ERACLIDES GAZETTE

Medical Marijuana—A "Gateway" to Compensability?

By: Zal Linder, Partner, Atlanta

Recently, Georgia passed new legislation into law on April 21, 2015, which allows for the use of cannabis oil for eight different medical conditions. The Georgia General Assembly approved, and Governor Nathan Deal signed a law allowing registered patients and their caregivers to legally possess up to 20 fluid ounces of low-THC oil with their doctors' recommendations. A closer inspection of this new law allows for patients with eight specific medical conditions to be eligible for treatment with cannabis oil that has a minimal level (only 5 percent) of tetrahydrocannabinol, or THC. This allows physicians the ability to prescribe "medical marijuana" to treat specific conditions such as Parkinson's disease, Lou Gehrig's disease, seizure disorders, sickle cell anemia, cancer, Crohn's disease, multiple sclerosis, and mitochondrial disease. As a result of such a narrow usage of medical marijuana, many experts are not even classifying Georgia as a "Medical Marijuana" state.

In order to be protected under Georgia's new marijuana law, the patient or caregiver must register with Georgia's "Low THC Oil Patient Registry." The Low THC Oil registry is a secured database of qualified patients who are registered and issued medical marijuana registration cards. The patient or caregiver must also sign a waiver to be developed by the Georgia Composite Medical Board stating that "the use of cannabinoids and THC containing products have not been approved by the FDA and the clinical benefits are unknown and may cause harm."

The question now turns to how this growing trend in legalization of marijuana impacts workers' compensation claims, and if a positive drug test for marijuana could overcome the hurdle of compensability. O.C.G.A. §34-9-17(b) states: "No compensation shall be allowed for an injury or death due to intoxication by alcohol or being under the influence of marijuana or a controlled substance, *except as may have been lawfully prescribed by a physician for such employee and taken in accordance with such prescription*…"

Under most circumstances, a positive test for marijuana taken within 8 hours of an accident will serve as a bar to compensability of an accident. However, given the new law in place, should the injured worker present the employer/insurer with his Low THC Oil Registry Card, this could be enough to overcome his or her burden of rebutting the positive drug test by showing that the marijuana was lawfully prescribed by a physician. Furthermore, what if another injured worker is working at a light duty position and gets re-injured, and then tests positive for marijuana? If he or she can show that they are a patient under the care of a physician within one of the assigned categories for receiving medical marijuana in Georgia, could this also serve as a means for circumventing all defenses to the positive drug test? Unfortunately, the short answer is that we still don't know, as we have not received any guidance so far from the Georgia Courts.

A quick look at a recent case decided last month in Colorado gives reason for optimism for employers and insurers, and signals how injured workers still have an uphill battle to overcome compensability. The case involved Brandon Coats, a quadriplegic who was fired by Dish Network in 2010 after he failed a company drug test for marijuana. See Coats v. Dish Network, LLC., 2015 CO 44, No. 13SC394. The facts show that the plaintiff (Coats) had authorization to smoke medical marijuana, which has been legal in Colorado since 2000. The plaintiff testified that he never used marijuana, nor was he under its influence while at work, facts that Dish Network did not dispute. However, Dish Network relied upon their zero-tolerance drug policy, and despite its legality in Colorado, argued that medical marijuana is still illegal on the federal level. Therefore, Dish took the position that the use of the drug for any reason is cause for termination.

There is a Colorado law that protects employees from being discharged for "lawful activities," but the Colorado Supreme Court held that the law refers only to activities which are legal under *both* state and federal law. The Court further held that "employees who engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected by the statute." The implication here is that a Georgia employer could terminate an injured worker, or any employee for that matter, on the basis of a positive drug test, regardless of whether the marijuana was being prescribed lawfully by a physician. Within the context of a workers' compensation claim, it would then allow the employer/insurer to raise a TTD defense that the termination was for reasons unrelated to the accident, and thus shift the burden back to the claimant to prove TTD entitlement. This assumes that the claimant is able to first prove compensability of the initial accident, as a positive drug test at the outset of the claim may still bar the claim entirely.

Although the Coats case is limited to Colorado, the Court's decision may have national ramifications. Previous cases in California, Montana, Oregon, and Washington all swung for the employer, while New Mexico rulings have favored the employee. Interestingly, the Colorado case was widely viewed as the best chance for a ruling in favor of medical marijuana patients, and yet still the employee lost. Going forward, it will be telling to see how the Georgia Courts look to these recent rulings, and whether they fall in line with other jurisdictions ruling in favor of employers and insurers.

Game Over for "Gotcha!" One Time Changes

By: Liana Mette, Associate, Jacksonville

As of late, a thorn in the sides of employer/carriers across Florida has taken root: the hidden one time change request. Often buried in documents or motions that appear to have a completely different purpose, these requests for a one time change of physician could easily be unnoticed by the E/C until after the 5-day deadline has passed. Until now, the use of this tactic by claimants' attorneys has triggered an increase in litigation efforts to resolve this question: was the hidden request sufficient to put the E/C on notice and effectively begin the 5-day statutory period?

On July 15, 2015, Florida's 1st DCA issued an order in Gonzalez v. Quinco Electrical, Inc., Case No. 1D14-5395, holding that the claimant's one time change request did not give the E/C proper notice because it was contained in a Notice of Appearance (NOA) filed by the claimant's attorney. The E/C discovered the request on the sixth day after the NOA was filed, and authorized a new doctor the same day. The claimant, however, argued that the E/C lost its right to select the new doctor because it failed to do so within the 5-day period. The JCC found that the NOA did not trigger the E/C's obligation to authorize another physician and that the E/C's authorization on the sixth day was valid.

The claimant's attorney admitted that he "took advantage of" the knowledge that adjusters do not necessarily read every document they receive in detail. The Court explained that a claimant's one time change request should not be hidden in a document that "appears on its face to have exclusively another purpose. Rather, the request should be readily apparent, unobscured, and unambiguous" in order to put the E/C on notice of the request. According to FS 440.015 (2013), the workers' compensation system must "ensure the prompt delivery of benefits to the injured worker" and must be "an efficient and self-executing system which is not an economic or administrative burden." The Court noted that the claimant's attorney's use of the hidden one time change request effectively delayed the delivery of benefits and increased litigation expense, which was "directly contrary to the self-executing system intended."

The Court also stated that the dispute was the result of an intentional act on the part of the claimant's attorney, an act that the Court considered "inappropriate sharp practice and gamesmanship." The Court referred to the Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, and The Rules Regulating The Florida Bar, explaining that "[l]awyers' adherence to these pledges and duties would eliminate the improper 'gotcha' tactics that generate disputes such as this that unfairly and needlessly consume public and private resources while delaying the workers' compensation process and making it more expensive."

In light of this decision, Florida E/Cs should not be penalized for responding to one time change requests outside the 5-day statutory period when the request itself is hidden within material received from a claimant's attorney.

Gimme Shelter for PTD benefits

By: Sean Jordan, Associate, Orlando

"*Oh, a storm is threat'ning,*
My very life today,
If I don't get some shelter,
Oh yeah, I'm gonna fade away"
The Rolling Stones, Gimme Shelter, on Let it Bleed (London Records 1969)

Despite a lack of citable evidence, I feel comfortable that The Rolling Stones did not write "Gimme Shelter" about sheltered employment in workers' compensation cases. However, the lyrics mirror a history of case law in which employer/carriers mistakenly offer a claimant "sheltered" employment as an attempt to rebut a claimant's prima facie case for permanent total disability (PTD) benefits. The First DCA's recent per curiam affirmation rendered in Jairo Lozano v. Planet Hollywood / Zurich American Insurance Company (Case No. 1D14-5703, June 18, 2015), further solidified the Court's longstanding position that sheltered employment will not rebut a claimant's eligibility for PTD benefits under FS 440.15(1)(b).

In Florida, once a claimant establishes a prima facie case for PTD benefits, the employer can rebut with evidence that the claimant can be placed in "gainful" employment. However, the availability of gainful employment is a factual issue to be determined on a case-by-case basis. In general, an employer is able to show available gainful employment when (1) the position offered to the claimant is available on the open labor market, and (2) the job modifications needed for the claimant's work restrictions are not unusual or novel. If the employer cannot provide this evidence, then the court will conclude the employment is sheltered and only exists to avoid payment of PTD benefits.

First, an employer must show the job is available on the open labor market. Employers should offer evidence the position is not exclusively available to the claimant or employees with workers' compensation claims. In other words, the employer should be able to show the position offered to the claimant is available in its location(s), or in the locations of its competitors, and would be filled by the general public if the claimant was not working in that position.

Second, an employer must show the modifications made to the position to account for the claimant's restrictions are reasonable. The Americans with Disabilities Act requires employers to make reasonable modifications for their disabled employees' restrictions. Reasonable modifications will not place a job outside of the definition of gainful employment. However, job modifications that are unusual or novel may cause a court to consider a position to be sheltered employment. As a practice point, a likely indicator that a job is sheltered is if the modifications make a claimant's job duties different from others holding the position.

Lozano emphasizes the need for employers to carefully work through this factual analysis. In Lozano, the claimant was terminated by the employer in 2012 after suffering an injury at work. In 2014, the employer offered the claimant a position as a prep cook. The employer made modifications to the position to account for the claimant's restrictions. As a result, the claimant was not required to do heavy lifting, allowed to work at a self-directed pace, and not required to meet any quotas. Additionally, the claimant was regularly sent home early, and told not to report to his shift.

Based on the evidence the JCC concluded the position was "at best sheltered employment and at worst is a litigation tactic." First, the JCC concluded the job was created exclusively for the claimant and not available on the open job market because the claimant's job was not essential to the employer's ongoing operation, and the employer would not hire someone else to perform the claimant's tasks. The JCC based this on evidence the claimant was regularly sent home early and told not to report to work. Second, the JCC concluded the job modifications were not reasonable, but rather were unusual and novel because they made the claimant's job duties different from the other prep cooks. The JCC relied on evidence that the other prep cooks were required to perform heavy lifting, work at a fast pace, and meet quotas. Therefore, the JCC concluded, and the First DCA affirmed, the claimant's position constituted sheltered employment.

In light of this case, any job offers/accomodations made by an employer during the pendency of, or in anticipation of, a PTD claim must be closely scrutinized. Without passing these tests, the job will not help to defend a PTD claim, and alternative solutions will need to be provided.

Medical Malpractice and Workers' Compensation Liens

By: Faith Searles, Associate, Tampa

Medical malpractice lawsuits can serve as a collateral source for exposure recovery when medical negligence occurs during the claimant's treatment for an industrial accident. The employer/carrier has the right to bring suit against third parties on behalf of the claimant when a claimant fails to do so. FS 440.39(4)(a) states in part:

> "If the injured employee…fails to bring suit against such third-party tortfeasor within 1 year after the cause of action thereof has accrued, the employer/carrier, may, after giving 30 days' notice to the injured employee…and the injured employee's attorney, if represented by counsel, institute suit against such third-party tortfeasor, either in his or her own name or as provided by subsection (3), and, in the event suit is so instituted, shall be subrogated to and entitled to retain from any judgment recovered against, or settlement made with, such third party…."

This statutory right can become quite handy when an authorized physician tries to abate their own medical negligence with amenities furnished on the workers' compensation carrier's tab.

HYPOTHETICAL. After conservative care fails to alleviate the claimant's back pain, the authorized physician implants an inter-spinal pain pump. Complications arise from this procedure due to medical negligence, leaving the claimant significantly worse off. The physician then seeks authorization of expensive and previously unnecessary items (i.e. a Jacuzzi tub, attendant care, handicap accessible van), all the while claiming medical necessity and causal relation to the prior industrial accident - a loosely veiled attempt to keep the claimant happy and avoid a medical malpractice claim.

In such a situation the E/C may bring suit *on behalf of* the claimant to hold the physician accountable and recover the physician's share of injuries caused to the claimant. The E/C must wait one year before filing the medical malpractice suit (after proper compliance with FS 440.39), and the claimant is thereafter unable to bring the lawsuit, thus securing tighter control of the outcome in favor of the E/C's ultimate reimbursement. See Kimbrell v. Paige, 448 So.2d 1009 (Fla. 1984).

If the claimant in the example given above were to file the malpractice suit or reach a settlement with the negligent authorized physician, the E/C may still be entitled to subrogation from a properly asserted lien under FS 440.39(3)(b). According to the Florida Supreme Court, the E/C may assert a lien if medical malpractice *aggravates* or *worsens* a compensable injury, payable from the proceeds of a medical malpractice settlement or verdict at trial. See Liberty Mutual Insurance Co. v. Chambers, 526 So.2d 66, 67 (Fla. 1988) (adopting American Mutual Insurance Co. v. Decker, 518 So.2d 315 (Fla. 2d DCA 1987). Such a procedure was found to be "expressly provided by law" and anticipated by the collateral source statute per FS 768.50(4).

FS 440.39(4)(a) and FS 440.39(3)(b) can be powerful tools for the E/C to ensure any funding furnished to the claimant is solely related to the workers' compensation case for which they are responsible…rather than the medical negligence of a treating physician. If you have any questions about third party medical malpractice litigation or liens, feel free to contact our firm.

The Fort Myers District welcomes its newest JCC, Jack Weiss, Esquire. Judge Weiss brings years of defense work to the bench and takes the place of Judge Spangler, who recently relocated to the Tampa District.