"No Credible Threat" of Federal Liability: NJ Supreme Court Orders That Employer Reimburse Injured Employee's Costs for Medical Cannabis

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Porzio Client Alert

On April 13, 2021, the New Jersey Supreme Court, in a unanimous decision, found an employee was entitled to costs for prescribed medical marijuana under the Workers' Compensation Act ("WCA"). The decision – *Hager v. M&K Construction* – centered on an M&K Construction employee who injured his back in a work-related incident. The employee treated with prescribed opioids, but the treatment was ineffective, so he enrolled in New Jersey's medical marijuana program. Shortly thereafter, a workers' compensation court ordered the employer to reimburse the employee for his ongoing medical marijuana costs due to the employee exhibiting permanent disability. The Appellate Division affirmed the workers' compensation court's decision, and the matter was appealed to the New Jersey Supreme Court.

The most interesting aspect of the Supreme Court's decision was the analysis related to the interplay between federal and state laws. The employer argued because cannabis remains illegal under the Controlled Substances Act ("CSA"), the federal government could potentially issue federal charges against the employer if forced to pay for an employee's possession of cannabis, even if medically prescribed. The Supreme Court noted that while a "tectonic shift" has occurred in New Jersey regarding the use of both medical and recreational cannabis, the CSA must be considered to determine whether the United States Constitution Supremacy Clause pre-empted New Jersey's laws. The Supreme Court of the United States has interpreted this Clause to mean "that if there is any conflict between federal and state law, federal law shall prevail." *See Gonzales v. Raich,* 545 U.S. 1, 29 (2005).

The New Jersey Supreme Court found that state medical cannabis laws are not pre-empted by the CSA due, in part, to the United States Congress, through annual appropriations riders, prohibiting the Department of Justice from using federal funds to interfere with those acting in compliance with state medical cannabis laws. Citing a previous United States Supreme Court decision (*i.e. Wyeth v. Levine*, 555 U.S. 555 (2009)), the New Jersey Supreme Court determined the CSA was effectively "suspended" in relation to medical cannabis, and joined the New Hampshire Supreme Court as one of only two highest state courts to find medical cannabis laws not pre-empted by the CSA. Id. at 575 (SCOTUS concludes federal pre-emption argument is "particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to . . . tolerate whatever tension there [is] between them.")

Other states' highest courts have reached the opposite conclusion. See, *e.g., Wright's Case*, 156 N.E. 3d 161, 175 (Mass. 2020) (concluding that the plain language of the state reimbursement limitation provision prohibited compelling workers' compensation insurers to reimburse the cost of medical marijuana); *Bourgoin v. Twin Rivers Paper Co.,* 187 A.3d 10 (Me. 2018).

These dueling interpretations eventually may set the stage for the Supreme Court of the United States to take up the federal pre-emption issue regarding medical and/or recreational cannabis. For now, the New Jersey Supreme Court has clarified that employers will have to reimburse employee's medical cannabis costs in certain fact-specific scenarios. If you have questions regarding the *Hager v. M&K Construction* decision, please contact Porzio's Labor and Employment Team.