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Insurance Reimbursement for Medical Cannabis—Where Does NJ Stand Now?, authors Eileen Ficaro and Gregory Brown, New Jersey Law Journal, 5-3-2023

By Eileen Ficaro and Gregory F. Brown | May 08, 2023

Medical cannabis was legalized in New Jersey under the 2010 Compassionate Use Medical Marijuana Act, and became more widely available under the 2019 Jake Honig Compassionate Use Medical Cannabis Act. A 2020 referendum established that recreational marijuana is legal in New Jersey. With the legality of medical cannabis confirmed, New Jersey's legislature and courts are left with the practical implications of the drug's new status. Among them is when and under what circumstances an insurance company is required to reimburse a patient for medical cannabis. To date, insurance reimbursement for medical cannabis in New Jersey remains a patchwork quilt that yields counterintuitive results, and may remain that way for some time.

The enactment of New Jersey's Compassionate Use Act was met with great fanfare due to the relief it afforded to patients with chronic or terminal conditions. A less noticed feature of the act was its provision that nothing within it "shall 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 cannabis." See N.J. Stat. Ann. Section 24:6I-14. Stated differently, while medical cannabis is legally available to patients, they cannot expect their insurance carrier to pay for it.

One explanation for the provision is that most private health insurers are national in scope and are reluctant to provide reimbursement for cannabis due to its status as a "Schedule I" narcotic under the Controlled Substances Act of 1970. According to the CSA, Schedule I narcotics "have no currently accepted medical use in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse." Cannabis is included in this classification, along with heroin, LSD, methamphetamine and peyote. It follows that a health insurer could expose itself to liability if it aids and abets its insured in securing a Schedule I narcotic. A more cynical explanation for the private health insurer provision is the influence of the health insurance lobby in the State House.

In contrast, an employer or workers' compensation carrier can be required to reimburse an injured worker for medical cannabis. In 2021, the New Jersey Supreme Court decided Hager v. M&K Construction, 247 A.3d 864 (N.J. 2021). Hager involved an employee who suffered from chronic back pain due to a 2001 injury at a construction site. He became addicted to opioids for the pain, but came under the care of a physician who prescribed him medical cannabis, albeit at a cost of $600 per month. In the underlying workers' compensation proceeding, the employee claimed that medical cannabis allowed him to overcome his dangerous opioid addiction. His physician testified that medical cannabis carries a "very weak" risk of chemical addiction when compared to opioids, and is less likely to lead to injury or death. The employee added that medical cannabis "took the edge off." The employer's expert physician responded that medical cannabis had harmful effects of its own, and is psychologically addictive. He recommended exercise and toleration of the pain as a more productive course. The workers' compensation court disagreed, and concluded that "marijuana is the clearly indicated option." The workers' compensation court further observed that when the best interests of the injured worker were given their required consideration due under New Jersey's workers' compensation scheme, reimbursement was mandated.

The employer in Hager appealed to the New Jersey Supreme Court on several bases, including that it was a "private health insurer" under the Compassionate Use Act and could not be required to reimburse the employee for medical cannabis. The employer further argued that the federal CSA preempted the Compassionate Use Act, and that it would be exposed to criminal liability by aiding and abetting its employee's possession of cannabis, an illegal Schedule I narcotic. The New Jersey Supreme Court rejected both arguments.

First, the court determined that workers' compensation coverage is not private health insurance based on the New Jersey Health Insurance Code's statement that "health insurance does not include workmen's compensation coverages." See N.J.S.A. 17B:17-4. Second, the court determined that the Compassionate Use Act was not preempted by the federal CSA. In reaching its conclusion, the court observed that succeeding Congresses affirmatively declined to appropriate funds for the enforcement of the CSA as it related to cannabis, in part because the drug was either legal or decriminalized in many states. The Hager court determined that without a realistic threat of criminal prosecution, it was possible for the employer to comply with both the workers' compensation judge's order and the CSA. Accordingly, Hager reasoned, federal law does not preempt New Jersey's allowance of the possession of medical cannabis under the CSA.

Legislative efforts to build on Hager followed. In 2020 and 2022, Bills A1708 and A3511, respectively, were reported out of committee in the New Jersey Assembly. Each proposed that the Compassionate Use Act be amended to state that "an employer or workers' compensation insurance carrier or private passenger automobile insurance carrier shall provide coverage for costs associated with the medical use of cannabis." The bills also affirmatively responded to the Hager employer's claim of federal prosecution by relieving an employer or insurance carrier of compliance with the law "upon intervention by the federal government to enforce the Controlled Substances Act." Interestingly, the exclusion for private health insurers contained in the Compassionate Use Act was not affected under the proposal. The most notable aspect of the proposal is opening of the broad area of auto insurance to mandatory reimbursement.

In sum, an employee injured on the job in New Jersey may be entitled to reimbursement for the costs of medical cannabis to alleviate his or her symptoms, but a nonemployee in New Jersey with private health insurance with the same need is not entitled to similar reimbursement. This dichotomy is based on a single phrase in the Health Insurance Code that is arguably directed to a different legislative end. While the judiciary is not a legislature, Hager's analysis reflects the judiciary's intent to expand insurance reimbursement of medical cannabis where possible.

Hager's result may prove to be more consistent with reality. Indeed, a private health insurance carrier would typically reimburse its insured for a prescribed opioid while leaving a prescription for medical cannabis unreimbursed, even though each perform the same function of pain relief and are controversial. With the shift in public sentiment away from opioids and increasing toleration of cannabis, as evidenced by its legalization for recreational use, it is foreseeable that lawmakers may eventually require private health insurers to reimburse their insureds for medical cannabis. Still, the negative consequences and public costs of the increase in medical cannabis use that would follow a general health insurance reimbursement mandate should be carefully considered, especially in the shadow of the opioid epidemic.

Another dichotomy that affects the question of insurance reimbursement of medical cannabis is the dramatic difference in how it is considered at the federal and state level. Under the Nixon-era scheduling of narcotics under the CSA that remains in place today, cannabis "has no currently accepted medical use in the United States." This sentiment is the opposite of the New Jersey Legislature's findings in the Compassionate Use Act, which states that "Modern medical research has discovered a beneficial use for cannabis in treating or alleviating the pain or other symptoms associated with certain medical conditions[.]" N.J. Stat. Ann. Section 24:6I-2. Hager seemed to recognize the absurdity of placing medical cannabis in the same league as heroin and ecstasy, and that times have changed. Still, the Minnesota Supreme Court, another state where medical cannabis is legal, rejected the premise that it was possible for an employer to reimburse an injured worker for medical cannabis and still comply with the federal CSA. See Musta v. Mendota Heights Dental Center, 965 N.W.2d 312, 324 (Minn. 2021), cert. denied, 213 L. Ed. 2d 1064, 142 S. Ct. 2834 (2022). There, the court found that Congressional decisions on appropriations do not change the law, and that it is impossible for an employer to comply with both Minnesota law and the CSA. In that sense, a requirement that national public health insurers not be required to reimburse for medical cannabis in New Jersey is sound policy that provides a more stable and predictable environment for private health insurers in the state.

In the end, the debate over insurance reimbursement for medical cannabis may turn on New Jersey's citizens' values, as reflected in their legislature. New Jersey is evidently moving toward an insurance structure where cannabis will be treated as another therapy available to physicians and subject to insurance reimbursement. As Hager reflects, federalism provides enough flexibility to enable New Jersey to follow its course despite the federal CSA. For those reasons, insurers should expect reimbursement requirements for medical cannabis

to expand in New Jersey in the long term.

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