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# Lessons From N.M. for N.J.: Can Marijuana be Considered Reasonable and Necessary Medical Treatment?

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Key Points:

- Medical



marijuana may be deemed reasonable and necessary medical treatment.

- Find out if a doctor is licensed to prescribe medical marijuana before authorizing treatment.

Marijuana has been making headlines across the country, and New Jersey is no exception. On March 21, 2015, approximately 200 protestors gathered outside the New Jersey Statehouse for the “Spring Smoke Out” rally advocating the legalization of marijuana in the state.

New Jersey is already one of 20 states, along with the District of Columbia, that has passed legislation legalizing medical marijuana. New Jersey’s Compassionate Use Medical Marijuana Act was signed into law on Jan. 18, 2010. The Act placed the responsibility for implementation with the New Jersey Department of Health, which established the Medicinal Marijuana Program to accomplish the same. The Medicinal Marijuana Program is still in its infancy. However, in light of the *Maez v. Riley Industrial* decision from the New Mexico Court of

Appeals, we need to understand how the Medicinal Marijuana Program works and the potential interplay with the workers' compensation system.

On Jan. 13, 2015, in *Maez v. Riley Industrial*, 2015 N.M.App. LEXIS 7 (N.M.Ct.App. Jan. 13, 2015), the Court of Appeals of New Mexico issued one of the most liberal medical marijuana decisions to date. The petitioner, Miguel Maez, suffered two compensable work-related injuries to his lumbar spine during the course and scope of his employment with the respondent, Riley Industrial. The petitioner received temporary total disability benefits and authorized medical treatment.

His authorized treating physician, Dr. Anthony Reeve, treated the petitioner with a variety of prescribed medications, including several opioids. As the petitioner was participating in long-term opioid therapy, Dr. Reeve performed regular urine drug testing. During one of the tests, the petitioner tested positive for marijuana. Dr. Reeve informed the petitioner that if he was going to use marijuana, he needed to have a medical marijuana license. The petitioner was provided with the required medical marijuana license by Dr. Reeve.

The evidence at trial showed that Dr. Reeve signed the certification for the petitioner's participation in the state's medical marijuana program, certifying that he had a debilitating medical condition and that the potential health benefits of the medical use of marijuana would outweigh the health risks to the patient. He also certified that the petitioner's unrelieved symptoms had failed other medical therapies. However, when asked, "...because you signed for (medical marijuana), do you believe that it is an appropriate medical treatment for (petitioner's) herniated disc?," Dr. Reeve responded, "[w]ell, I think I need to be really clear on this issue. What happens is patients are going to use the cannabis (marijuana) either one way or the other. He already tested positive for it. And so I explain to patients, 'If you are going to use cannabis, you should probably have a license for it ...' And if patients request that I sign it, I will sign for them, but I am not recommending or distributing or in any way advocating for the use of medical cannabis."

The workers' compensation judge found that the authorized treating physician did not prescribe medical marijuana and concluded that, as a result, medical marijuana was not reasonable and necessary medical care. The petitioner appealed. The New Mexico Court of Appeals ruled that, because Dr. Reeve had treated the petitioner with traditional pain management that had failed and because he had adopted a treatment plan based on medical marijuana, the lower court's conclusion that medical marijuana was not reasonable and necessary medical care was not supported by substantial evidence in the record, and the court reversed the decision.

This decision is scary for many reasons and has prompted many respondents to wonder if this could happen to them. The

New Jersey and New Mexico workers' compensation systems are very similar. The New Mexico workers' compensation statute requires an employer to provide an injured worker with "reasonable and necessary health care services," akin to the requirements of N.J.S.A. 34:15-15, which mandates that New Jersey employers furnish medical, surgical or other treatment and hospital services necessary to cure and relieve the worker of the effects of the injury and to restore function.

Likewise, the New Jersey Compassionate Use Medical Marijuana Act is comparable to the New Mexico law governing medical marijuana, known as the Lynn and Erin Compassionate Use Act. Therefore, New Jersey respondents should heed the Maez case. It is imperative that they understand how the New Jersey Medicinal Marijuana Program works in conjunction with the New Jersey workers' compensation system to guard against marijuana being deemed "reasonable and medically necessary."

Medical marijuana laws vary widely from state to state. In New Jersey, medical marijuana is limited to the treatment of patients with one of the following approved debilitating medical conditions: amyotrophic lateral sclerosis, multiple sclerosis, terminal cancer, muscular dystrophy, inflammatory bowel disease, including Crohn's Disease, and terminal illness if the physician has determined that a patient has less than 12 months to live. Patients with seizure disorders, including epilepsy, intractable skeletal muscular spasticity and glaucoma, may also be prescribed medical marijuana if intolerant to conventional therapy. Severe or chronic pain, severe nausea or vomiting, cachexia wasting syndrome resulting from positive status of human immunodeficiency virus, acquired immune deficiency syndrome or cancer may also be treated with medical marijuana.

The Medicinal Marijuana Program will not accept any petition to add to the approved list of debilitating medical conditions before completing at least two annual reports required pursuant to N.J.A.C. 8:64-4.2. According to the New Jersey Department of Health Medicinal Marijuana Program 2014 Annual Report, released March 2015, there are approximately 3,727 qualifying patients registered in the Medicinal Marijuana Program. Of the qualifying patients, the overwhelming majority are being treated for intractable skeletal spasticity and severe or chronic pain.

Medical marijuana may only be prescribed by a physician registered with the Medicinal Marijuana Program. As of Dec. 31, 2014, there were 325 physicians registered as active with the program. Physicians who wish to participate in the program must hold an active New Jersey medical license in good standing and issued by the New Jersey Board of Medical Examiners, possess an active controlled dangerous substance registration issued by the New Jersey Division of Consumer Affairs that is not subject to limitation, and practice within the state of New Jersey. In addition, the physician must establish a bona fide relationship with a patient in order to register them

with the program. A bona fide physician-patient relationship is one in which the physician has ongoing responsibility for the assessment, care and treatment of a patient's debilitating medical condition whereby: 1) the physician-patient relationship has existed for at least one year, or the physician has seen or assessed the patient for the debilitating medical condition on at least four visits; or 2) the physician assumes responsibility for providing management and care of the patient's debilitating medical condition after conducting a comprehensive medical history and physical examination, including a personal review of the patient's medical records maintained by other treating physicians, reflecting the patient's reaction and response to conventional medical therapies. A list of all registered physicians can be found on the Department of Health Medical Marijuana Program website.

All medical marijuana patients must register to participate in the program, and medical marijuana may only be distributed at an approved alternative treatment center. According to the New Jersey Department of Health Medicinal Marijuana Biennial Report released in February 2014, the average price for one ounce of medicinal marijuana dispensed by New Jersey's alternative treatment centers is \$469.

In New Jersey, a respondent's most powerful tool when defending any workers' compensation claim is the right to direct the injured worker's medical treatment. As a result, the easiest way to avoid being deemed responsible for a prescription for medical marijuana is to avoid authorizing treatment with a physician licensed with the state of New Jersey to prescribe medical marijuana. However, if faced with a request to authorize medical marijuana as a reasonable and medically necessary treatment plan, consider raising the following arguments:

1. Medical marijuana is still classified as a Schedule I Drug under federal law, making its use for any purpose illegal on the federal level.
2. Medical marijuana has not gone through the same studies and Phase III clinical trials for pain management that opioids have, and, therefore, its medicinal benefits have not been proven.
3. According to Dr. Theresa Genovese-Elliott of the Spine and Pain Institute of Santa Fe, there are insufficient testing parameters for medical marijuana.
4. The FDA has not approved marijuana for the treatment of any condition or disease.

As the implementation of New Jersey's medical marijuana law rolls on, the interplay between the New Jersey workers' compensation system and the Medicinal Marijuana Program will undoubtedly present challenges. Therefore, respondents should prepare now before the smoke clears.

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