Pot for Pain

A Courtroom Conundrum in Workers' Compensation

By Susan K.H. Conley
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If a workers' compensation court orders a workers' compensation carrier to reimburse an employee for medical marijuana, the insurer could be subject to liability for committing crimes.

Thirty-three states have legalized medical cannabis and ten states have legalized recreational use of marijuana. The uncertain combination of the Controlled Substance Act, the failure of Congress to enact legislation legalizing marijuana, and the emerging state regulatory systems that have accompanied legalization present uncertainty in this evolving industry. This developing sector allows those with the knowledge base to guide employers and insurers adroitly through this legal maze.

Federal Law Overview

As a matter of federal law, marijuana is prohibited as a Schedule I drug under the Controlled Substance Act, 21 U.S.C. §812 (c) (CSA). Because marijuana is a Schedule I substance, the CSA makes it a crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana knowingly or intentionally. 21 U.S.C.S. §841(a)(1). The CSA also criminalizes "knowingly or intentionally… possess[ing] a controlled substance." *Id.* §844(a). Despite federal law, states continue to legalize marijuana both medically and recreationally.

In late 2014, Congress approved the annual appropriations bill. Under this bill, funds could not be used to interfere with the implementation of state medical marijuana laws. Consolidated Appropriations Act, 2014, §538. *See also* Consolidated Appropriations Act, 2019, §538. The rider to this bill was added after the most recent government shutdown and enacted February 15, 2019. Consolidated Appropriations Act, 2019.

Under the Obama administration, three memoranda established policy guidelines regarding states' medical marijuana legalization. Memorandum from David W. Ogden, U.S. Deputy Att'y Gen., for Selected U.S. States Att'ys (Oct. 19, 2009); Memo-

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randum from James M. Cole, U.S. Deputy Att'y Gen., for U.S. States Att'ys (June 29, 2011); Memorandum from James M. Cole, U.S. Deputy Att'y Gen., for all U.S. States Att'ys (Aug. 29, 2013). The August 2013 Cole memorandum provides that as long as dispensaries, providers, and individuals comply with state law in the distribution and use of medical marijuana, the federal government will not prosecute.

On January 4, 2018, U.S. Attorney General Jeff Sessions rescinded all of these preceding memoranda that advised against targeting providers and users who complied with state legal marijuana laws. Memorandum from Jefferson B. Sessions, U.S. Att'y Gen., for all U.S. Att'ys (Jan. 4, 2018). This is where we are today, with the federal government continuing to bury its head in the sand and failing to enact bills to legalize marijuana. Hence, it is up to states that have legalized or are evolving toward legalization, as well as individuals and businesses, to decide whether they want to take the risk of breaking the federal law, under which individuals possessing, producing, growing, or selling marijuana can be prosecuted. 21 U.S.C. §801.

The Controlled Substance Act

The federal statute regulating marijuana is the Controlled Substance Act (CSA), signed into law by President Richard Nixon in 1970, "to conquer drug abuse and to control the legitimate traffic in controlled substances." *Gonzales v. Raich,* 545 U.S. 1, 12 (2005). It is the main federal statute regulating the possession and use of certain substances such as heroin, LSD, and cocaine. The CSA places all substances into one of five schedules. This placement primarily is based on the substance's potential for abuse, safety, and dependence.

Schedule I is for the substances that the U.S. Food and Drug Administration (FDA) and the U.S. Drug Enforcement Administration (DEA) have determined have a high potential for abuse, for which there is no currently accepted medical use, and are, in the federal government's estimation, unsafe for use under medical supervision. Marijuana is classified as a Schedule I drug, along with heroin, peyote, and MDMA, also known as "Ecstasy" or "Molly." Any possession or use of the substance, even if it is legal under state law, is illegal under federal law. Even though there is state and public support of marijuana's medical use, the CSA has not caught up to the public sentiment.

Kendall Fisher notes five criteria that must be met for the DEA and FDA to find that a substance has medical treatment value:

1) the drugs chemistry must be known and reproducible;
2) there must be adequate safety studies;
3) there must be adequate and well-controlled studies proving efficacy;
4) the drug must be accepted by qualified experts; and
5) the scientific evidence must be widely available.

Cannabis and the Controlled Substance Act, CAP-impact Blog (Oct. 27, 2017) (citing Jonathan P. Caulkins *et al.*, *Marijuana Legalization: What Everyone Needs to Know* 84 (2nd ed. 2016)), https://www.capimpactca.com/.

Medical marijuana, according to the DEA in 2016, had a high potential for abuse, and the scientific and medical research had "not progressed to the point" that marijuana had "a currently accepted medical use," even when use was "severely restricted." Drug Enforcement Admin., *Schedule of Controlled Substances: Maintaining Marijuana in Schedule I of the Controlled Substances Act* (July 2016).

The position of the DEA remains unchanged today. Any attempts to reschedule marijuana have failed. Congress has introduced legislation to legalize and reschedule this drug; however, all legislation has failed or stalled in committee. This creates uncertainty for states that have legalized marijuana and for the insurance adjusters and the courts handling and deciding workers' compensation claims.

Preemption

The Supremacy Clause of the United States Constitution provides that federal law takes precedence over state law. *See* U.S. Const. art. VI. cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (emphasis added)).

To understand the conflict between state and federal law and the preemption doctrine, it is necessary to analyze and to understand the Supremacy Clause. The pertinent part of the Supremacy Clause provides, "the laws of the United States… shall be the supreme law of the land." In essence, when federal law conflicts with state law, federal law prevails.

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The doctrine of preemption is derived from the Supremacy Clause. There are two main types of preemption: express and implied. One type of implied preemption is "conflict preemption." When the state law is drafted in such a way that it becomes impossible to comply simultaneously with both the state and federal laws, it is recognized as "conflict preemption."

State laws that allow medical use of marijuana run counter to the CSA; therefore, there is a direct conflict with federal law. This is the rub for workers' compensation insurers and courts in deciding whether

to pay or to order payment for legally prescribed medical marijuana.

Preemption and State Marijuana Laws

Under the Supremacy Clause, "state laws are preempted when they conflict with federal law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). And "[t]his includes cases where compliance with both federal and state regulations is a physical impossibility…." *Id.* (internal quotation and citation omitted). The CSA preempts state laws with which it is in "a positive conflict":

> No provision of the subsection shall be construed as indicating an intent on the part of the Congress to occupy the field in which the provision operates, including criminal penalties, to the exclusion of the State law on the same subject matter which would otherwise be within the authority of the State, *unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.*

21 U.S.C. §903 (emphasis added).

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For example, this provision, on its face, allows a state to enact greater criminal penalties for the possession of marijuana. It does not, however, authorize any state to overrule what Congress said in the CSA.

In applying preemption to cases involving medical marijuana, courts are divided. Arizona, California, and Michigan have laws that decriminalize certain acts under state law related to medical marijuana use. In all three states, courts have held that the laws decriminalizing medical marijuana did not pose an obstacle to the federal enforcement of federal law. *See Reed-Kaliher,* 332 P.3d 591–92 (Ariz. Ct. App. 2014) aff'd, 237 Ariz. 119, 124 (Az. 2015); *Qualified Patients Assn v. City of Anaheim,* 187 Cal. App. 4th 734 (Cal. Ct. App. 2010) *Ter Beek v. City of Wyoming,* 846 N.W.2d 531, 537–41 (2014). *See* Heather Gray, Commentary: Federal Preemption of State Laws Regarding Medical Marijuana (January 21, 2015). Decriminalization did not prevent federal law enforcement officers from enforcing federal law. Thus, state law was not preempted in these cases.

Oregon reached a different conclusion. The court in this case found that the state provision legalizing possession of marijuana presented an obstacle to the enforcement of federal law, thereby creating a conflict. *Emerald Steel Fabricators v. Bureau of Labor and Industries, (BOLI)*, 230 P.3d 518, 528–29 (Or. 2010); *see* Gray, *supra*. The court only preempted (or severed) this section of the state statute, but not any other sections.

In June 2018, the legal landscape changed in the case of *Bourgoin v. Twin Rivers Paper Co. LLC*. The Supreme Judicial Court of Maine held that a company's workers' compensation carrier cannot be forced to pay for medical marijuana, citing the supremacy of federal law over state law as the basis for its decision. According to the Maine court, if the employer were to comply with an order from a hearing officer to subsidize medical marijuana under Maine's statute, then the employer would be engaging in conduct that would meet the elements of criminal aiding and abetting and be subject to penalties for violating the CSA. *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A.3d 10 (Me. 2018). The concerning issue is when workers' compensation courts construe marijuana laws as requiring insurers knowingly to finance employees' buying, possessing, or using a Schedule I controlled substance. This creates a "positive conflict" between those state laws and the CSA. Compliance with state marijuana laws and the CSA would be impossible. In the case of *We Are Am. v. Maricopa Cnty. Bd. of Sup'rs*, 297 F.R.D. 373, 392 (D. Ariz. 2013), the U.S. Department of Justice brought an action against five dispensaries for distributing medical marijuana. Despite the positive result for the dispensaries, this case should set off alarm bells for any party involved in a medical marijuana case. That employees seek marijuana for medical purposes, with the blessing of the states where it is legal, in no way diminishes the federal crime with which they could be charged.

Courts across the country have acknowledged this issue, specifically in Florida, Maine, and Vermont, and they have concluded that federal law preempts workers' compensation courts from compelling reimbursement for medical marijuana. In *Bourgoin*, the court noted the CSA preempts the Maine Medical Use of Marijuana Act, and when the Maine statute "is used as the basis for requiring an employer to reimburse an employee for the cost of medical marijuana, the order based on the [act] must yield." *Bourgoin v. Twin Rivers*, 187 A.3d at 22. *See Gaetan H. Bourgoin, (Employee)*, No. Case No.: 89-013655N, 2019 WL 913756, at *1 (Me. Work. Comp. Bd. Jan. 29, 2019) (following *Gaetan* to deny "the employee's petition seeking reimbursement for the cost of medical marijuana").

In *Patrick Shawn Jones, Employee/Claimant vs. Grace Healthcare Center, Employer*, the Florida court refused to order an employer or insurer to pay for marijuana, because doing so would have compelled a CSA violation. 2019 WL 1594488, at *7 (Fla. Off. Comp. Judge Comp. Cl.). The court noted that to require an employer or carrier to pay for or to facilitate a worker's obtainment of marijuana would be in violation of the federal Controlled Substances Act (CSA), and would require the employer or carrier to commit an act that would expose them to criminal liability under federal law. The Florida court went on to state: "[E]ven in some states without such an exclusion, the courts have held that a workers' compensation employer or carrier may not be ordered to pay for medical marijuana, because such an order would require the employer or carrier to commit a federal crime." *Id.* at *6. (citing *Michael Hall v. Safelite Group, Inc.*, Op. No. 06-18WC (Vt. Mar. 28, 2018); *Hall*, No. 06-18WC, at ¶ 36 ("I interpret the language of §4474c(b) to mean just what it says. The fact that medical marijuana can now be legally prescribed, distributed and used means that an insurer who wants to cover its costs on

behalf of a registered patient can do so without violating Vermont law. However, given the uncertainties engendered by the drug's continued illegality under federal law, it cannot be compelled to do so.").

Workers' compensation courts that have addressed the preemption issue, but disagreed with the above analysis, have relied on the premise that any concern that an employer or insurer might incur criminal liability is speculative. *See Appeal of Panaggio*, No. 2017-0469, 2019 WL 1067945, at *4 (N.H. Mar. 7, 2019) ("The board did not cite any legal authority for its conclusion, much less identify a federal statute that, under the circumstances of this case, would expose the insurance carrier to criminal prosecution; thus, we are left to speculate.") (citing and following *Lewis v. American General Media*, 355 P.3d 850, 858 (N.M. Ct. App. 2015) (rejecting as "speculation" the employer's argument that reimbursing an injured employee for medical marijuana renders it criminally liable under federal law)); *Vialpando v. Ben's Auto. Servs.*, 2014-NMCA-084, ¶ 15, 331 P.3d 975, 980 (rejecting the employer's CSA-based preemption argument directed at workers' compensation law because the "Employer does not cite to any federal statute it would be forced to violate, and we will not search for such a statute." The court went on to apply a reasonableness and necessity standard).

The reasoning of these courts is faulty because the federal CSA does not exempt medical marijuana and specifically states that marijuana serves no medical purpose, and it cannot be safely monitored under medical supervision. *See* 21 U.S.C. §812(b)(1). *See also Marin All. For Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1159 (N.D. Cal. 2011) (following *Gonzales v. Raich*, 545 U.S. 1, 12 (2005), declining to rule contrary to *Raich* that marijuana has no medical value, and rejecting the plaintiffs' argument that the CSA's scope under the Commerce Clause did not include "marijuana grown only in California, pursuant to California State law, and distributed only within California, only to California residents holding state-issued cards, and only for medical purposes").

The Maine court put the point well in *Bourgoin*: to the extent that Maine workers' compensation law required an employer to subsidize Bourgoin's use of medical marijuana, the employer would be aiding and abetting a federal crime. In addition to facing prosecution for manufacturing, distributing, dispensing, or possessing marijuana, the federal prosecution can be directed against a "principal," which is defined as any individual who "commits an offense against the United States or *aids, abets*, counsels, commands, induces or procures its commission." 18 U.S.C.S. §2(a) (Pub. L. No. 115–181) (emphasis added). Section 2 "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission." *Rosemond v. United States*, 572 U.S. 65, 134 S. Ct. 1240, 1245, 188 L.Ed.2d 248 (2014).

As the *Rosemond* Court recognized, "almost every court of appeals has held [that] a defendant can be convicted as an aider and abettor without proof that he participated in each and every element of the offense." *Id.* at 1246 (quotation marks omitted) (alteration omitted). Thus, "a person is liable under [section] 2 for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Id.* at 1245.

The *mens rea* required for aiding and abetting is an "intent [that] must go to the specific and entire crime charged," such as "when a person actively participates in a criminal venture with full knowledge of the circumstances constituting the charged offense." *Id.* at 1248–49. Put another way, "for purposes of aiding and abetting law, a person who actively participates in a criminal scheme *knowing* its extent and character *intends* that scheme's commission," and on that basis, *the person* is criminally liable. *Id.* at 1249 (emphasis added). *See also id.* at 1250 ("The law does not, nor should it, care whether [the defendant] participates with a happy heart or a sense of foreboding. Either way, [the defendant] has the same culpability, because either way [the defendant] has *knowingly* elected to aid in the commission of a [crime].") (emphasis added).

Therefore, were Twin Rivers to comply with the administrative order by subsidizing Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all of the elements of criminal aiding and abetting as defined in section 2(a). Were Twin Rivers to comply with the hearing officer's order and knowingly reimburse Bourgoin for the cost of the medical marijuana as permitted by the Maine Medical Use of Marijuana Act, Twin Rivers would necessarily engage in conduct made criminal by the CSA—aiding and abetting Bourgoin to purchase, possess, and use marijuana—by acting with knowledge of what it was doing. *Bourgoin*, 187 A.3d at 16–17, 19.

Workers' compensation courts that have addressed the preemption issue, but disagreed with the above analysis, have relied on the premise that any concern that an employer or insurer might incur criminal liability is speculative.

The Eighth Circuit recently concluded in *Schostag* that the criminal defendant's "use of marijuana—even for medical purposes—contravenes federal law" under the CSA. *United States v. Schostag*, 895 F.3d 1025, 1028 (8th Cir. 2018). The court stated, "Although some medical marijuana is legal in Minnesota as a matter of state law, the state's law conflicts with federal law." *Id.* (citing *United States v. Hicks*, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) ("It is indisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana."). The *Schostag* court concluded that "the district court

had no discretion to allow [the defendant] to use medical marijuana while on supervised release." *Id.* That was even though the defendant's "physician prescribed him medical marijuana for chronic pain." *Id.* at 1027.

The Colorado Supreme Court concluded similarly in *People v. Crouse*. The Colorado Constitution "require[d] law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge." *People v. Crouse*, 2017 CO 5, ¶¶ 1–2, 388 P.3d 39 (Colo. 2018). That created a "positive conflict" with the CSA—and preemption—because the CSA "prohibits the distribution of marijuana, with limited exceptions," whereas the constitution's provision, in effect, required law enforcement to distribute medical marijuana. *Id.*

In essence, until federally legalized, the risk in these cases is that a workers' compensation insurer who pays, or is ordered by a court to pay, for medical marijuana could be liable for criminal conspiracy if the insurer knowingly financed an employee's "unlawful" purchase, possession, and use of medical marijuana.

It is thus no surprise that courts have also refused to enforce marijuana contracts. In the case of *Staffin v. Cnty. of Shasta*, No. 2:13-CV-00315 JAM, 2013 WL 1896812, at *4 (E.D. Cal. May 6, 2013), the court dismissed the plaintiffs' Contracts Clause claim, stating, "Because Plaintiffs cannot allege a valid contract under federal law, the complaint cannot be saved by amendment and therefore granting Plaintiffs leave to amend would be futile." *See also Hemphill v. Liberty Mut. Ins. Co.*, No. CV 10-861 LH/RHS, 2013 WL 12123984, at *2 (D. N.M. Mar. 28, 2013) ("This federal court, even sitting in diversity, cannot force Defendant to recompense Plaintiff for medical expenses that are contrary to federal law and federal policy, even if the contract generally provides for the payment of future medical expenses."); *Tracy v. USAA Cas. Ins. Co.*, No. CIV. 11-00487 LEK, 2012 WL 928186, at *13 (D. Haw. Mar. 16, 2012) ("To require Defendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy, as reflected in the CSA, Gonzales, and its progeny.").

The CSA imposes harsh criminal penalties when it comes to Schedule I substances such as marijuana. Those include prison sentences of ten or even twenty years in extreme cases, in addition to stiff fines, for those who "knowingly or intentionally" grow, distribute, dispense, or possess controlled such substances. *See* 21 U.S.C. §841(b).

Penalties are not reserved for principal actors. Conspirers are included: the CSA extends "the same penalties as those prescribed for the offense" to any person who "conspires to commit" the offense, when the offense was the conspiracy's "object." *See* 21 U.S.C. §846. As mentioned, the CSA is subject to the general aiding-and-abetting statute, under which whoever "aids, abets, counsels, commands, induces or procures [an offense's] commission, is punishable as a principal." 18 U.S.C. §2(a). S*ee, e.g.*, *United States v. Posters N Things Ltd*, 969 F.2d 652, 661–62 (8th Cir. 1992), *aff'd sub nom. Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994). *See also United States v. Smith*, 573 F.3d 639, 646 (8th Cir. 2009) (noting that the CSA's scope also includes "[l]ay persons who conspire with or aid and abet a practitioner's unlawful distribution of drugs").

In essence, until federally legalized, the risk in these cases is that a workers' compensation insurer who pays, or is ordered by a court to pay, for medical marijuana could be liable for criminal conspiracy if the insurer knowingly financed an employee's "unlawful" purchase, possession, and use of medical marijuana. *See U.S. v. Hamilton*, 837 F.3d 859, 861 (8th Cir. 2016). ("[T]he three elements of a conspiracy offense [are]: (1) a conspiracy existed for an illegal purpose; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly joined in it.… The government need not prove that the defendant knew all the conspirators or was aware of all the details.") (quotations omitted). The insurer would likewise have aiding-and-abetting liability for the same action. *See United States v. Farid*, 733 F.2d 1318, 1319 (8th Cir. 1984) (Ex. 134) ("The essential elements of aiding and abetting are: (1) the defendant associated himself with the unlawful venture; (2) he participated in it as something he wished to bring about; and (3) he sought by his actions to make it succeed."). Whether the insurer supplied the money before or after the drug purchase would be immaterial. *See United States v. York*, 578 F.2d 1036, 1040 (5th Cir. 1978). ("[T]he clock does not stop for purposes of determining whether a participant is properly characterized as an aider and abettor… the moment a substantive crime is sufficiently complete to support a conviction.").

Conclusion

Thus, if a workers' compensation court orders a workers' compensation carrier to reimburse an employee for medical marijuana, the carrier could be subject to liability for committing these crimes, and, to an extent, the court would be complicit in furthering the employee's federal crimes under the CSA. If an employee chooses to open him- or herself up to criminal prosecution under the CSA, that is his or her choice. However, for a court to order and subject an insurer to the crimes described here is patently unfair and certainly not the law in any state. Even if it were a state's law, that law should be preempted by the Supremacy Clause and the CSA.