BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NO. E120634

SIDNEY W. JONES, EMPLOYEE	**CLAIMANT**
AMERCABLE CORP (EL DORADO), EMPLOYER	**RESPONDENT NO. 1**
CNA INSURANCE CO., INSURANCE CARRIER/TPA	**RESPONDENT NO. 1**
DEATH & PERMANENT TOTAL DISABILITY	**RESPONDENT NO. 2**

OPINION AND ORDER FILED JUNE 17, 2021

Hearing before the Arkansas Workers' Compensation Commission (the Commission), Administrative Law Judge (ALJ) Mike Pickens, in El Dorado, Union County, Arkansas, on March 18, 2021.

The claimant was represented by the Honorable F. Mattison Thomas, III, Thomas Law Firm, El Dorado, Union County, Arkansas.

Respondent No. 1 was represented by the Honorable Karen H. McKinney, Barber Law Firm, Little Rock, Pulaski County, Arkansas.

Respondent No. 2, represented by the Honorable Christy L. King, State of Arkansas, Death & Permanent Total Disability Trust Fund, waived appearance at the hearing.

INTRODUCTION

In the Prehearing Order filed February 26, 2021, the parties agreed to the following stipulations which they modified and affirmed on the record at the hearing:

1. The Arkansas Workers' Compensation Commission (the Commission) has jurisdiction over this claim.
2. The employer/employee/carrier-TPA relationship existed with the claimant at all relevant times including November 26, 1991, when the claimant sustained a compensable injury to both arms, which necessitated the amputation of one arm beginning at the elbow, and 27% permanent anatomical impairment to the other arm.

3. The claimant has been determined to be permanently and totally disabled, and Respondent no. 2 is paying permanent total disability (PTD) benefits at the appropriate rate.

4. Respondent No. 1 controverts the requested medical treatment.

5. The parties specifically reserve any and all other issues for future determination and/or litigation.

(Commission Exhibit 1 at 1-2; Hearing Transcript at 4-7). Pursuant to the parties' agreement, the issues litigated at the hearing were:

1. Whether the claimant's authorized treating pain management physician, Dr. Carlos Roman's, recommended prescription of medical marijuana is related to, and constitutes reasonably necessary medical treatment for, the claimant's admittedly compensable injuries pursuant to the Arkansas Workers' Compensation Act (the Act).

2. If Dr. Roman's recommended use of medical marijuana is deemed to constitute reasonably necessary medical treatment whether, as a matter of law, the Commission may, or has the authority to require the respondents to pay for, and/or reimbursement the claimant for it.

3. Whether the claimant's attorney is entitled to a controverted fee on these facts.

4. The parties specifically reserve any and all other issues for future litigation and/or determination.

(Comms'n Ex. 1 at 2; T. 4-7).

The claimant contends medical marijuana was approved by the voters of the State of Arkansas as a medical treatment for certain conditions, one (1) of which is constant and irretractable pain. The claimant contends he certainly experiences constant, irretractable pain. The claimant contends further medical marijuana is now accepted by the vast majority of physicians, as well as states, as a treatment for pain. This medical marijuana is being used to reduce the reliance

on opioids. Therefore, the claimant contends the Act does and rightfully should require respondents – in this case Respondent No. 2 – to pay for the cost of his medical marijuana prescription. The claimant specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 2-3; T. 8-14).

First, Respondent No. 1 contends they have approved and paid for all the claimant's legal, related, reasonably necessary pain management treatment, and they stand ready, willing, and able to continue to pay for Food and Drug Administration (FDA) approved pain management treatment that is related to, and reasonably necessary for treatment of the claimant's compensable injury. Second, Respondent No. 1 contends that, as a matter of law, the Medical Marijuana Amendment 98 to the Arkansas Constitution (Ark. Constitution, Amend. 98) unequivocally states in plain language that health insurers shall not be required to pay for medical marijuana and, therefore, this provision applies to workers' compensation since it is a form of medical insurance. Third, and alternatively, if the Commission deems the applicable provision does not apply to workers' compensation claims, Respondent No. 1 contends marijuana continues to be classified as a Schedule I Controlled Substance under federal law, and it would be illegal under federal law for an out-of-state insurance company to essentially aid and abet a criminal act by paying for medical marijuana in the state of Arkansas. Fourth, Respondent No. 1 contends the Commission has gone through the formal, statutorily-mandated administrative rule-making process, and adopted a Drug Formulary which, among other things, only authorizes workers' compensation insurers to pay for FDA approved medications. *See,* AWCC Rule 099.41. Marijuana, medical or otherwise, remains illegal under federal law, clearly is not an FDA approved drug and, therefore, it is not a

"prescription" medication for which Respondent No. 1 may be deemed liable. Fifth and finally, Respondent No. 1 contends that, as a matter of law, medical marijuana does not, nor may it properly be deemed, to constitute reasonably necessary medical treatment pursuant to the Act. Respondent No. 1 specifically reserves any and all other issues for future litigation and/or determination. (Comms'n Ex. 1 at 3; T. 14-18).

Respondent No. 2 contends it has been and is paying all appropriate PTD benefits. Respondent No. 2 waives its right to appear at the hearing, and defers to the outcome of the litigation. (Comms'n Ex. 1 at 3).

The record consists of the hearing transcript and any and all exhibits contained therein and attached thereto. In addition, the record consists of the parties' blue-backed briefs, and any and all relevant cases, or articles, or other primary/precedential, or persuasive authority contained therein or attached thereto.

STATEMENT OF THE CASE

The basic, relevant facts of this claim are straight-forward. I will address the primary facts in this section of the opinion, but will also include other facts in the record not contained in this section in the "Discussion" section, *infra*.

The claimant, Mr. Sidney W. Jones (the claimant), was 51 years old at the time of the hearing. When he was 30 years old, the claimant was operating a machine at his place of employment, Amercable, on November 26, 1991, almost 20 years ago. As he was performing his job duties, his right arm became "caught" in the machine, which caused a severe injury to the claimant's right arm and, ultimately, after a number of surgeries, amputation of his right arm up to

his elbow. (Claimant's Exhibit 1 at 1, 1-3; Respondents' Exhibit 1 at 1, 1-6; T. 18-20). The claimant also sustained a compensable consequence injury to his left arm, for which he has undergone a number of diagnostic tests, as well as a left carpal tunnel and left ulnar nerve release. The claimant has been fitted for three (3) different prosthetics for his right arm, although rarely uses them because he finds them not to be functional. He was not wearing a prosthetic his right arm at the subject hearing. (CX1 at 1, 1-3; RX1 at 1, 1-6). As the parties stipulated, *supra*, the claimant has been determined to be permanently and totally disabled (PTD), and Respondent No. 2 has been and continues to pay him all appropriate PTD benefits at the correct compensation rate. Respondent No. 1 also remains responsible, and has paid, all reasonably necessary medical treatment related to the claimant's compensable right arm injury, and the compensable consequence injuries to his left arm.

Prior to his visit to see Dr. Carlos Roman, *infra*, on June 17, 2020, the claimant had presented himself for an independent medical evaluation (IME) with Dr. Mark Tait, an orthopedic specialist associated with the University of Arkansas for Medical Sciences (UAMS). Dr. Tait reviewed a number of the claimant's medical records, as well as the films and interpretations of various diagnostic tests the claimant had undergone between February 4, 2014, and April 5, 2019. The UAMS medical records reveal the claimant's complaints on this June 17, 2020, IME to be: "Shoulder Pain *left;* Hand Pain *left;* Elbow Pain, *left*. Dr. Tait also conducted a physical examination of the claimant. (RX1 at 1, 1-6). At the conclusion of the IME, Dr. Tait and his colleague, Dr. Bracey, assessed the claimant's left arm complaints as follows:

> Chronic left arm pain with multiple surgical interventions for ulnar nerve
> nerve transposition with residual symptoms and pain without evidence of

> acute peripheral compression or instability of the hand or elbow.

(RX1 at 5). Dr. Tait summarizes his findings and conclusions in the section of the IME report entitled, “Plan/Medical Decision Making:”

> Dr. Bracey [and] myself saw the patient today together [sic] we discussed the patient at length in regards to his injuries. Primarily he is concerned about the chronic pain left arm [sic] is not concerned about his right amputation stump. He states that the right amputation does not bother him [sic] we talked at length about targeted muscle reinnervation for help with pain and neuroma issues if this becomes a problem [sic] he states that this is not currently a problem in regards to left arm do not see any signs of acute peripheral compression ulnar nerve after previous transpositions and neurolysis. In regards to the hand and thumb does not show evidence of instability or acute pathology. His pain is somewhat diffuse and difficult to ascertain of [sic] specific anatomic reason for this [sic] therefore he would be referred for long-term chronic management of his pain with oral medications. We do not see a role for surgical intervention in this patient. From our standpoint he has no further restrictions at work other than those previously imposed.

(RX1 at 6) (Bracketed material added).

Thereafter, a little over five (5) months later, on November 18, 2020, the claimant presented himself to see Dr. Carlos Roman, a pain management physician associated with Pain Management Solutions located in Little Rock, Arkansas, for an independent medical evaluation (IME). Dr. Roman examined the results of some of the claimant’s more recent diagnostic tests, and he conducted a physical examination. Dr. Roman noted the claimant complained of “chronic left shoulder pain and some hand and wrist pain.” (CX1 at 1, 1-2). Dr. Roman’s IME report of November 18, 2020, concludes as follows:

> **FINAL DIAGNOSES:**
> 1. Chronic right arm pain.
> 2. Phantom.
> 3. Arthritis in the left wrist and hand.
> 4. Depression and anxiety.

> We will prescribe hydrocodone as stated and give him access to medical marijuana by way of a legitimate medical card. I will see him at three-month intervals, or sooner if indicated.

(CX1 at 3). Of course, Dr. Roman's statement, *supra*, that his office would "give him [the claimant] access to medical marijuana by way of a legitimate medical card" was the focus of, and the seminal issue tried and to be decided at the subject hearing. (CX1 at 3) (Bracketed material added).

DISCUSSION

The Burden of Proof

When deciding any issue, the ALJ and the Commission shall determine, on the basis of the record as a whole, whether the party having the burden of proof on the issue has established it by a preponderance of the evidence. ***Ark. Code Ann***. § 11-9-704(c)(2) (2020 Lexis Supplement). The claimant has the burden of proving by a preponderance of the evidence he is entitled to benefits. *Stone v. Patel,* 26 Ark. App. 54, 759 S.W.2d 579 (Ark. App. 1998). ***Ark. Code Ann.*** Section 11-9-704(c)(3) (2020 Lexis Supp.) states that the ALJ, the Commission, and the courts "shall strictly construe" the Act, which also requires them to read and construe the Act in its entirety, and to harmonize its provisions when necessary. *Farmers Coop. v. Biles,* 77 Ark. App. 1, 69 S.W.2d 899 (Ark. App. 2002). In determining whether the claimant has met his burden of proof, the Commission is required to weigh the evidence impartially without giving the benefit of the doubt to either party**.** ***Ark. Code Ann***. § 11-9-704(c)(4) (2020 Lexis Supp.); *Gencorp Polymer Products v. Landers,* 36 Ark. App. 190, 820 S.W.2d 475 (Ark. App. 1991); *Fowler v. McHenry*, 22 Ark. App. 196, 737 S.W.2d 633 (Ark. App. 1987).

All claims for workers' compensation benefits must be based on proof. Speculation and conjecture, even if plausible, cannot take the place of proof. *Ark. Dep't of Corrections v. Glover,* 35 Ark. App. 32, 812 S.W.2d 692 (Ark. App. 1991); *Deana Constr. Co. v. Herndon*, 264 Ark. 791, 595 S.W.2d 155 (1979). It is the Commission's exclusive responsibility to determine the credibility of the witnesses and the weight to give their testimony. *Whaley v. Hardees,* 51 Ark. App. 116, 912 S.W.2d 14 (Ark. App. 1995). The Commission is not required to believe either a claimant's or any other witness's testimony, but may accept and translate into findings of fact those portions of the testimony it deems believable. *McClain v. Texaco, Inc*., 29 Ark. App. 218, 780 S.W.2d 34 (Ark. App. 1989); *Farmers Coop. v. Biles, supra*.

The Commission has the duty to weigh the medical evidence just as it does any other evidence, and its resolution of the medical evidence has the force and effect of a jury verdict. *Williams v. Pro Staff Temps.*, 336 Ark. 510, 988 S.W.2d 1 (1999). It is within the Commission's province to weigh the totality of the medical evidence and to determine what evidence is most credible given the totality of the credible evidence of record. *Minnesota Mining & Mfg'ing v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999).

Reasonably Necessary Medical Treatment

Ark. Code Ann. § 11-9-508(a)(1) (2020 Lexis Supp.) requires an employer to promptly provide an injured worker with, among other modalities, such medical treatment "as may be reasonably necessary in connection with the injury received by the employee." The burden of proof is on the claimant to prove the additional medical treatment he requests is reasonably necessary for treatment of his compensable injury. *Lankford v. Crossland Constr. Co*., 2011 Ark. App. 416,

384 S.W.3d 561 (Ark. App. 2011). What constitutes reasonably necessary medical treatment is a question of fact for the Commission, and the decision turns on the sufficiency of the evidence. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (Ark. App. 1984); *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

While injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence, Arkansas law is well-settled that such services may include those necessary to accurately diagnose the nature and extent of the compensable injury(ies); to reduce or alleviate symptoms resulting from the compensable injury(ies); to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury(ies). ***Ark. Code Ann***. § 11-9-705(a)(3); *Jordan v. Tyson Foods, Inc*., 51 Ark. App. 100, 911 S.W.2d 593 (Ark. App. 1995).

Moreover, our court of appeals has noted that even if the healing period has ended, a claimant may be entitled to ongoing medical treatment *if* the treatment is geared toward management of problems emanating from the compensable injury(ies). *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark App. 230; 184 S.W. 3d 31, (Ark. App. 2004) (Emphasis added). Consequently, the Commission has found that treatment intended to help a claimant cope with chronic pain attributable to a compensable injury may be reasonably necessary. *Maynard v. Belden Wire & Cable Co.*, AWCC No. E502002 (Full Commission Opinion filed April 28, 1998); and *Billy Chronister v. Lavaca Vault*, AWCC Claim No. 704562 (Full Commission Opinion filed June 20, 1991). A claimant is not required to support the alleged need for continued medical treatment with objective findings. *Chamber Door Industries, Inc. v. Graham*, 59 Ark. App. 224, 956 S.W.2d 196 (Ark. App. 1997).

This case presents an interesting and, for some it appears, a very emotional issue of first impression for this Commission. I do very much appreciate the knowledge, skill, expertise, eloquence, and professionalism both claimant's and respondents' counsel (and co-counsel) demonstrated during the course of the hearing. I also very much appreciate both the claimant's and respondents' counsels' well researched, thoughtful, and well written post-hearing briefs. The attorneys' demonstrated skill in the courtroom, and their considerable efforts in researching and addressing the relevant issues in their respective briefs made the ALJ's job in rendering this decision a relatively easy one.

Despite the specific enumeration of the issues to be litigated at the subject hearing, *supra*, the ***essential threshold issue*** to be decided in this claim, of course, is actually listed as issue number "2", on page 2, *supra,* namely (to paraphrase somewhat): Even if, *arguendo,* Dr. Roman's "prescription" of giving the claimant "…access to medical marijuana by way of a legitimate medical card" was deemed to meet the statutory and common law requirements for "reasonably necessary" medical treatment related to the claimant's compensable injury(ies) herein, does this Commission have the statutory authority pursuant to the Act ***to order*** this – or any other respondent, for that matter – to pay for, or to reimburse the claimant for, a drug, substance, or chemical that is illegal under federal law? Based on the applicable law as applied to the specific facts of this case, I have no other legal alternative than to find the simple answer to this threshold question is a resounding, "***NO.***"

Moreover, since Respondent No. 1 has committed on the record its willingness to continue to pay for any and all Federal Food & Drug Administration (FDA) approved pain management

treatment (and the FDA has in fact approved some THC-based medications as meeting federal standards of safety, and efficacy in alleviating chronic pain complaints such as the claimant's, so long as such FDA approved pain management treatment is related to, and constitutes reasonably necessary medical treatment for, the claimant's compensable injuries, I find Dr. Roman's rather vague, so-called "prescription" of giving the claimant "…access to medical marijuana by way of a legitimate medical card" to clearly ***not*** constitute reasonably necessary medical treatment on these facts. My decision herein is based on the law as applied to the specific facts of this case, as I explain in more detail, *infra*.

Existing Federal Law – Specifically, The Controlled Substances Act – Classifies Marijuana (Cannabis), Medicial Or Otherwise, As A Schedule I Controlled Substance, Along With Such Notorious Drugs As LSD, Ecstasy, and Peyote.

First, neither private health insurers nor Medicare pay for medicinal marijuana. Why not? The answer is simple. There exists a federal law, the Controlled Substances Act (CSA), 21 ***U.S.C.*** Section 801, *et seq*. The CSA categorizes all substances which are in some manner regulated by existing federal law into one (1) of five (5) schedules, designated by Roman numerals. *See*, Title 21 ***Code of Federal Regulations (CFR)***, ***CFR*** Part 1300 to Section 1308, United States Department of Justice (U.S. DOJ) website, https:///www.deadversion.usdoj.gov. What schedule the substances fall under is determined by their medical use, potential for abuse, and safety or dependency liability. Pursuant to 21 ***U.S.C.*** Sections 802(32)(A) (which defines a "controlled substance"), and 813 (which categorizes the specific drugs in Schedules from I to V), federal law defines Schedule I drugs, substances, or chemicals as drugs with no currently accepted medical use and a high potential for abuse. According to the Drug Enforcement Administration (DEA)

website, some common, recognizable examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote. *See,* https://www.dea.gov/controlled-substances. Significantly, marijuana (cannabis) is a Schedule I drug and, therefore, has been deemed by the federal government to have the same medicinal use/value – or more accurately stated, the lack thereof – and high potential for abuse as LSD, ecstasy, and peyote. Consequently, despite the passage of any state law purporting to "legalize" either so-called "medicinal" or "recreational" marijuana, whether passed by an initiated act of The People or their representatives in state legislatures, is in direct, headlong conflict with the aforementioned provisions of the federal CSA and the ***CFR*** rules promulgated thereunder. This fact quite simply is beyond reasonable dispute.

Possession of Marijuana Has Been, Is, and Remains A Federal Crime. If The Arkansas Workers' Compensation Commission Were To Order Respondent No. 1 – Or Any Arkansas Employer or Third-Party Payor to Pay For Or Reimburse A Claimant For The Purchase of Medicinal Marijuana – This Is Tantamount to the State of Arkansas Legally Mandating the Respondent or Third-Party Payor To Aid and Abet the Commission Of A Felony.

Second, as Respondent No. 1 correctly explains in its brief, while a few states have legalized medical and even recreational marijuana, under existing federal law both the possession and use of marijuana, medicinal or recreational, have been, are, and remain illegal as a Schedule I drug pursuant to the CSA, 21 U.S.C. §§ 801-904. Despite several states legalizing marijuana use, marijuana is still a Schedule I controlled substance under federal law and violators of this federal law, the CSA, risk arrest and prosecution. (Respondent No. 1's Brief at 6-12).

18 ***U.S.C.*** Section 2(b), which is the federal law dealing with aiding and abetting crimes, provides that: "Whoever willfully causes an act to be done which if directly performed by him or

another would be an offense against the United States, is punishable [not just as a person aiding or abetting the crime] as a principal." (Bracketed material added). The applicability of this federal law is demonstrated in *Rosemond v. United States*, 572 U.S. 65 (2014).

In *Rosemond*, the United States Supreme Court explained the concept of aiding and abetting a drug felony, and the circumstances under which a violation of 18 U.S.C. § 2 may occur. The court noted, "The common law imposed aiding and abetting liability on a person (possessing the requisite intent) who facilitated any part – even though not every part – of a criminal venture." *Id*. The court further noted, "Accomplice liability attached upon proof of '[a]ny participation in a general felonious plan carried out by confederates.' " *Rosemond, supra*, at 72. (Bracketed material added). The *Rosemond* court continued, "…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." *Id*. at 77. The Court went on to find that, "The provision of money by the insurer in return for medical marijuana provided to this or any other employee is a critical component in the distribution channel of a Schedule I controlled substance and, in fact, criminal liability can be established even without such payment." *Id*.

Therefore, as the United States Supreme Court clearly holds in *Rosemond,* the CSA does *not even require the actual sale or purchase of a federally illegal drug to support a conviction under the statute*. Indeed, *Rosemond* holds that criminal accomplice liability may be imposed on *any person* participating in the illegal transaction since the transaction is viewed as a whole. *Rosemond* interprets the federal statute regarding accomplice liability, 18 ***U.S.C.*** Section 2, broadly enough to include acts which other statutes may very well define as merely as aiding and

abetting. In *United States v. Wigley*, 627 F.2d 224, 226 (10th Cir. 1980) (citations omitted), the 10th Circuit Court of Appeals further stated: "Activities in furtherance of the ultimate sale [of controlled substances] such as vouching for the quality of the drugs, negotiating for or receiving the price, and supplying or delivering the drug are sufficient to establish distribution." (Bracketed material added).

It logically follows, then, in a workers' compensation scenario such as the one presented for decision on the facts of the instant case, *any respondent or other third-party payor* who made benefit payments to a claimant to pay for or reimburse the claimant's purchase of a Schedule I illegal federal drug like marijuana/cannabis (or LSD, ecstasy, or peyote, for that matter) would obviously be making the benefit payments with the knowledge they were participating in activity that is violative of clear federal laws, regulations, and policies – even if they were doing so in compliance with an order and award of an ALJ or the Commission. In fact, under the applicable federal law as it now exists, *any such order* would be patently unlawful, illegal and, therefore, void *ab initio*, and unenforceable.

At the hearing in this claim, the claimant argued the Cole Memorandum (Cole Memo), which the United States Department of Justice (U.S. DOJ) authored and issued on August 29, 2013, under then-Attorney General James M. Cole, serves to protect from federal prosecution state citizens, such as the claimant herein, who use marijuana in compliance with their respective state statutes. Apparently, the claimant's argument in this regard was intended to infer that if federal prosecutors followed the guidance of the Cole Memo, then any respondent or third-party payor who paid or reimbursed a claimant for his purchase of medical marijuana could expect to enjoy

the same protection against federal prosecution as the claimant. (T. 46, 100, 106). This argument strikes me much as does the old saw, "We are from the FEDERAL GOVERNMENT, and we are only here to help you. Trust us."

Even if the effect of the Cole Memo was intended to, or in fact at one time operated as the claimant represented, Respondent No. 1 correctly notes in its brief the Cole Memo's issuance in 2013 August, some eight (8) years ago, is now moot since the U.S. DOJ specifically and unequivocally rescinded it in 2018. *See,* U.S. DOJ Press Release 18-8, https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement. (Resp. No. 1's Brief at 9-11). It is interesting to note the Maine Supreme Court stated regarding the Memo: "Any reliance on this internal departmental policy, however, is entirely misplaced. Such a policy is transitory, as is irrefutably demonstrated by its recent revocation by the current administration. Most importantly, however, the magnitude of the risk of criminal prosecution is immaterial in this case. Prosecuted or not, the fact remains that [the insurer] would be forced to commit a federal crime if it complied with the directive of the Workers' Compensation Board." *Bourgoin v. Twin Rivers Paper Co., LLC*, 187 A. 3d 10, 15 (2017)*, Id.* at 21-22, citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 651 (1989) (Marshall, J., dissenting) ("The absence of prosecutions to date … hardly proves that prosecutors will not avail themselves [of the applicable law] in the future.") (Bracketed material added).

On January 4, 2018, then-United States Attorney General Jeff Sessions rescinded a trio of memos, including the Cole Memo, that had adopted what many U.S. DOJ watchers referred to as a policy of non-interference with marijuana-friendly state laws. *See* U.S. DOJ Press Release 18-8,

supra. The move essentially shifted federal policy from the hands-off approach adopted under the Obama administration to providing individual federal prosecutors across the country the discretion to decide how to prioritize resources to crack down on marijuana possession, distribution, and cultivation in states where it is legal. In a memorandum to all United States federal prosecutors, Attorney General Sessions said: "In deciding which marijuana activities to prosecute under these laws with the department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions… .These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." *Id*.

Along these lines, with another change in U.S. presidential and DOJ administrations, Congress voted in its last session to extend a spending provision known as the Rohrabacher-Blumenauer Amendment (the R-B Amendment). The R-B Amendment effectively blocks the U.S. DOJ from using federal funds to impede the implementation of state medical marijuana laws. *See* https://www.marijuanamoment.net/congressional-funding-bill-restores-financial-aid-for-students-with-drug-convictions-and-has-other-marijuana-provisions/. In July 2020, a House subcommittee introduced a base appropriations bill which included the R-B Amendment. During the COVID-19 he R-B Amendment was then renewed through a series of stopgap spending bills on October 1, December 11, December 18, December 20, and December 22, 2020. On December 27, 2020, the amendment was renewed through the signing of the FY 2021 omnibus spending bill. The Rohrabacher-Blumenauer Amendment is effective through September 30, 2021. *Id*.

The R-B Amendment most certainly does *no*t, nor can it reasonably be read or interpreted, to prohibit the criminal prosecution of a party deemed to be aiding and abetting the production or consumption of marijuana in clear violation of federal law. Furthermore, prosecuted or not, as Respondent No. 1 astutely noted it its post-trial brief, if this Commission issued an opinion and order mandating they pay for or reimburse the claimant for his routine purchases of medical marijuana, a Class I drug under the federal CSA, such an order would in effect force the respondents to knowingly commit a federal crime. (Resp. No. 1's Brief at 11). Whether or not federal prosecutors are currently prosecuting this type of activity does not mean they will not pursue such investigations and prosecutions in the future. This is especially more likely than not since it is readily apparent possessing, using, paying for, and distributing medical marijuana is a federal crime. In sum, while the federal government has shifted federal policy from the hands-off approach adopted under the since-rescinded Cole Memo, marijuana possession is still a federal crime, and it is up to individual prosecutors to decide to what extent violators will be prosecuted. And there are no guarantees federal prosecutors will not actively begin actively and vigilantly prosecuting marijuana possession and related crimes as they have done in years past.

Section 6(b)(1) of Amendment 98 To the Arkansas Constitution, A/K/A "The Arkansas Medical Marijuana Amendment of 2016," Clearly and Unequivocally States That Section 6(b)(1) *DOES NOT* Require Either A Government Assistance Program Or Private Health Insurer To Reimburse A Person For *ANY COSTS* Associated With the Medical Use Of Marijuana Unless Federal Law Requires Reimbursement – Which, As Of the Date of This Opinion and Order, It Most Certainly Does Not – and It Is Unlikely It Ever Will.

After years of losing attempts pushed by the ever-growing proponents of marijuana for all, on November 8, 2016, a slim majority – 53 percent – of devoted, vigilant hardcore marijuana activists, and Arkansas voters, finally approved a medical marijuana initiative, which ultimately

became Amendment 98 to the Arkansas Constitution (Amendment 98). Amendment 98 is also known as the "Arkansas Medical Marijuana Amendment of 2016." During the 2017 session of the Arkansas General Assembly, the legislature made some revisions to Amendment 98. Pursuant to Amendment 98, a physician does not write a patient a prescription for medical marijuana. The physician's role is to simply certify that his or her patient has one of the "qualifying medical conditions" enumerated in Amendment 98, Section 13(A) – (C).

Amendment 98 does not require a licensed physician to actually write, or issue, a patient a prescription for medical marijuana, since this would constitute a clear violation of the federal Controlled Substances Act. *See infra.* In fact, the licensed Arkansas physician simply provides a "qualifying patient" or a "visiting qualifying patient" as those terms are defined in Section 2(14) and (18) of Amendment 98, with a "written certification" defined in Section 2 (19)(A) as:

> …[A] document signed by a physician stating that in the physician's professional opinion, after having completed a full assessment of the qualifying patient's medical history and current medical condition made in the course of a physician-patient relationship, the qualifying patient has a qualifying medical condition and the potential benefits of the use of medical marijuana would likely outweigh the health risks for the qualifying patient.

(Bracketed material added). Subsection (19)(B) goes on to require, "A written certification shall specify the qualifying patient's qualifying medical condition, which also shall be noted in the qualifying patient's medical records."

Finally, and highly revealing and significant in rendering a decision in this claim is Section 6(b)(1), which plainly states in pertinent part:

> (b) This section does *not* require:

> (1) *A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana unless federal law requires reimbursement.*

(Emphasis added). Therefore, it is beyond reasonable dispute that, based on the abundantly clear, plain language of Section 6(B)(1) that private health insurers are not required to pay medical marijuana. Moreover, it is just as abundantly clear that Section 6(b)(1) likewise does not require private workers' compensation respondent-employers and/or their insurers to pay for medical marijuana.

It would take either a super-majority vote to once again amend either the constitutionally-based Arkansas Workers' Compensation Act itself, and/or a super-majority vote on Amendment 98 to attempt to require workers' compensation insurers to cover non-FDA approved medical marijuana/cannabis. Indeed, had our General Assembly in its wisdom seen fit to require respondent-employers and/or their workers' compensation insurers to pay for medical marijuana in any or all of its various forms, from smoking and vaping, to gummies and brownies, both The People, and certainly the General Assembly, have had ample opportunity to do so. However, wisely, they have recognized the wisdom in *not* mandating our states' employers and insurers from having to bear the costs associated with paying for medical marijuana/cannabis, a Schedule I drug as defined by the federal Controlled Substances Act and the regulations propounded thereunder.

<u>Medicare Does Not Pay/Reimburse Recipients For Medical Marijuana</u>

Since marijuana remains a Schedule I controlled substance pursuant to the federal CSA, it cannot have a National Drug Code, so there is no standardized reimbursement rate for medical marijuana in the Medicare system. *See,* https://www.ncci.com/Articles/Documents/II_IR2016-

Legal-Marijuana.pdf. In addition to the fact medical marijuana is illegal under the federal CSA as a Schedule I drug with no apparent medicinal value, and a high probability of addiction and other physical, intellectual, and emotional deleterious effects, the lack of coding is just one more reason Medicare does not pay for medical marijuana.

States That Have Ruled Workers' Compensation Insurers Are *NOT* Required To Reimburse Claimant's For Medical Marijuana

As Respondent No. 1 explained at Pages 12-19 of its brief, at least ten (10) states have specifically prohibited reimbursement for medical marijuana as part of their workers' compensation laws. Respondent No. 1's research was both thorough and accurate, so I will share it with the parties almost verbatim. The states who have specifically determined, either through legislative or court action, that claimant's shall not be reimbursed for medical marijuana are: Arizona, Colorado, Florida, Iowa, Louisiana, Maine, Massachusetts, Michigan, North Dakota, Pennsylvania, and Washington. As one can see, this is a good cross-section of states, some of which may be called "moderate," some "conservative," some "liberal." Thankfully, it appears these states have based their decisions on the dangers and efficacy/inefficacy of medical marijuana, and their public policy surrounding the issues based on science, practical experience, common sense, and not "politics." Many of the states that have legalized medical marijuana have adopted provisions purporting to exempt private health insurers from *any* obligation to pay for its use. *See* ***Larson's Workers' Compensation*** §94.06 (Matthew Bender Rev. Ed.) at p. 94-71. Professor Larson has described these statutes, most of which contain the same or similar introductory language, as "acknowledging the inconsistency between state and federal law," and thus "making it clear" that an insurer "may not be compelled to reimburse a patient for costs associated with the

use of medical marijuana." *Id*.

Arizona was the first state to say workers' compensation carriers did not have to pay for medical marijuana. In 2010, Arizona voters passed the Arizona Medical Marijuana Act (Proposition 203), which made it legal for a qualified physician to prescribe medical marijuana. The way the act was written specifically detailed that individuals could not use government medical assistance to purchase medical marijuana, nor would private insurance carriers be required to reimburse for medical marijuana. However, nothing in the law mentioned workers' compensation. In 2015, Governor Ducey signed Arizona House Bill 2346 into law. HB2346 was an amendment to the Medical Marijuana Act, which stated that the law would not require self-insured employers and workers' comp carriers to reimburse injured workers who were prescribed medical marijuana.

Although a Colorado court approved reimbursement for the prescription drug Marinol, a pharmaceutical cannabinoid product, it refused to approve payment for marijuana because it remains an illegal drug under federal law. *In re Armendariz v. Chief Masonry*, 2014 WL 3886663 (Colo. Ind. Cl. App. Off. 2014). the court held "There is no exception for marijuana use for medicinal purposes, or for marijuana use conducted in accordance with state law." 21 ***U.S.C.*** § 844(a); *Gonzales v. Raich*, 545 U.S. 1, 14 (2005) (finding that "[t]he Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," including in the area of marijuana regulation) (Bracketed material added). Therefore, the court determined the claimant's use of medical marijuana was unlawful under federal law and thus not protected by state medical marijuana statutes. *Id*.

Florida and North Dakota have passed laws prohibiting medical marijuana reimbursement through workers' compensation programs. In Florida, as part of the constitutional medical marijuana amendment, the legislative branch amended ***Florida Statutes*** Section 381.986(15) to address the continuation of drug free workplaces and in the same section, the statute states "marijuana, as defined in this section, is not reimbursable under chapter 440 [Florida's workers compensation law]." In 2017, North Dakota's legislature amended its state statute to expressly prohibit the payment of workers' compensation benefits for medical marijuana. *See* ***North Dakota Century Code*** 65-05-07, subsection 8, https://www.legis.nd.gov/assembly/65-2017/documents/17-0567-04000.pdf .

In *Bourgoin v. Twin Rivers Paper Co.*, 187 A.3d 10 (ME 2018), the Maine Supreme Court examined the conflict between federal and state law regarding medicinal and recreational use of marijuana. The court found federal law, specifically the Controlled Substances Act, to supersede state law on the issue. It is important to note that in two previous instances, the Maine Workers' Compensation Board had found the use of medical cannabis not to be reasonable and necessary. *See Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229-30 (D.N.M. 2016); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159, 230 P.3d 518, 536.

Employees who use medical marijuana to treat a work-related injury cannot get reimbursed through workers' compensation, Massachusetts' highest court recently held. *Wright's Case*, 486 Mass. 98, 99, 156 N.E.3d 161, 165 (2020). The Industrial Accident Reviewing Board determined that a claimant's medical marijuana expenses were not compensable under ***Mass. Gen. Laws*** ch. 152, §§ 13 and 30 because the Medical Marijuana Act, 2012 ***Mass. Acts 369*** (codified in 2018 as

Mass. Gen. Laws ch. 94I), recognized that marijuana possession and distribution remained illegal under Federal law, that the Commonwealth had no authority to alter the illegal status of marijuana at the Federal level, and that nothing in 2012 ***Mass. Acts*** 369, § 7 required health insurers to reimburse any person for medical marijuana expenses. *Id*. This determination does not change if the employer is self-insured. *See Delano's Case*, 2021 Mass. App. Unpub. LEXIS 141 ("We do not see any reason to distinguish this case on the basis that Partners Healthcare System, Inc., is self-insured.")

The applicable Oregon statute specifically says private health insurers do not have to reimburse for medical marijuana: "Nothing in ***O.R.S.*** 475B.785 to 475B.949 requires: (1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana. . ." *Arkansas's medical marijuana statute, along with many other states, uses identical language as section 1 of Oregon's law.*

The state of Montana says health insurers do not have to reimburse claimants for medical marijuana. Current Montana law, even with the 2020 passage of recreational marijuana use, recognizes marijuana remains a federally banned substance and does not have a proven track record of efficacy. Therefore, Montana legislators decided the workers' compensation system is statutorily not required to pay for it. Most state workers' compensation systems are not required to pay for medical marijuana. Generally, workers' compensation systems do not pay for experimental or unproven medical procedures or drugs. That is the case with the Montana system as well; Montana law requires the payment for reasonable and necessary medical treatments to address the work-related injury. Reasonable and necessary medical treatment has been defined as

excluding experimental treatments or drugs.

Similar to Arkansas law, Montana ***M.C.A.*** 50-46-320 states:

> (4) Nothing in this part may be construed to require:
>
> (a) a government medical assistance program, a group benefit plan that is covered by the provisions of Title 2, chapter 18, an insurer covered by the provisions of Title 33, or an insurer as defined in 39-71-116 to reimburse an individual for costs associated with the use of marijuana by a registered cardholder;

And, under Montana's workers' compensation law, ***M.C.A.*** 39-71-407:

> (c) Nothing in this chapter may be construed to require an insurer to reimburse any person for costs associated with the use of marijuana for a debilitating medical condition, as defined in 50-46-302.

Montana also has the Administrative Rules of Montana, specifically ***A.R.M.*** 24.29.1526, which reads: "Disallowed Procedures: . . . (1) Only reasonable and necessary medical expenses are payable. Procedures that are not generally accepted by the medical community may be determined not to be 'reasonable' or 'necessary.' Providers are encouraged to seek prior approval from the insurer for experimental or controversial procedures. . . (3) Medical services which are not payable include, but are not limited to, the following: . . . (j) *medical marijuana*." (Emphasis added).

In ruling that an insurer did not have to provide a claimant with a referral to a physician for the purpose of prescribing marijuana, nor was the employer required to reimburse the employee's marijuana expenses, the judge reasoned that, even assuming that the claimant's contention was true (that his arrest and prosecution was unlikely), it did not change the fact he was asking the agency to order defendants to engage in an activity that is illegal under federal law. *See Presson v. Freiburger Concrete & Topsoil, Inc.*, WCC File No. 5049542 (Alt. Care, April 28, 2018). The

judge concluded, "Because defendants risk violating federal law if they pay for claimant's requested treatment, it is found that the defendants' refusal to authorize the referral to [the physician] is reasonable." Additionally, the judge concluded that the refusal to authorize the care was reasonable because the treatment sought is illegal under federal and Iowa state law, and because under both federal and state law, marijuana is classified as a Schedule I drug, which has no accepted medical use. *Id*. "If Congress and the Iowa legislature have determined that marijuana has no accepted medical use, then it certainly cannot be regarded as reasonable treatment by the agency." *Id*.

Once again, Iowa's statute is nearly identical to Arkansas's law. ***Iowa State Law***, Sec. 26. 124E.22 Regulation of marijuana use by government medical assistance programs, private health insurers, and other entities: "Nothing in this chapter shall require a government medical assistance program, private health insurer, workers' compensation carrier, or self-insured employer providing workers' compensation benefits to reimburse a person for costs associated with the medical use of marijuana."

In 2018, the Louisiana legislature passed HB 579. Of particular importance to the workers' compensation industry is a provision that exempts employers and workers' compensation insurers from having to reimburse for medical marijuana-related to injuries sustained on the job. The legislation stated, "Notwithstanding any other provision of law to the contrary, employers and their worker's compensation insurers shall not be obliged or ordered to pay for medical marijuana in claims arising under Title 23 of the ***Louisiana Revised Statutes*** of 1950, the Louisiana Workers' Compensation Law." Act 708, ***Louisiana Revised Statutes***.

In California, medical marijuana has been legal since 1996, but only with a doctor's recommendation. However, it is not covered by the Workers' Compensation system, so insurance companies usually deny reimbursements for cannabis-based treatments even if they are recommended by a doctor. The reasoning behind denials is that although many states, including California, have chosen to decriminalize or legalize marijuana, the federal government has not.

A workers' compensation judge in California ordered reimbursement to an injured worker for medical marijuana prescribed to him for his pain. However, this was ultimately overturned on appeal, as it was found to violate California's medical marijuana statute, which specifically provides that nothing in the state's medical marijuana program requires insurers, "a governmental, private, or any other health insurance provider or health care service plan," to be liable for reimbursing for medical marijuana use. (***Cal. Health & Safety Code*** § 11362.785(d)).

Under the Illinois Workers' Compensation Act, the employer is required to pay reasonable and necessary medical expenses. *See* 820 ***I.L.C.S.*** 305/8(a). However, the Illinois Compassionate Use of Medical Marijuana Pilot Program Act appears to provide employers an express defense to a claim for payment of the costs associated with medical marijuana prescribed by a treating doctor to cure or relieve the ill effects of a workplace injury:

"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 ***I.L.C.S.*** 130/40(d). Arkansas's statute is the same as Illinois's, and should also be interpreted to provide employers the good faith denial of reimbursement for medical marijuana.

Only A Small Minority of States Have Taken the Draconian Measure of Forcing Their Employers and Insurers To Reimburse Claimants For Medical Marijuana.

However, unlike Arkansas, and the immediately aforementioned states, Respondent No. 1's research revealed the following states have statutory language on the books which support these states requiring employers/insurers to pay for medical marijuana. (Respn. No. 1's Brief at 19-23). Of course, in Arkansas no such statutory language exists which could be used to require employers to pay for medical marijuana.

A few years ago, the New Mexico appellate court issued a decision that required insurers to provide reimbursement for an injured worker using medical marijuana to treat their injury. *Vialpando v. Ben's Automotive*, 331 P.3d 975 (N.M. Ct. App. 2014). This was a first of its kind decision. In approving the use and reimbursement of marijuana in a workers' compensation case, the Court noted the employer and insurer would not violate federal law. A similar result was reached in the workers' compensation courts in *Maez v. Riley Industrial*, 2013 WL 4238545 (N.M. Workers' Comp. Admin. 2013), and *Lewis v. American General Media*, 2013 WL 6517276 (N.M. Workers' Comp. Admin. 2013).

While Arkansas's statute expressly states health insurers cannot be forced to reimburse users for cannabis, New Mexico's statute is *completely silent* on the issue. *Vialpando v. Ben's Automotive*, 331 P.3d 975 (N.M. Ct. App. 2014). Therefore, it is not surprising that New Mexico courts have three recent holdings ordering an insurer to reimburse a claimant's out of pocket costs for medical marijuana. However, because the Arkansas Medical Marijuana Act has made its intentions clear that health insurers cannot be forced to reimburse claimants for marijuana, our case is easily distinguished, and the New Mexico case law should not be considered persuasive,

much less authoritative, in any Arkansas workers' compensation claim, including this one.

In 2017, a New Jersey administrative law judge ruled that a workers' compensation carrier was responsible for reimbursement of medical marijuana for an injured worker who was using the marijuana to treat their covered injuries. *Hager v. M & R Construction*, 2020 WL 218390 (App. Div.). While ***N.J.S.A.*** 24:6I-14 states: "Nothing in [the medical marijuana act] 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," the section does not define "private health insurer." (Bracketed material added). However, under Title 17, in defining "health insurance," the New Jersey Legislature expressly stated that "health insurance does not include workmen's compensation coverage." ***N.J.S.A.*** 17B:17-4. The New Jersey court explained, "We presume the Legislature is aware of its own enactments in passing a law." *Hager v. M&K Const.*, 462 N.J. Super. 146, 168, 225 A.3d 137, 149 (Super. Ct. App. Div. 2020); *In re Petition for Referendum on City of Trenton Ordinance 09-02*, 201 N.J. 349, 359, 990 A.2d 1109 (2010). In contrast, while the Arkansas Medical Marijuana Act also does not define "private health insurer," it cannot be presumed the drafters of the Initiated Amendment Arkansas voters adopted were aware of any prior definition of "health insurance." Unlike in New Jersey where "health insurance" specifically excludes "workmen's compensation coverage," Arkansas only limits "transactions of accident and health insurance" as excluding workers' compensation. Accident and Health Insurance does not include within its definition what a private health insurer is. *See* ***Ark. Code Ann***. § 23-62-103(b). Arkansas law does not contain this express provision that separates workers' compensation coverage from health insurance coverage. Therefore, the similar applicable Arkansas statutes can

be clearly distinguished from those of New Jersey, and New Jersey case law is not congruent with Arkansas statutes.

In Minnesota, the Workers' Compensation Court of Appeals ruled that an insurance carrier must pay for an injured workers' use of medical marijuana to treat muscle spasms. In 2015, the Minnesota Department of Labor and Industry redefined "illegal substance" to exclude an individual's use of medical marijuana as permitted under state law. https://www.employmentandlaborlawblog.com/2019/02/minnesota-workers-compensation-claims-involving-medical-marijuana/. This means that medical marijuana is a reimbursable form of medical treatment for Minnesota workers' involved in compensation claims. *Id*. However, the Minnesota statutes do not use the same language as our Arkansas statutes. Furthermore, in Minnesota the use of marijuana is limited to liquid, pill, or vaporized forms. The *smoking of marijuana remains illegal* in Minnesota. Regarding reimbursement, ***Minn. Stat***. 152.23 provides that, "…nothing in sections 152.22 to 152.37 [the medical marijuana act] requires the medical assistance and MinnesotaCare programs to reimburse an enrollee or a provider for costs associated with the medical use of cannabis." But the Minnesota statute does not include the same language for health insurers or workers' compensation insurers. In contrast, Arkansas's medical marijuana act specifically states, "This amendment does not require (1) A government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana unless federal law requires reimbursement." Therefore, Minnesota law is clearly distinguishable from the similar Arkansas law and, therefore, the subject Minnesota statute should not be considered persuasive, much less authoritative or controlling, precedent in Arkansas.

In Connecticut, the worker's compensation review board found that use of medical marijuana was reimbursable and constituted reasonable and necessary medical treatment. The decision was appealed, but eventually was settled in March 2018 before the Connecticut Supreme Court rendered a decision. *See Petrini v. Marcus Dairy, Inc.*, State of Connecticut (Workers' Compensation Commission Review Board October 5, 2016) https://wcc.state.ct.us/crb/2016/6021crb.htm.

In *Hall v. Safelite v. Group, Inc.*, a Vermont court held an insurer who chooses to reimburse a claimant for medical marijuana may do so without violating state law, but the insurer cannot be forced to do so. "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." Opinion No. 06-18WC, January 2, 2018.

Unlike Vermont, medical marijuana is not a prescription drug in Arkansas. The Arkansas marijuana amendment provides only that, a physician may determine whether a patient is eligible to apply for medical marijuana card due to a qualifying health condition(s). No Arkansas physician may simply write a script for medical marijuana, nor prescribe medical marijuana to a card holder. Also, in Arkansas the law does not require any medical oversight whatsoever to determine and monitor the dosage, amount, form, or strength of marijuana the card holder chooses to purchase and use. It is important to note here that Vermont does *not require* reimbursement, it merely *does not prohibit* reimbursement *if* the insurer/employer voluntarily chooses to reimburse the employee.

In re: Matter of Quigley v. Village of East Aurora, the Supreme Court of New York, Appellate Division, Third Department, March 2021, the court held the Compassionate Care Act provided, "…no exemption for workers' compensation carriers" and, furthermore, the legislature "did not intend to exempt workers' compensation carriers from the obligation to reimburse injured claimants for their medical marijuana expenses." The court determined, "because the workers' compensation carrier could comply with the state's statutory scheme without running afoul of federal law, there was no conflict between the federal Controlled Substances Act and either New York's Compassionate Care Act or § 13(a) of its Workers' Compensation Law with regard to the insurer's obligation to reimburse the claimant for his medical marijuana expenses."

New York's Public Health Law § 3368 (2) provides, "nothing in this title shall be construed to require an insurer or health plan under [the Public Health Law] or the Insurance Law to provide coverage for medical marijuana. Nothing in this title shall be construed to require coverage for medical marijuana under [Public Health Law article 25 (maternal and child health)] or [Social Services Law article 5 (public assistance)]." (Bracketed material added). According to its express terms, the subject exemption from coverage for medical marijuana expenses pertains only to three (3) chapters of law: the Public Health Law, the Insurance Law, and the Social Services Law. (Bracketed material added). The court found the text of the statute referenced an exemption from coverage under the Workers' Compensation Law. "If the Legislature intended for said exemption to apply to workers' compensation insurance carriers, it certainly could have included such language in the text of the statute; it chose not to." *Matter of Quigley v. Vill. of E. Aurora*, 2021 NY Slip Op. 01174, ¶ 4 (App. Div. 3rd Dept.).

In contrast, the Arkansas Medical Marijuana Act does not contain this restraining language. Instead, it broadly states that a "private health insurer" shall not be required to reimburse a card holder for the purchase of medical marijuana. Arkansas's law does not define "private health insurer", and there is nothing in the Act that excludes workers' compensation carriers from the definition of health insurer as that is precisely one of the coverages workers' compensation law provides an injured worker. Furthermore, *Quigley* is currently under appeal to the New York Court of Appeals (New York's highest state court), and will likely be closely scrutinized on the basis of the doctrine of preemption.

Even If the Commission Could Somehow Invent a Novel, Tenuous Legal Theory Requiring Employers and Workers' Compensation Insurers To Pay For Medical Marijuana, An Illegal Schedule I Drug Under the CSA, There Exists Grossly Insufficient Medical Evidence It is Effective in Treating Chronic Pain. Also, There Exist Other FDA Approved, THC-Based Drugs That Have Been Proven To Be Both Safe and Effective in Relieving Chronic Pain.

The FDA has not approved marijuana as a safe and effective drug for any medicinal purpose, and there are currently no scientifically supported and accepted medical uses for it. In his letter brief, the claimant cited some anecdotal evidence; however, none of this evidence is supported by the majority of the scientific community in the United States. (Claimant's Post-Trial Brief at 2). Any decision based on the safety and efficacy of medical marijuana must, of necessity, be supported by credible scientific studies. In its brief, Respondent No. 1 introduced some enlightening studies from well-known and reputable sources concerning the safety and efficacy of marijuana. I found these to be persuasive.

The United States Department of Health and Human Services (HHS) conducted in-depth studies of marijuana and determined the drug's chemistry, physiological effects, and potency with

respect to tetrahydrocannabinol (THC, the psychoactive compound in marijuana) is unknown, and it is not consistently reproducible. In layperson's terms, some marijuana plants have significantly greater levels of THC in them than do others; therefore, no adequate safety studies have been conducted using marijuana to date. In its post-hearing brief, Respondent No. 1 cited some well known studies related to marijuana. In June 2019, Stanford University released a study that found the legalization of medical marijuana did not reduce the rate of fatal opioid overdoses as previously reported in 2014. *See* https://med.stanford.edu/news/all-news/2019/06/medical-marijuana-does-not-reduce-opioid-deaths.html. Moreover, since marijuana remains a Schedule I drug, federal funding to study its use as a medical treatment is, for all practical purposes, nonexistent. "Federal dollars for addiction treatment off-limits for medical marijuana," (***Los Angeles Times***, November 24, 2019). Therefore, what we know about medical marijuana mostly exists from small scale studies and anecdotal evidence. From the research provided below, it appears medical marijuana has about the same effect on pain, and specifically nerve pain, as opioid medications. *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5549367/; *see also*, https://pubmed.ncbi.nlm.-nih.gov/15857739/; https://pubmed.ncbi.nlm.nih.gov/17296917/ .

Various studies demonstrate a narrow therapeutic window for cannabis as pharmacotherapy for pain. A recent meta-analysis of clinical trials of cannabis and cannabinoids for pain found only modest evidence supporting the use of cannabinoid pharmacotherapy for pain. *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5549367/ .

However, further examination of studies of cannabis in pain models shows the wide range of analgesic effects seen in medical marijuana. For example, Wallace, et al. tested the effects of

smoked cannabis (low, medium, or high doses vs. inactive placebo) on intradermal capsaicin-induced pain responses using a randomized, double-blind, crossover trial in 15 healthy volunteers (mean age of 28.9; 58% male). Results indicated a decrease in pain with the medium cannabis dose and a *significant increase in pain* with the high dose. *See* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5549367? (Emphasis added). No discernible differences were observed with the low cannabis dose, and there was no effect on the area of hyperalgesia (extreme sensitivity to pain) at any dose. The authors concluded that there is likely a therapeutic window of modest analgesia for smoked cannabis. *Id*. Since it is impossible to quantify or qualify this likely therapeutic window as there is no regulation of the chemistry or dosing of cannabis, the ability to effectively conclude that smoked cannabis is reasonable and necessary medical treatment for pain is nebulous.

Another experimental study with 18 healthy female volunteers tested the effects of orally administered cannabis extract (vs. active placebo) on sunburn and intradermal capsaicin pain responses using a double-blind, crossover trial. Results indicated that the cannabis extract did not produce any analgesic or anti-hyperanalgesic effects. There was also some evidence of an unexpected increase in pain sensitivity in the cannabis group. These authors concluded the utility of cannabis use for acute pain relief is limited by the poorly understood therapeutic window and the dose-dependent occurrence of psychotropic side effects. *See Id*. Thus, this study does not support a finding that cannabis is reasonable and necessary as a pain reliever.

In terms of clinical pain, a recent systematic review and meta-analysis of cannabinoids for medical use that examined 28 randomized trials among 2454 patients with chronic pain indicated

that, compared with placebo, cannabinoids were associated with greater a reduction in pain (37% vs. 31%). However, while 37% of the cannabinoid users reported decreased pain, a full 31% also reported decreased pain, but from placebo. *Id*. Whiting, et al. concluded that there was moderate evidence to support the use of cannabinoids for the treatment of chronic pain, most commonly, neuropathy. However, Whiting also found cannabinoids were associated with an increased risk for short-term adverse events, including serious adverse events, compared to placebo. *Id*. Given the almost identical results for placebos versus cannabinoids, the effectiveness in reducing pain is just as likely a psychological rather than a physiological response.

A 2007 study examined the effect of smoked cannabis on neuropathic pain and found smoked cannabis reduced daily pain by 34% compared to 17% reduction reported in the placebo group. *See* https://pubmed.ncbi.nlm.nih.gov/17296917/ . However, the investigators noted that these findings are comparable to oral prescription drugs used for chronic neuropathic pain. *Id*. This test, therefore, does not support a finding that marijuana – which cannot be effectively monitored or dosed – is any better than FDA approved medications for controlling pain.

The claimant's own testimony supports these findings:

> Q. Attorney: Okay. As far as the pain and the level of pain, does it [marijuana] affect your level of pain in one way or the other?
>
> A. Claimant: Yes. It makes it tolerable.
>
> Q. Tolerable. Does it allow you to function, though, when you are able to treat with marijuana?
>
> A. Yes.
>
> Q. Do you have the same level of functionality with hydrocodones?

A. Somewhat. The hydrocodones more stop the pain[.]

. . .

Q. All right. And so compare that to a day where you're able to access enough marijuana. I think you said in your deposition something like 10 grams?

A. Uh-huh.

Q. So on a day when you're able to access that much marijuana, how does that affect you when you have it available?

A. It makes the day go by easier. Less pain. I can't really say less pain, but less attention to pain.

Q. And with regard to pain, and I think you've alluded to this in your testimony with your attorney, marijuana does not actually stop your pain that you experience with your left arm; is that correct?

A. No, it doesn't. It stops the pain in the right arm.

. . .

Q. The Court: As I understand it, you want the medical marijuana because it doesn't so much help with the pain, but it makes you be able to deal with the pain better? It relaxes you so that you don't care, I think -- is that what -- the term you used; is that correct?

A. Yes, sir. As my daughter tells me, it makes me a more tolerable person.

(T. 23:9-25; 24: 1-2.; 25: 11-17; 57: 12-16; 79: 16-23; 79: 16-23).

Under oath at the hearing, the claimant himself acknowledged that smoking marijuana does not stop the pain he experiences in his one remaining arm. He further testified the prescription pain medications do a better job of stopping pain as compared to marijuana; that marijuana does not actually relieve pain, rather, it makes him not care about the pain. Accordingly, in this case, the medical efficacy of marijuana has not been shown to be any greater than that of FDA approved

prescription medications. Further, in the medical report of Dr. Roman the claimant introduced into the record of the hearing, he himself admitted: "*Medical marijuana is not proven effective for medical use at this time*." (CX1 at 2) (Emphasis added).

If the claimant believes THC/cannabis-derived or related products will be helpful to him, and he is concerned about what he called the "stigma" of smoking marijuana, he should take heart. The FDA has approved one (1) cannabis-derived product, Epidiolex (cannabidiol). In addition, the FDA has approved three (3) cannabis-related drug products that are intended to prevent severe, chronic pain, and nausea: Marinol (dronabinol), Syndros (dronabinol), and Cesamet (nabilone). The claimant may discuss and obtain these drugs with his treating healthcare provider. *See,* https://www.fda.gov/news-events/public-health-focus/fda-and-cannabis-research-and-drug-approval-process.

CONCLUSION

Ark. Code Ann. Section 11-9-1001 (2020 Lexis Repl.) entitled, "**Legislative declaration**", is a unique and rather extraordinary statement concerning the Arkansas General Assembly's legislative purpose and intent in amending our workers' compensation laws in Act 796 of 1993. This provision states:

> The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state. The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force… .

***

> In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, *the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed*, those things shall be addressed by the General Assembly and should *not* be done by administrative law judges, the Workers' Compensation Commission, or the courts.

(Emphasis added). While this strong statement of legislative intent has not been well received by some, as an ALJ who recognizes my role is to apply the law and not to make it, I intend to abide my oath as an ALJ, and to follow our elected General Assembly's clearly stated intent which has the very best interests of our state's workers', employees, economy, and way of life in heart and mind.

There are a number of public policy issues that are integral to the issue of medical marijuana that are more suited to and appropriately considered and addressed by our state legislature, rather than a workers' compensation administrative law judge or a quasi-judicial administrative commission. The reason for this is readily apparent: One of the responsibilities of the General Assembly is to pass laws dealing with the public health, welfare, and safety of Arkansas citizens. Amendment 98, the Arkansas Medical Marijuana Amendment of 2016, was a controversial initiated amendment that, after many years of failed attempts, was passed by a slim majority, 53%, of Arkansans.

Whether this initiated Act will prove to be the result of wisdom, wealth, greed, folly, or despair, etc., remains to be seen. In the meantime, there are a number of possible clarifications the Amendment may require, one of which was the subject of this workers' compensation claim of first impression: Does Amendment 98 require Arkansas employers and their insurers to pay for

medical marijuana?

Although Amendment 98 does not specifically address this issue, after hearing the case, researching the law, studying the parties' briefs and related materials, I have come to the conclusion that neither the state of Arkansas nor the Commission has the authority to require an Arkansas employer, a workers' compensation insurer, or any other third-party payor to pay for medical marijuana. Marijuana is still a Schedule 1 controlled substance under federal law, the CSA. Federal law, i.e., the CSA, preempts state law and the Arkansas Medical Marijuana Act, a/k/a Amendment 98. Amendment 98 contains no exception for marijuana use for medicinal purposes, or for marijuana use conducted in accordance with state law. 21 ***U.S.C***. § 844(a); *see also*, *Gonzales v. Raich*, 545 U.S. 1, 14 (2005). "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail," including in the area of marijuana regulation. Consequently, I have found the claimant's use of medical marijuana herein to be unlawful under federal law – specifically, the CSA – and, therefore, not protected by Amendment 98. *See Gonzales*, 545 U.S. at 29. I fully expect this case to be appealed to the Full Commission, the Arkansas Court of Appeals, and possibly to the Arkansas Supreme Court.

In hearing, trying, researching and writing the opinion in this claim, I cam across a number of issues other than the obvious direct conflict with existing federal law/the CSA, which in the future will not only affect our workers' compensation system, our employees, and employers; but also all Arkansans. Still, just within the context of Arkansas workers' compensation law, these are a few of the questions that come to mind: How will frequent marijuana use affect workers' short-

and long-term memories? Will marijuana use impair the cognitive abilities of our workforce? Will smoking marijuana have the same, or possibly even worse, harmful effects on Arkansans' lungs and general health as smoking tobacco? Doesn't smoked marijuana contain cancer-causing compounds just like cigarette smoke? Doesn't smoking marijuana serve to create a higher risk of abuse and addiction? Lead to a higher percentage of all kinds of accidents, including automobile crashes and workplace injuries and deaths? Marijuana is illegal under federal law, and the CSA and the accompanying ***CFR*** regulations classify it as a Schedule I drug, alongside drugs like LSD, heroin, and ecstasy. The federal Schedule I classification defines marijuana and the other Class I drugs as substances that have no currently accepted medicinal value, and a high likelihood of addiction, both physical and mental? Who truly is benefiting from the sale of legalized marijuana, especially in light of its very high cost? Dispensary owners, operators, and investors? Consumers? Others? Many more questions abound, of course; however, in this claim, I was asked and required to address only one related issue which, at some point in the future, the General Assembly may be asked or required to address, as well.

All of the aforementioned evidence leads one to the inevitable conclusion that, as a matter of law, smoking marijuana does ***not*** constitute reasonably necessary medical treatment within the Act's meaning, nor is there any demonstrable scientific evidence, much less the requisite legal proof, that it is an effective, worthwhile medical treatment for which Respondent No. 1, or any other Arkansas employer or their workers' compensation insurer, should be required or ordered to pay. Therefore, based on the aforementioned law as applied to the facts of this claim, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this claim.

2. The stipulations contained in the Prehearing Order filed February 21, 2021, which the parties modified and affirmed on the record at the hearing, hereby are accepted as facts.

3. As a matter of law and pursuant to the Arkansas Workers' Compensation Act, medical marijuana does not and cannot conceivably and legally be deemed to constitute reasonably necessary medical treatment in relation to a compensable injury(ies). Pursuant to the federal Controlled Substances Act (CSA) and the related provisions of the ***Code of Federal Regulation (CFR)***, *supra,* marijuana has been, is, and remains a Schedule I controlled substance, alongside such notorious drugs as LSD, heroin, and ecstasy. Its classification as a Schedule I controlled substance by federal legal definition means it has no currently known medicinal value, and a high likelihood of addiction.

4. As a matter of law, the federal Controlled Substances Act, the related ***CFR*** provisions, and all other applicable provisions of federal law mentioned, *supra*, preempt Amendment 98 of the Arkansas Constitution of 1874, a/k/a The Medical Marijuana Act.

5. Therefore, for all the reasons enumerated in Paragraphs 3. and 4. of these "Findings of Fact and Conclusions of Law," Respondent No. 1 may not legally be required or ordered to pay the costs associated with the claimant's medical marijuana use. Moreover, Respondent No. 1 may not legally be required to pay for the costs associated with the claimant's medical marijuana use since any such requirement or order would subject Respondent No. 1 to federal prosecution pursuant to the CSA, the related ***CFR*** provisions, and the other federal laws mentioned in the "Discussion" section of this opinion and order, *supra,* including but not limited to aiding and abetting the commission of a felony.

6. Even if Amendment 98 was not preempted by federal law, and the Act provided for the payment of medical marijuana, I find based on the specific facts of this case that medical marijuana does not constitute reasonably necessary medical treatment in relation to the claimant's compensable injury(ies). There exist other legal, FDA approved medications and treatment modalities of which the claimant may avail himself through his authorized treating physician.

7. Respondent No. 1 has been, is, and shall remain responsible for any and all FDA approved, reasonably necessary medical treatment which is related to the claimant's compensable injury(ies) which are the subject of this claim.

8. The claimant's attorney is not entitled to a fee on these facts.

Wherefore, for all the aforementioned reasons, this claim requesting Respondent No. 1 be required to pay for medical marijuana is hereby denied and dismissed.

If they have not already done so, Respondent No. 1 shall pay the court reporter's invoice within ten (10) days of their receipt of this opinion and order.

IT IS SO ORDERED.

____
Mike Pickens
Administrative Law Judge

MP/mp