

## **WORKERS' COMPENSATION SHOP TALK**

In the last [Shop Talk](#), we discussed the health care uses of CBD, how it is being handled by physicians, whether a prescription is needed, and if CBD is useful in treating workplace injuries. In this issue, we will discuss the intersection of CBD and employer drug-testing programs, whether and how employers are likely to pay for CBD for their injured workers, and how Ohio is dealing with CBD.

### **Intersection of CBD and employer drug-testing programs**

One of the claimed advantages of using hemp-derived CBD products over marijuana is that by law (PL 115-334, the “Farm Bill”) they contain less than .3% THC – the psychoactive component in cannabis. Due to the low THC found in hemp-derived CBD products, users do not experience the “high” that marijuana users can experience. *See National Center for Biotechnology Information [survey](#).*

However, because most CBD products derived from hemp still contain at least trace amounts of THC, there's a remote possibility that CBD use could lead to a positive drug test. The [most common test](#) used by hospitals and employers is a urine test that specifically targets THC metabolites. For urine tests, the U.S. Department of Health and Human Services recommends a cutoff of 50 nanograms per milliliter for THC metabolites to trigger a positive result. *49 CFR 40.87* (Ohio's drug testing law, R.C. 4123.54, adopts this standard in order to create a “rebuttable presumption” of intoxication.) One estimate from [US Drug Test Centers](#) found that users consuming excessively high levels of CBD or hemp oil (greater than 2,000 mg per day) could possibly result in a positive test, although the chance was unlikely. At that level of consumption, some studies note that the consumer/patient would also likely experience psychoactive effects. The Food and Drug Administration cautioned that the wide range of CBD products available (i.e. candy, coffee, oils and lotions) could result in a [cumulative exposure](#). This could, in theory, lead to a positive test. Further complicating the issue is that CBD products are largely unregulated, with some products found to have significantly higher amounts of THC present.

While current tests should be sufficient, employers should consider the rising use of CBD products in evaluating their testing programs.

### **Does an employer have to pay for CBD as part of treatment?**

Payment for CBD treatments for workers' compensation claims is still an open question. Most analysts who have looked at the issue anticipate a reimbursement model similar to other over-the-counter remedies. Guidance can be taken from medicinal marijuana, wherein most states medical marijuana has been approved have at least attempted to facilitate payment for injured workers. The sticking point in most states for medical marijuana remains the legality issue - that

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the sale or possession of cannabis which contains more than .3% THC remains illegal under the Federal Controlled Substances Act. This issue was discussed by the Maine Supreme Court in *Gaetan H. Bourgoin v. Twin Rivers Paper Company, LLC, et al.* In that [case](#), Mr. Bourgoin suffered chronic pain as a result of a workplace injury. He received certification for medicinal marijuana under Maine's Medical Use of Marijuana Act. Maine's Board of Workers' Compensation granted Mr. Bourgoin's petition to have his employer, Twin Rivers, pay for his medicinal marijuana. Twin Rivers appealed, arguing that requiring the employer to pay for medicinal marijuana violated the Controlled Substances Act. The Maine Supreme Court agreed, stating Twin Rivers would be "aiding" or "abetting" Mr. Bourgoin's pursuit of a substance banned under federal law if it paid for his marijuana.

The question of legality does not arise with CBD since the 2018 Farm Bill eliminates the concern that federal law will conflict with state laws by legalizing CBD derived from hemp. The remaining question concerns whether reimbursement is required, and that question will concern whether CBD is recognized as a medically necessary treatment.

### **Cannabis and CBD in Ohio – A Work In Progress**

The Ohio General Assembly passed Ohio's medical marijuana control program on September 8, 2016, which is codified under R.C. Chapter 3796. The program, which took effect on September 8, 2018, allows medicinal marijuana to be used to treat 21 "qualifying" medical conditions. (The details, such as establishing dispensaries and labs, continue to lag.) The affected conditions include traumatic brain injury, post-traumatic stress disorder, and chronic and severe pain. The Ohio Bureau of Workers' Compensation released [guidance](#) as to reimbursing expenses for medical marijuana prescribed to treat injured workers in August, 2018. It noted that while the Ohio Revised Code does not address reimbursement, current BWC rules and statutes limit which medications are reimbursable. Under OAC 4123-6-21.1(C) the BWC only reimburses for drugs that are approved by the FDA, and that are dispensed by a registered pharmacist from an enrolled pharmacy provider. The FDA has not approved marijuana because federal law treats marijuana as a [Schedule I](#) controlled substance, and therefore physicians are not permitted to prescribe it and pharmacies cannot stock it. Additionally, only licensed retail dispensaries, not enrolled pharmacy providers, will dispense medical marijuana under [R.C. 3796.20](#). However, so long as physicians have the proper certification, they can "recommend" marijuana as treatment.

While marijuana has many barriers to reimbursement in Ohio's workers' compensation system, CBD's path is potentially easier. Ohio has already taken its first step proposing a regulation that would decriminalize CBD derived from hemp. Under current law, Ohio treats CBD the same as it does marijuana. [Senate Bill 57](#) would not only decriminalize CBD derived from hemp, which is in line with what 2018's Farm Bill did, it would also provide a licensing program for hemp cultivation. The Ohio General Assembly passed S.B. 57 on July 17, 2019, but Governor Mike DeWine has yet to sign S.B. 57 into law.

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Until S.B. 57 is passed, CBD products in Ohio are still nominally treated like marijuana. As such, the State of Ohio Board of Pharmacy issued a statement in its August 2018 [newsletter](#) advising that the only way to legally purchase CBD derived from hemp is through a medical marijuana dispensary. Some retailers have removed their CBD products, while others advertise them. Some Ohio local enforcement agencies have been swift to [order](#) retailers to remove hemp products off the shelves. A notable case involved the seizure of [7,000 ounces](#) of CBD oil on an Ohio highway, leading to indictments of two men from Rhode Island. Once testing revealed that the seized CBD oil contained .15% THC, less than the pending S.B. 57's .3% threshold, Ohio decided not to prosecute. If passed, S.B. 57 will provide a process for those who had their CBD products confiscated returned to them. The State Board of Pharmacy has approved Epidiolex, the first ever FDA approved drug derived from cannabis that treats severe forms of epilepsy, as legal in Ohio. In time Ohio will likely join the other [17 states](#) that have specifically passed laws allowing CBD for certain purposes, mostly for the treatment of seizures.

Surveys such as BSD Analytics and Arcview Market Research estimate the CBD business could reach \$20 billion in sales by 2024. Therefore, it is only a matter of time before injured Ohio employees will seek reimbursement for taking CBD to treat ailments stemming from workplace injuries. It is best for Ohio employers to work with MCOs and third-party administrators to develop protocols and guidelines.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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