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Court Affirms Workers' Compensation Determination Requiring Employer To Reimburse Employee for Costs of Medical Marijuana

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A New Mexico intermediate appellate court has affirmed a workers' compensation judge's determination that an employer and its workers' compensation carrier are required to reimburse an employee for costs associated with the purchase of medical marijuana. *Vialpando v. Ben's Auto. Servs. and Redwood Fire & Casualty*, 2014-NMCA-32,920 (N.M. Court of Appeals, May 19, 2014).

Gregory Vialpando sustained a work-related lower back injury in June 2000 that required numerous surgical procedures. By 2008, the workers' compensation judge assigned to Vialpando's case determined that Vialpando had reached "maximum medical improvement" for his physical and psychological conditions, and that he had a 99% permanent partial disability.

In 2007 the State of New Mexico passed the Lynn and Erin Compassionate Use Act, which created a program allowing for the use of medical marijuana. Vialpando, who according to his doctor suffered "extremely high intensity, frequency, and duration of pain", was certified by his doctor to participate in the Compassionate Use Act's medical marijuana program. Vialpando filed an application in 2013 for approval by the workers' compensation judge of medical treatment for medical marijuana. The workers' compensation judge granted Vialpando's request, holding that Vialpando was entitled to "ongoing and reasonable medical care" which included the use of medical marijuana. The workers' compensation judge ordered Vialpando to pay for the medical marijuana and required the employer and its workers' compensation carrier to reimburse Vialpando for these costs.

The employer challenged the ruling, arguing that: (1) it was illegal and unenforceable under federal law and thereby also contrary to public policy; and (2) the Act and its regulations do not recognize reimbursement for medical marijuana.

Turning to the reimbursement issue first, the Court noted that the New Mexico Workers' Compensation Act requires an employer to provide an injured worker "reasonable and necessary health care services from a health care provider." Rejecting the employer's argument that a doctor who dispenses medical marijuana is not a "health

care provider," the Court interpreted "health care services" very broadly and focused on the "reasonable and necessary" requirement. Given that Vialpando's doctors recommended the services under a program authorized by the Compassionate Use Act, that was sufficient for the Court to conclude that medical marijuana is "reasonable and necessary" under the Workers' Compensation Act.

The Court also rejected the employer's arguments that marijuana is illegal under federal law and therefore reimbursing Vialpando would require it to violate federal law. First, the Court stated that the employer did not challenge the legality of the Compassionate Use Act and did not identify any federal statute that it would be forced to violate. Next, the Court rejected the argument that reimbursing Vialpando would violate public policy. The Court noted that the "Department of Justice has recently offered what we view as equivocal statements about state laws allowing marijuana use for medical and even recreational purposes," and further noted that the Department of Justice has stated that it would defer its right to challenge laws in Colorado and Washington legalizing possession of marijuana. Additionally, it was clear to the Court that New Mexico public policy clearly favors the use of medical marijuana. For these reasons, the Court upheld the workers' compensation judge's ruling requiring the employer and its workers' compensation carrier to reimburse Vialpando for medical marijuana expenses.

This case is one of the first court rulings to highlight the fact that although marijuana remains illegal under federal law, the federal government's current position is that it will not oppose state medical and recreational marijuana laws. Employers should take note and be cautious when opposing employees' claims under these state laws.

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