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INSURANCE BROKERS AND CONSULTANTS

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IN THIS ISSUE

LEGALIZATION OF MEDICAL MARIJUANA IN PENNSYLVANIA AND THE EFFECTS ON WORKERS' COMPENSATION

On April 17, 2016, Governor Wolf signed Title 35 P.S. Health and Safety, Chapter 64 (commonly known as the Pennsylvania Medical Marijuana Act), into law. This law permits the use of marijuana in certain regulated instances in the Commonwealth despite the ongoing prohibition under federal law. To determine the potential impact on workers' compensation, one must first assess who can access medical marijuana.

From a patient perspective, access to medical marijuana is limited to individuals who have a specified serious medical condition. Serious medical conditions include: 1) cancer; 2) HIV/AIDS; 3) amyotrophic lateral sclerosis (ALS); 4) Parkinson's disease; 5) multiple sclerosis; 6) damage to the nervous tissue of the spinal cord with objective neurological signs indicated by intractable spasticity; 7) epilepsy; 8) inflammatory bowel disease (IBS); 9) neuropathies; 10) Huntington's disease; 11) Crohn's disease; 12) post-traumatic stress disorder (PTSD); 13) intractable seizures; 14) glaucoma; 15) severe chronic or intractable pain; 16) autism; and 17) sickle cell anemia.

Out of the seventeen eligible conditions, the following are most likely to be encountered in the workers' compensation context:

(1) Post-traumatic stress disorder;

(2) Neuropathic pain; and

(3) Severe chronic or intractable pain.

How Does This Affect Employers and Insurers in Pennsylvania?

Under federal law, medical marijuana is treated like every other controlled substance, such as cocaine and heroin. Therefore, use or possession of medical marijuana is a federal crime even if possessed or used for valid medical treatment under Pennsylvania law. In this light, the issue of who can pay for medical marijuana in Pennsylvania becomes complicated.

In Pennsylvania, there are a variety of entities which pay for medical treatment including insurance carriers, third-party administrators and self-insured employers. All of these entities have a valid apprehension about issuing payment for medical marijuana in light of the ongoing conflict between state and federal law.

In an attempt to address these concerns, Title 35 P.S. Chapter 64 §2102 states that "nothing in this act shall be construed to require an insurer or a health plan, whether paid for by Commonwealth funds or private funds, to provide coverage for medical marijuana." Despite the clear language, there is cause for concern as there is no definition of insurer or health plan contained in this law. There are entities in the workers compensation forum, which may not be viewed as "insurers" or "health plans," including self-insured employers that do not function as traditional "insurers." It remains unclear if these non-traditional entities are afforded the protection set forth by §2102.

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HAVE AN EMERGENCY CLAIM?

Please call The Graham Company at 215.567.6300, 24 hours a day, 365 days a year.

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There may be reason for employers and insurers to have additional concerns when hiring and employing a patient who has been prescribed medical marijuana. §2103(B)(1) states that "no employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use marijuana." However, §2103 (B)(2) states that, "[t]his act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position." It can be construed that this provision offers some protection to employers, but there is no definition of the term "standard of care" and the extent of any protection may be left to the courts to interpret. These provisions should not limit an employer's ability to discipline an employee as a result of a positive post-accident drug test, so long as the employee's conduct fell below the standard of care normally accepted for that position. However, a positive post-injury drug test alone may not result in a denial of workers' compensation benefits. While the Pennsylvania Workers' Compensation Act bars compensation when an injury results from a claimant's violation of the law, if the injured worker is legally prescribed medical marijuana and fails a post-injury drug test, there may be no such violation. Further, similar to other work-related accidents involving legal or illegal drugs, the employer will still be required to demonstrate that the consumption of marijuana was the cause of the claimant's injury in order for there to be a denial of benefits.

Other questions arise regarding medical marijuana use and the issue of workplace safety. §510(1-3) specifies that an employee, "may not operate or be in physical control…of strong chemicals or high voltage electricity (or any public utility) if that patient has more than 10 nanograms of tetrahydrocannabis in their blood." However, without a provision requiring the employee to disclose a prescription for medical marijuana, an employer may be unable to make accommodations accordingly. This section also specifies that an employee "under the influence of medical marijuana" may not perform any employment duties at heights or in confined spaces. Furthermore, employees "may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer." The term "life-threatening" is not defined and may also be subject to interpretation through the Courts.

Additionally, §510(4) states that, "a patient may be prohibited by an employer from performing any duty which could result in a public health or safety risk while under the influence of medical marijuana." This language can be construed to allow an employer discretion when prohibiting an employee under the influence of medical marijuana to perform tasks of employment. Since there is no definition for "under the influence" an employer may not recognize when an employee is under the influence and be restricted from performing certain job duties. This provision could be construed to shift the responsibility to an employer to determine when an employee is under the influence of medical marijuana, which may result in future financial exposure.

What the Future Holds

Under the current construct of the Pennsylvania Medical Marijuana Law, we see at least four potential worker's compensation litigation issues:

(1) Whether a Utilization Review of marijuana treatment would be viable on the theory that the treatment is not reasonable or necessary due to the continuing language in federal law that marijuana is a Schedule 1 drug and cannot be prescribed for any purpose;

(2) Whether, if requested to do so, a workers' compensation carrier must reimburse an injured employee for out of pocket payments made for medical marijuana;

(3) Can an employer, carrier or health plan be required to pay directly for medical marijuana if prescribed to treat a work related injury;

This issue will likely be determined by the Courts as the payment of medical marijuana is prohibited by this law, while the Pennsylvania Workers' Compensation Act requires an employer, insurance carrier or third party administrator to pay for reasonable, necessary and related expenses; and,

(4) Reinstatement of wage loss benefits for termination and/or wage loss associated with the use of medical marijuana related to a work injury.

As noted above, the Pennsylvania Workers' Compensation Act allows for a denial of workers' compensation benefits if an employee is in violation of the law. In this situation, as long as the employee's use of medical marijuana in legal, it is unlikely benefits will be terminated.

We anticipate significant litigation for insurance carriers, third-party administrators, employers and other entities throughout the process of implementation of the medical marijuana statute in Pennsylvania. The process will become more intricate when the Pennsylvania Workers' Compensation Act is involved. Further, it is crucial for employers and insurance carriers to understand the ramifications of the Pennsylvania Medical Marijuana Act beyond the workers' compensation realm. Employers should consider the impact of the Act on their employment practices and the requirements related thereto under federal law.

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The Graham Company recognizes that emergencies don't just happen during business hours. The Graham Company Claims Services Department stands ready to assist our clients 24 hours a day, 365 days a year. In the event of an emergency claim, please call The Graham Company at 215.567.6300. If you are calling after hours, you will receive instructions on how to reach The Graham Company's On-Call Emergency Claims Coordinator.

The Graham Company will help you record the vital information concerning the loss and obtain the appropriate experts to help you. These experts could include an insurance adjuster, an attorney, cause and origin expert, restoration specialist, media consultant, and depending upon the severity of the loss, a public adjuster. These experts are important in documenting and controlling the evidence involved in the loss. Subrogation recovery may hinge upon the investigation and immediate attention is critical.

This is a service we hope you will never have to use, but rest assured, we are here to help.

EMERGENCY CLAIM BYTES

ASBESTOS... SILICA... LEAD PAINT... OH MY!
ALLOCATION METHODS FOR LONG TAIL INSURANCE

Long-tail or delayed manifestation claims typically arise from losses that occur over an extended period of time. Examples of such claims include exposure to various injurious substances, such as pollution, asbestos, silica or lead paint. Generally, these claims are reported to insurance companies many years after a person is first exposed to the substance. Often, the identity of the insurance companies on the risk at the time of exposure through time of injury is lost. Additionally, even if a policy can be identified, it may have asbestos or silica exclusions. A common threshold question therefore arises as to how the losses will be apportioned between the insurance companies and the policyholders who may be standing in for the insurance companies for the uninsured years. While the concept of allocation is a central component of both coverage litigation and general claims handling, there is no universal method of application, and the respective apportionment of defense and indemnification can vary state by state. This article provides analysis of the two leading allocation methods and how they are applied in New Jersey and Pennsylvania.

Of course, before a loss can be apportioned to a specific insurance policy, a determination must be made as to whether the terms of that policy were in fact triggered. After identifying the policies triggered by a particular loss, it is necessary then to determine how the loss will be shared among and between the insurance company/companies and the policyholder (who, as mentioned above, may have no insurance coverage for specific years either because of lost policies or specific exclusions). The two leading methods in this regard are *pro rata* allocation and joint and several liability.

The *Pro Rata* Allocation Method

Insurance companies typically advocate for *pro rata* allocation or "horizontal exhaustion", which focuses on the time on the risk and frequently apportions the loss equally with its insured. Courts employing this method will apportion sums to the policyholder for triggered periods in which there is no insurance or where there exist insufficient limits of insurance. Sums assigned to the policyholder in such situations are referred to as "orphan shares." Notably, defense costs and indemnification are treated differently with respect to these types of shares. Generally, the defense of the policyholder is the sole responsibility of the insurance companies (on the theory that the insurance companies assumed a full and complete duty to defend – where duty to defend policies are involved). On the other hand, indemnity (payment of any settlement or judgment) is handled differently. The responsibility for indemnity is laid upon the specific insurance carrier or policyholder on the risk.

The Joint and Several Liability Approach

The joint and several liability approach (also referred to as the "all sums" or "vertical spike" methods) permits the policyholder to essentially pick and choose the insurance policy to which the loss will be allocated. Generally, the policyholder is shielded from assuming any portion of the loss unless deductibles or self-insured retentions are involved. Needless to say, this is the preferred allocation method of policyholders.

New Jersey

Courts in New Jersey have adopted the *pro rata* allocation method in long tail cases and have continued to reject the joint and several liability approach. The seminal case in New Jersey is *Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998), where the policyholder experienced an environmental property damage claim arising from its disposal of waste. The Court in *Carter-Wallace* specifically outlined the manner in which the *pro rata* allocation method is to be applied. First, the limits for an individual policy period (including both primary and excess) are divided by the total coverage limits under the triggered policies for all years on the risk (including both primary and excess). Thereafter, the percentage of the loss for each year is allocated to the applicable insurance policies, self-insured retentions or to the policyholder. New Jersey Courts have routinely applied the *pro rata* allocation method. *See also Owens-Illinois, Inc. v. United Ins. Co.*, 650 A.2d 974 (N.J. 1994); *IMO Industries Inc. v. Transamerica Corp.*, 2014 WL 4810047 (N.J. Super.Ct. App. Div. 2014); *Foster Wheeler L.L.C. v. Affiliated Fm Ins. Co.*, 27 Misc. 3d 1223(A), 2010 WL 1945774 (N.Y. Sup 2010) (unreported decision) (New Jersey law applied).

Pennsylvania

Pennsylvania courts have routinely upheld the joint and several liability approach and have avoided allocation to the policyholder. In *J.H. France Refractories Co. v. Allstate Ins. Co.*, 534 Pa. 29, 626 A.2d 502 (Pa. 1993), the policyholder was sued for asbestos bodily injury claims. The Court ultimately permitted the policyholder to seek recovery of indemnity costs from any triggered insurer without exposing itself to any risk. The chosen insurers would thereafter seek contribution from those insurers not selected by the policyholder. *See also ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 764 F.2d 968 (3d Cir. 1985) and *Viacom, Inc. v. Transit Cas. Co.*, 138 S.W.3d 723 (Mo. 2004) (applying Pennsylvania law). Pennsylvania courts have also accepted the joint and several liability approach for defense costs, holding that such expenses will not be allocated to the policyholder. *See TPLC, Inc. v. United Nat'l Ins. Co.*, 44 F.3d 1484 (10th Cir. 1995) (applying Pennsylvania law).

Use of an Insurance Archeologist

No matter what allocation method is utilized by your state, the simple fact is that the more insurance companies/policies that you can get involved in your loss, the better. In the event you suffer a long tail claim, you should consider the assistance of an insurance archaeologist, who will help identify and locate insurance policies dating back to the inception of a claim. This type of assistance is especially necessary in cases where the policyholder may not have adequately maintained records or retained copies of the operative insurance policies. Regardless of the complexity of the claim, policyholders should understand the governing allocation method in their jurisdiction in the event such a claim arises.

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6 Steps to Prepare Your Business for the 2016 Hurricane Season

According to AccuWeather, the East Coast may be in for a wet and windy couple of months ahead. Hurricane season, which runs from June 1 through Nov. 30, is just starting, but forecasters are already buzzing about what Mother Nature has in store for the East Coast. Weather forecasters are predicting 14 storms – eight hurricanes and six tropical storms – will develop in the Atlantic Ocean this season. However, there is one caveat that could limit the number of storms we experience. Weather forecasters are calling it a "cold blob" of water in the North Atlantic Ocean that could push its way south into tropical regions of the ocean.

Hurricane Preparedness for Businesses in 2016

Regardless, businesses are wise to make sure they are prepared for potential storm losses. Insureds should consider taking these steps over the next couple of weeks:

1. Prepare buildings. Have your buildings inspected and complete maintenance necessary to ensure they can withstand severe weather.

2. Review your current insurance program. Review your policies to ensure appropriate limits and deductibles are in place and evaluate coverage gaps. Your current program may not cover mold damage from flooding. Most property policies have exclusions or extreme sublimits for mold remediation and you may want to consider a separate pollution policy.

3. Review reporting requirements. While every policy is different, most require you to notify the carrier immediately, take reasonable steps to protect your property from further loss and submit "proof of loss" within a certain time period.

4. Create a list of emergency vendors. Verify that you have accurate contact information for your broker, carrier and emergency vendors. Ideally, vendors responsible for handling the aftermath of flooding, fire, power interruption, etc., should be recognized as preferred vendors by your carrier. Prenegotiating rates and availability guarantees with vendors will give you peace of mind and save time and money in the event of a disaster.

5. Review disaster recovery plans. Make sure your business's disaster recovery plan is up to date. If it's been a while since you updated it, check out a recent blog post on the key components of a disaster recovery plan.

6. Review team assignments. Your business's disaster recovery plan should clearly outline members of this team along with their roles and responsibilities. Key members should include a team leader and a staff of employees that specializes in information systems, insurance, human resources, communications and public relations.

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PERSONNEL BYTES

We are pleased to announce that in 2016, The Graham Company welcomed Michael Rymal as its newest Associate Claims Consultant in our Claims Services Department. Mike graduated from Temple University with a Bachelor's degree in Risk Management & Insurance. Mike remains active in the Fox School of Business Alumni Association and the Alumni Chapter of Gamma Iota Sigma.

Additionally we congratulate Christa Solfanelli for her promotion as the new Associate General Counsel at The Graham Company. Christa originally joined Graham in March 2015 as a Claims Consultant and brings more than 10 years of insurance litigation experience to her new role. Prior to Graham, Christa gained extensive experience as a partner for a Philadelphia-based insurance defense firm representing construction contractors in the context of jobsite accidents, defect claims and construction delay claims. She has been repeatedly selected by her peers as a "Pennsylvania Rising Star" in the area of construction litigation.

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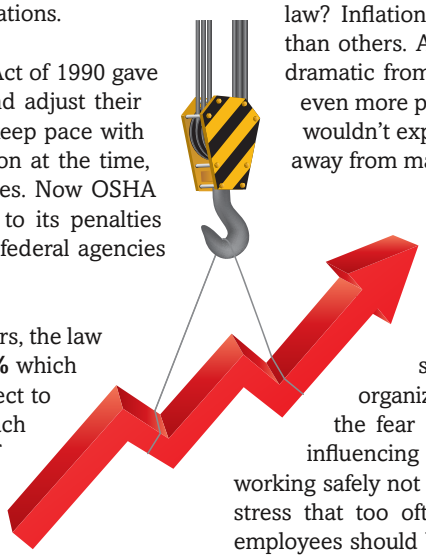
OSHA FINES TO INCREASE IN 2016

How Did This Happen?

For the first time in a quarter century, OSHA is expected to increase its fines for safety violations. This increase in OSHA fines is the result of the Bipartisan Budget Act of 2015 (H.R. 1314), established on November 2, 2015. A section of the budget bill—entitled the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015—contains the language that permits OSHA to adjust their civil penalties for safety violations.

The Federal Civil Penalties Inflation Adjustment Act of 1990 gave most federal agencies the authority to review and adjust their civil penalties once every five years in order to keep pace with inflation. OSHA was excluded from this legislation at the time, leaving OSHA fines stagnant for over two decades. Now OSHA will be required to make inflationary increases to its penalties every year putting the agency in line with other federal agencies like the FDA, EPA and EEOC.

To correct the flat rate for the past twenty-five years, the law permits a one time "catch-up adjustment" of **78%** which will take effect no later than August 1, 2016. Expect to see OSHA fine increases by January 15th of each subsequent year as the agency will make cost of living adjustments based on the annual Consumer Price Index percentage increase.



Maximum Penalties:

Although OSHA must go through the rulemaking process to finalize the penalty increases, the budget directs that the increase be issued as an interim final rule. This means that OSHA does not have to issue a proposed rule, which would be subject to a public notice and comment period before finalized. Rather, the rule will become effective immediately upon publication.

We anticipate that no later than August 2016, the new maximum penalties for OSHA safety violations would be as follows:

- **Other than Serious /Serious Violations: $12,471**
- **Willful/Repeat Violations: $124,712**

Although the agency is not required to take the full penalty increase, it probably will. OSHA has tried for years to convince Congress to increase the civil penalties the agency can impose when an employer is cited for a violation. Most recently, on October 7, 2015, Assistant Secretary of Labor for OSHA, Dr. David Michaels, told a House subcommittee that the "most serious obstacle to effective OSHA enforcement of the law is the very low level of civil penalties allowed under our law, as well as weak criminal sanctions," and that "OSHA penalties must be increased to provide a real disincentive for employers accepting injuries and worker deaths as a cost of doing business."

The budget changes go into effect July 1, 2016 and the increased penalties will take effect by August 1, 2016 in all states regulated by Federal OSHA. The law does not automatically apply to states regulated by State Plans, but since State Plan programs must be at least as effective as Federal OSHA, State Plans are likely to increase civil penalties as well.

Will OSHA assess the maximum penalties allowable under the law? Inflation is fluid, so the increases may be worse some years than others. After the catch-up year, they certainly won't be as dramatic from year-to-year. Given OSHA's stated goal to place even more pressure on employers to keep workplaces safe, we wouldn't expect the agency to lower fines at any time or to shy away from maxing them out.

Be Proactive:

This potentially huge increase in the cost of OSHA fines makes it even more important to shore up your safety programs and continue to stress a culture of safety throughout your organization. For companies with a health safety culture, the fear of increased penalties should not be a factor in influencing employees to work safely. Employees should be working safely not to avoid OSHA citations but to avoid the pain and stress that too often accompanies incidents. The safety of your employees should be a core value, exclusive of regulatory oversight, and should infiltrate every area of operations.

Employers are advised to:

1. Ensure that safety programs are comprehensive and up to date.
2. Ensure that employees receive all necessary safety training, can demonstrate that they understood the material covered in the training, and that all training is well-documented.
3. Assess the workplace for hazards and address any identified hazards as quickly as possible.
4. Monitor your safety management system to make sure it is working.

Taking these steps will demonstrate the employer's commitment to safety and help reduce the possibility of receiving what soon will be very costly OSHA citations.

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