 410 ILCS 130/50.

**Defense to Cause of Action.** Nothing in this Act shall be construed to create or imply a cause of action for any person against an employer for: (1) actions based on the employer's **good faith belief** that a registered qualifying patient used or possessed cannabis while on the employer's premises or during the hours of employment; (2) actions based on the employer's good faith belief that a registered qualifying patient was impaired while working on the employer's premises during the hours of employment; (3) injury or loss to a third party if the employer neither knew nor had reason to know that the employee was impaired. *Id.*



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# IMPACT ON IL WORKERS COMP.

# Impact on IL Workers Compensation

**Employee Intoxication.** Under the Illinois Workers Compensation Act, an employee is barred from recovering compensation for work injuries caused by his or her intoxication, **including impairment due to consumption of marijuana**. For accidents on or after September 1, 2011, recovery is barred if the employee's **intoxication** was the proximate cause of his injury, or if the employee's level of intoxication was sufficient to constitute a departure from employment. **Intoxication is presumed** if:

- An employee's level of intoxication is at a BAC level of .08 or greater;
- There is evidence of **impairment due to ingestion of cannabis** or controlled substances; or
- An employee refuses to submit to a test.

# Impact on IL Workers Compensation

**Employee Intoxication.** Evidence must show that the employee was so intoxicated that, as a matter of law, the injury arose out of employee's intoxication which was to a sufficient degree so as to be viewed as an abandonment or departure from employment. *Paganelis v. Indus. Comm'n*, 132 Ill. 2d 468 (1989).

**Rebuttable presumption.** Intoxication is the proximate cause of the injury when there is evidence of impairment due to unlawful or unauthorized drug use. 820 ILC 305/11.

# Impact on IL Workers Compensation



- “**Evidence of Impairment**” same as “**impairment**” defined under Cannabis Act 410 ILCS 130/50 (lower standard)?
- How to determine proximate cause when **marijuana can be in the system longer than alcohol**, it is difficult to objectively measure whether the use of marijuana was the proximate cause of the work injury. **Marijuana can remain in the person’s system anywhere from 24 hours to 30 days**, depending upon usage, proving whether the worker was impaired at the time of the work injury may be difficult.

# Impact on IL Workers Compensation

- Can employer still be entitled to the presumption, even though drug use may have been authorized and/or lawful?
- How does the employer go about preserving objective measurable use?





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# CASE LAW



# *Jeff Phillips v. Continental Tire*

- P sued R for alleged retaliation for seeking WC benefits.
- R had a tire manufacturing facility in Mt. Vernon.
- R had a written substance abuse policy which provided that refusal to submit to testing was immediate cause for suspension pending termination.
- Per policy, P could seek medical treatment in medical services facility and return to work without taking a drug test if P did not seek to initiate a WC claim.
- P complained of hand numbness, sought WC benefits and refused to submit to a drug test.
- P was terminated per substance abuse policy.

# *Jeff Phillips v. Continental Tire*

Seventh Circuit Court of Appeals found against P and noted:

- R had consistently applied the drug testing policy and had discharged other employees who refused to submit to drug test per policy.
- Other employees had initiated WC claims and were not discharged.
- Point to section 11 of the Act which provides for presumption of intoxication if P refuses to a drug test.
- Court stated that drug testing was not against public policy and cited to the Medical Cannabis Act which states that nothing shall prohibit an employer from enforcing a drug testing policy so long as it is applied in a nondiscriminatory matter.

[Jeff Phillips v. Continental Tire The Americas, LLC, 2014 WL 572339 \(2014\)](#)

# OSHA SECTION 1904.35(B)(1)(IV)

“Section 1904.35(b)(1)(iv) does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an objectively reasonable basis for testing, and the rule does not apply to drug testing employees for reasons other than injury-reporting. Moreover, OSHA will not issue citations under section 1904.35(b)(1)(iv) for drug testing conducted under a state workers’ compensation law or other state or federal law. Drug testing under state or federal law does not violate section 1904.35(b)(1)(iv).”

# OSHA SECTION 1904.35(B)(1)(IV)

“When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, the central inquiry will be whether the employer had a **reasonable basis** for believing that drug use by the reporting employee **could have** contributed to the injury or illness.”

“The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a **tool to evaluate the root causes of workplace injuries** and illness in appropriate circumstances.”

# *Payment of Prescribed Marijuana*

Section 8(a) of the Illinois Workers Compensation Act requires the employer to pay for medical treatment that is reasonable, necessary and causally related to the work injury. This includes medical, surgical and hospital treatment reasonably required to cure or relieve from effects of the accidental injury.

If employee is prescribed medical marijuana to relieve the affects of a work related injury, is the employer obligated to pay?

# Developing Case Law

## Gary Noll v Lepage Bakeries Inc (App. 2016, Maine)

- Arb ordered Lepage to reimburse Knoll for the cost of obtaining medical marijuana certificate, medical marijuana.
- Lepage appealed and argued:
  1. Ordering reimbursement is against federal law and puts it at risk for prosecution because the purchase, sell, and possession of marijuana, even for medical purposes, is illegal.
  2. Act provides that “private health insurer” cannot be required to reimburse costs for marijuana use.

# Developing Case Law

**Argument 1:** Ordering reimbursement is against federal law and puts it at risk for prosecution because the purchase, sell, and possession of marijuana, even for medical purposes, is illegal.

- Conflict of Law: Federal government's authority to prosecute drug offenses supersedes state law authorizing use of possession of marijuana.

## Court Response:

- New Mexico case of *Vialpando* wherein Court compelled reimbursement for medical marijuana and noted that although illegal under Federal law, the justice dept. has indicated that interfering with state medical marijuana laws is not one of it's enforcement priorities.

# Developing Case Law

## Court Response:

- Footnote 3, Professor Larson: Federal government has signaled it will continue to look the other way when it comes to the distribution and use of medical marijuana. December 16, 2014, then President Obama signed the Consolidated and Further Continuing Appropriations Act which, in effect, blocks use of Dept. of Justice funds to prevent States from implementing their own State laws that authorize use of medical marijuana. Congress has continued that measure through September 30, 2016.
- As such, reimbursement would not place Lepage at risk of prosecution.

# Developing Case Law

**Argument 2:** Act provides that “private health insurer” cannot be required to reimburse costs for marijuana use. This Chapter may not be construed to require: “A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana.”

## Court Response:

- Lepage is self-insured. Cites to *Deabay* wherein the Court noted that payments made by a health insurer could not be construed as payments by the employer or WC insurer **for purposes of tolling SOL**. Term “insurer” in SOL clearly contemplated WC carriers.

# *Developing Case Law*

## Court Response:

- Workers Compensation insurance is characterized by statute as casualty insurance, not health insurance.
- While both private health insurance and WC carriers are required to provide coverage for medical treatment, WC Act is also a substitute for and shields employers from civil liability.
- Private Insurance is governed by various state and federal laws, WC Act subjects employers and carriers to an entirely different set of legal and regulatory obligations with respect to liability for medical treatment.

# Developing Case Law

## Bourgoin v. Twin Rivers Paper Co. and Sedgwick (App. 2016)

- Arb ordered Twin Rivers to reimburse Knoll for the cost of obtaining medical marijuana certificate, medical marijuana.
- Twin Rivers appealed and argued:
  1. Reimbursement for medical marijuana violates Federal law. Main Marijuana Act protects public insurance programs and private health ins from being required to pay for medical marijuana.
  2. Treatment with medical marijuana cannot be considered reasonable and proper medical treatment.

# Developing Case Law

**Argument 1:** Reimbursement for medical marijuana violates Federal law. Main Marijuana Act protects public insurance programs and private health ins from being required to pay for medical marijuana.

## Court Response:

- Cited the reasons in the Noll case and rejected this argument.
- Footnote 3: Twin Rivers argued that ordering reimbursement is not reasonable and proper because, due to the nature of dispensaries., receipts are not required to appear on the same billing forms as other treatment under the Act. Thus there can be no oversight over the billing, and the system lacks accountability and is ripe for fraud.

# *Developing Case Law*

- The Arb ordered that Twin Rivers reimburse Petitioner for “out of pocket expenses to obtain medical marijuana as shown by proper receipts for purchases from a dispensary duly licensed by the state of Maine.”

# Developing Case Law

**Argument 2:** Treatment with medical marijuana cannot be considered reasonable and proper medical treatment.

- IME: Denied reasonableness based upon no accepted medical use and inadequate scientific and medical research supporting use of medical marijuana for medical purposes.
- Arb rejected IME, citing: (1) strong narcotics medicine failed; (2) P was found to be dependent on narcotics; (3) previous efforts to stop opioid use resulted in side effects followed psychiatric hospitalization; (4) evidence P had experienced significant benefit from medical marijuana while opioid treatment had failed; (5) evidence showed that after a long history of unsuccessful treatment for pain with conventional methods, medical marijuana has provided P with relief.

# Developing Case Law

States Where Reimbursement was Ordered:

## Connecticut

David Petrini, Claimant-Appellee, 6021 CRB-7-15-7, 2016 WL 6659149 (Conn. Work. Comp. Com. May 12, 2016) Compensation Review Board (CRB) upheld a trial commissioner's order that an employer must pay for the cost of an injured employee's medical marijuana going forward as prescribed by the claimant's physicians and to reimburse the claimant for his out-of-pocket medical marijuana expenses. The CRB found no basis for concluding that the current lack of FDA approval for medical marijuana compelled the trial commissioner to find that the claimant's use of medical marijuana failed to satisfy the "necessary or reasonable" standard. The employer also unsuccessfully argued that, because the monthly cost of the claimant's recommended marijuana dosage was more than three times the cost of his prescription medications, the use of medical marijuana was therefore neither reasonable nor necessary.

# Developing Case Law

## States Where Reimbursement was Ordered:

### Maine

Gaetan H. Bourgoin v. Twin Rivers Paper Co., Case No.: 89-01-36-55N, 2015 WL 1811598 (ME. Work. Comp. Bd. Mar. 16, 2015) aff'd App. Div. 16-26 (Aug. 23, 2016) Administrative Law Judge ordered the employer/insurer to reimburse injured employee for his out of pocket expenses to obtain medical marijuana. The employer unsuccessfully argued that, in addition to being inconsistent with the federal Controlled Substances Act, the implementing statute in Maine protects “private health insurers” from being required to provide coverage for medical marijuana. However, the ALJ determined that that implementing statute did not apply because the employer and its insurer are not private health insurers but rather “casualty insurers” per the plain language of the Maine Worker’s Compensation Act. Appellate Division affirmed, en banc. Maine Supreme Judicial Court sitting as the Law Court declined to accept the case for review.

# Developing Case Law

States Where Reimbursement was Ordered:

## Maine

Donald H. Doten, (Employee), Case No: 09-02-37-96C, 2015 WL 4920122 (ME. Work. Comp. Bd. July 8, 2015) ALJ ordered the employer/insurer to reimburse injured employee for his purchases of medical marijuana. The employer unsuccessfully argued that because marijuana is illegal under federal law, the insurer cannot be compelled to reimburse employee. The ALJ noted that “as long as the policy of the Department of Justice remains that actions in compliance with existing state laws for medical use of marijuana shall not be prosecuted ...” there is no reason to deny reimbursement for lawfully prescribed medical marijuana.

# Developing Case Law

States Where Reimbursement was Ordered:

## New Mexico

*Vialpando v. Ben's Auto. Servs.*, 2014-NMCA-084, 331 P.3d 975 The Court held that the state's Workers' Compensation Act authorizes reimbursement of medical marijuana and declined to hold that an order to an employer to reimburse would require the employer to commit a federal crime. The Court noted that the Act requires an employer to provide an injured worker "reasonable and necessary health care services from a health care provider." The court rejected the employer's argument that a doctor who dispensed the medical marijuana was not a "health care provider" and dispensed with the apparent conflict with federal law by noting that the "[e]mployer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute."

# Developing Case Law

States Where Reimbursement was Ordered:

## New Mexico

*Maez v. Riley Indus.*, 2015-NMCA-049, 347 P.3d 732 Reversing a workers' compensation judge compensation order that medical marijuana was not reasonable and necessary medical care for a claimant's compensable injuries, the Court of Appeals held that, despite ambiguities in the testimony by the treating physician, the evidence was sufficient to support a conclusion here that medical marijuana constituted reasonable and necessary medical care. The Court favorable cited its prior holding in *Vialpando*.

# Developing Case Law

States Where Reimbursement was Ordered:

## New Mexico

*Lewis v. Am. Gen. Media*, 2015-NMCA-090, 355 P.3d 850 In the third in a series of consistent rulings, the Court found that a claimant's use of medical marijuana constituted reasonable and necessary medical care and ordered reimbursement by the employer. Unlike the employer in *Vialpando* (infra), counsel for the employer here identified the specific federal statute that would be violated by the reimbursement. In rejecting the employer's argument for preemption, the Court found the argument speculative in view of existing Department of Justice (DOJ) memoranda and federal policy. The Court also noted the 2015 budget directed that funds made available DOJ may not be used to prevent states enumerated in the budget Act from implementing their own laws related to medical marijuana.

# *Developing Case Law*

## Common Arguments Against Reimbursement:

1. Violation of Federal Law;
  - a) Policy by Department of Justice.
  
2. Exclusion of health insurers;
  - a) Health insurer v. casualty insurance.
  
3. Reasonable and necessary.
  - a) IME
  - b) Exhausting conventional treatment
  - c) Evidence of relief from medical marijuana.

# Developing Case Law

## How about in IL?



410 ILCS 130/1 – 410 ILCS 130/999

“Nothing in this Act may be construed to require a government medical assistance program, employer, property and **casualty insurer**, or private health insurer to reimburse a person for costs associated with the medical use of cannabis.” 410 ILCS 130/40(d). [scheduled for repeal Jan 1, 2018]



# Workers' Compensation Liability

# WC Liability

So if the employer adopts a “zero tolerance” policy, and denies medical marijuana due to the exclusion, the employer is safe, right?



# WC Liability

**Impact on Liability for Payment of TTD Benefits.** While employers are able to adopt and enforce a “zero tolerance” policy under the Cannabis Act, what happens when the employee has a pending workers compensation claim?

# WC Liability

Injured worker has work restrictions that can be accommodated by the employer but for the “zero tolerance” policy, is the employer still obligated to pay for TTD?

Injured worker is able to return to work, unrestricted, but for worker's need for ongoing cannabis use and the employer has a “zero tolerance” policy. Is TTD owed?

# WC Liability

An injured worker otherwise entitled to receive workers compensation benefits as a result of the work related injury is later terminated for conduct unrelated to the injury, the employer's obligation to pay temporary total disability benefits continues until the employee's medical condition has stabilized and a state of maximum medical improvement has been reached.

*Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132 (2010).



# WC Liability

**Vocational Rehabilitation.** Injured employee has permanent work restrictions that cannot be accommodated by worker's prior position. Worker requires regular use of medical marijuana. Worker is scheduled for vocational assessment.

# WC Liability



- Given worker's required use of medical marijuana, is the worker a vocational candidate?
- Likelihood of worker being able to secure subsequent employment given majority employers have "zero tolerance" drug use policy.

# WC Liability

**In order to qualify for vocational benefits, worker must show:**

- Loss of earnings capacity; AND
- Evidence that rehabilitation plan will increase worker's earning capacity.
  - To determine satisfaction of this prong, Commission looks at certain factors...

# WC Liability

## National Tea Co., 97 Ill. 2d 424, IL Supreme Court:

- 1) Finding that the injury caused a reduction in earning capacity and evidence that rehabilitation will increase the worker's earning capacity;
- 2) Probability that worker's job security will be improved by rehabilitation;
- 3) Likelihood that worker will be able to obtain employment upon completion of training;
- 4) Work life expectancy of worker and the ability, motivation of worker to undertake rehabilitation;
- 5) Cost versus benefit of any given rehabilitation program.

# WC Liability

## National Tea, Factors Denying Rehabilitation:

- 1) Worker has sufficient skills without further training or education to obtain regular gainful employment at or near pre-injury or post-rehabilitation earnings;
- 2) Prior unsuccessful attempt at rehabilitation;
- 3) Prior successful rehabilitation program which would presently enable worker to resume gainful employment;
- 4) Finding that worker is not trainable due to age, education or background.

# WC Liability



- Based upon factors in *National Tea*, what if the employer takes the position that the worker is **NOT** a vocational candidate due to need for continued use of medical marijuana?

# WC Liability

## Exposure for Permanent Total Disability?

Section 8(f) of the IL WC Act (820 ILCS 305/8(f)) requires establishment of one of the following for PTD benefits:

- 1) Medical evidence that demonstrates worker's complete inability to work;
- 2) “Odd lot” disability demonstrated by permanent work restrictions significant enough that no reasonable stable labor market could exist to support worker;
- 3) Limited situations where worker's disability is so limited in nature that worker is obviously unemployable.



# Conclusion

# Conclusion

The Compassionate Use of Medical Cannabis Pilot Program Act may present serious challenges to employers in Illinois. While there is nothing currently in the IL Workers Compensation Act that expressly addresses the issue, perhaps this may become an issue for legislation as this unfolds in Illinois!

THANK YOU!!

