Comments

A Bet Against Abetting: Why Medical Marijuana Reimbursement Under Workers' Compensation Is Not a Federal Crime

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ABSTRACT

Workers' compensation laws create a right for employees who are injured on the job to receive reimbursement for reasonable or necessary medical expenses associated with their injuries. Because of the numerous negative side effects of prescription opioids, injured employees often wish to participate in state medical marijuana programs when their injuries require long-term pain management.

Despite state laws that allow individuals to legally use and possess medical marijuana, the drug remains illegal under federal law. As a result, employers and workers' compensation insurers frequently deny injured employees' requests for reimbursement of medical marijuana expenses, even when their doctors deem medical marijuana a reasonable or necessary treatment. When employees petition a court or administrative tribunal to order reimbursement, employers and insurers

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often argue that complying with such an order would require them to aid and abet a violation of federal law.

This Comment argues that reimbursement of medical marijuana expenses pursuant to a court or tribunal order cannot constitute aiding and abetting a violation of federal law. Ultimately, this Comment recommends that if medical marijuana is to be excluded from workers' compensation coverage, that decision should be made by state legislatures rather than courts or tribunals. Until state legislatures make that decision, courts and tribunals should issue orders requiring employers and workers' compensation insurers to reimburse injured employees for their medical marijuana expenses.

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I. INTRODUCTION

Almost every state[1] has laws requiring most employers to carry some form of workers' compensation[2] coverage to compensate

1. *See generally Workers' Compensation Laws – State by State Comparison*, NAT'L FED'N INDEP. BUS. (June 7, 2017), https://bit.ly/36aFHHg (listing the workers' compensation requirements of each state, including 31 of the 50 states requiring coverage for employers with one or more employees, with Texas being the lone state with no coverage requirement).

2. *See Workers' Compensation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining workers' compensation as "[a] system of providing benefits to an employee for injuries occurring in the scope of employment").

employees that suffer injuries in the course of employment.[3] Under most state workers' compensation laws, an employer is generally required to reimburse an injured employee for reasonable or necessary medical expenses associated with the workplace injury.[4] Any workplace injury that causes an employee to seek medical treatment may give rise to a workers' compensation claim.[5]

When a workplace injury is particularly severe,[6] physicians will often prescribe pain-relieving opioids to injured employees.[7] However, in the wake of the opioid crisis,[8] many employees who suffer serious

3. *See, e.g.*, 77 PA. STAT. AND CONS. STAT. ANN. § 411(1) (West, Westlaw through 2020 Reg. Sess. Act 56) ("The term[] 'injury' . . . arising in the course of . . . employment . . . shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere . . . ."); WASH. REV. CODE ANN. § 51.08.013(1) (LexisNexis, LEXIS through 2020 Reg. Sess.) ("'Acting in the course of employment' means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business . . . ."); Scheffler Greenhouses, Inc. v. Indus. Comm'n, 362 N.E.2d 325, 327 (Ill. 1977) ("An injury is received in the course of employment where it occurs within a period of employment, at a place where the worker may reasonably be in the performance of his duties, and while he is fulfilling those duties or engaged in something incidental thereto.") (first citing Wise v. Indus. Comm'n, 295 N.E.2d 459, 461 (Ill. 1973); and then citing Chmelik v. Vana, 201 N.E.2d 434, 438 (Ill. 1964)).

4. *See, e.g.*, CONN. GEN. STAT. § 31-294d(a)(1) (LEXIS through 20-1 of 2020 First Reg. Sess.); LA. STAT. ANN. § 23:1203(B.) (Westlaw through 2019 Reg. Sess.); N.Y. WORKERS' COMP. LAW § 13(i) (Consol., LEXIS through 2020 released Chapters 1–56, 59–127); 77 PA. STAT. AND CONS. STAT. ANN. § 531(3)(vi)(A) (West, Westlaw through 2020 Reg. Sess. Act 57); VT. STAT. ANN. tit. 21, § 640(a) (LEXIS through Act 102 of 2019 Sess.).

5. *See, e.g.*, ARK. CODE ANN. § 11-9-102(4)(A)(i) (West, Westlaw through the end of 2020 First Extraordinary Sess. & 2020 Fiscal Sess. of 92nd Gen. Assemb.); OR. REV. STAT. ANN. § 656.005(7)(a) (West, Westlaw through 2020 Reg. Sess. of 80th Legis. Assemb.); TENN. CODE ANN. § 50-6-102(14) (West, Westlaw through 2020 First. Reg. Sess. of 111th Tenn. Gen. Assemb.).

6. *See, e.g.*, Hager v. M&K Constr., 225 A.3d 137, 142 (N.J. Super. Ct. App. Div. 2020) (describing the testimony of an employee's doctor who stated that as a result of the employee's workplace injury, the employee would require "medicine to manage his pain for the rest of his life"); Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 976-77 (N.M. Ct. App. 2014) (describing a worker whose lower-back injury caused him pain that his doctor considered more intense and frequent than that suffered by almost any patient the doctor had ever treated).

7. *See* Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 Del. Super. LEXIS 434, at *2 (Del. Super. Ct. Oct. 9, 2018) (discussing injured employee whose "primary means of pain relief" was various opioid medications); Lewis v. Am. Gen. Media, 355 P.3d 850, 852 (N.M. Ct. App. 2015) (listing various opioid medications prescribed to an injured employee for pain management); Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 Conn. Wrk. Comp. LEXIS 17, at *2 (Conn. Comp. Review Bd. May 12, 2016) (same).

8. *See generally Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, https://bit.ly/2PnmoF0 (last updated May 27, 2020) (explaining that the opioid crisis refers to the "misuse of and addiction to opioids" which resulted from doctors overprescribing prescription opioid pain relievers beginning in the late 1990s).

injuries at work oppose using these highly addictive drugs.[9] Instead, some employees wish to participate in state medical marijuana programs in lieu of taking multiple opioid pain relievers.[10] These injured employees quickly realize, however, that medical marijuana treatment is costly.[11] Compounding the financial hardship, employers and workers' compensation insurers often deny claims for medical marijuana reimbursement.[12]

Employees may appeal denials of workers' compensation benefits, including denials of medical marijuana reimbursement, to administrative tribunals.[13] The losing party in a tribunal decision may then appeal to state courts.[14] In these proceedings, employers and insurers often argue that a court or tribunal order requiring reimbursement for medical marijuana expenses ("reimbursement order") exposes them to criminal liability for violating federal law.[15] The theory behind this argument is

9. *See* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 13 (Me. 2018) (discussing employee who discontinued his use of opioid pain relievers "[d]ue to adverse side effects of his continued use of opioids"); *Petrini*, 2016 Conn. Wrk. Comp. LEXIS 17, at *2 ("At trial, the claimant expressed misgivings regarding the [opioid] medications, and testified as to [their] numerous side effects . . . ."). In addition to being highly addictive, opioids have many other negative side effects. *See generally* Marianne Matzo & Katherine A. Dawson, *Opioid-Induced Neurotoxicity*, AM. J. NURSING, Oct. 2013, at 51, 51 ("Common adverse effects of opioids . . . can include . . . constipation, pruritus, dry mouth, nausea, vomiting, sedation, somnolence, mitosis (papillary constriction), and diaphoresis.").

10. *See Bourgoin*, 187 A.3d at 13 (describing injured employee who switched from opioid medications to medical marijuana due to negative side effects of opioids); *Hager*, 225 A.3d at 142 (same); Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *4–5 (Conn. Comp. Review Bd. Oct. 29, 2019) (same); *Petrini*, 2016 Conn. Wrk. Comp. LEXIS 17, at *2–3 (same).

11. *See Hager*, 225 A.3d at 142 (describing an injured employee who paid $616 per month for his prescription of two ounces of medical marijuana); *see also Mansfield, Connecticut Medical Marijuana Dispensary*, NATURE'S MEDS., https://bit.ly/2ZE4RwZ (last visited June 7, 2020) (listing prices of medical marijuana flowers as anywhere between $20 and $44 per one-eighth ounce); *Ellicott City, Maryland Medical Marijuana Dispensary*, NATURE'S MEDS., https://bit.ly/348K58b (last visited June 7, 2020) (listing prices of medical marijuana flowers as anywhere between $35 and $60 per one-eighth ounce).

12. *See, e.g.*, Appeal of Panaggio, 205 A.3d 1099, 1101 (N.H. 2019).

13. Administrative tribunals are legislatively-created bodies that "serve dispute resolution . . . functions within agencies of the executive branch" and possess only those adjudicatory powers expressly granted to them by a legislature. *See* Ramos v. D.C. Dep't of Consumer & Regulatory Affairs, 601 A.2d 1069, 1073 (D.C. 1992). In workers' compensation disputes, these tribunals are typically called "workers' compensation boards" or "workers' compensation commissions." *See Workers' Compensation Board*, BLACK'S LAW DICTIONARY (11th ed. 2019).

14. *See, e.g.*, Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 Del. Super. LEXIS 434, at *1 (Del. Super. Ct. Oct. 9, 2018); *Bourgoin*, 187 A.3d at 12; *Panaggio*, 205 A.3d at 1100.

15. *See, e.g.*, Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 979 (N.M. Ct. App. 2014).

that requiring reimbursement forces the employer or insurer to aid and abet[16] a violation of the federal Controlled Substances Act ("CSA").[17]

The CSA places drugs into five categories, known as "schedules," based on factors such as the drug's "potential for abuse" and whether it has any "accepted medical use."[18] Marijuana is categorized as a Schedule I controlled substance, the most restrictive classification.[19] The effect of this categorization, for the purpose of this Comment, is that marijuana is not recognized as a valid medical treatment under federal law.[20] Consequently, possession of marijuana is a federal offense because, in the eyes of the federal government, physicians cannot validly prescribe the drug to patients.[21]

State courts and workers' compensation tribunals are split on the issue of whether reimbursement orders force employers and insurers to aid and abet the possession of marijuana in violation of the CSA.[22] A closer examination of the requirements for a successful aiding and abetting ("A&A") prosecution,[23] however, reveals that court- or tribunal-ordered medical marijuana reimbursement cannot expose an employer or insurer to criminal A&A liability.[24] Moreover, the decision to exclude a form of medical treatment from workers' compensation coverage is one

16. *See* 18 U.S.C. § 2(a) (2018) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); *see also* Rosemond v. United States, 572 U.S. 65, 71 (2014) ("[A] person is liable . . . for aiding and abetting a crime if (and only if) he (1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission.").

17. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–904 (2018)).

18. *See* 21 U.S.C. § 812(b)(1)–(5) (2018).

19. *See id.* § 812(c)(Sched. I)(c)(10).

20. *See id.* § 812(b)(1)(B) (stating that Schedule I controlled substances have "no currently accepted medical use in treatment in the United States").

21. *See id.* § 844 (criminalizing possession of a controlled substance that was not "obtained . . . pursuant to a *valid* prescription") (emphasis added).

22. *See* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 22 (Me. 2018) (holding that a court order requiring reimbursement requires an employer to aid and abet a violation of federal law); Wright v. Pioneer Valley, No. 04387-15, 2019 MA Wrk. Cmp. LEXIS 1, at *26 (Mass. Dep't Indus. Accidents Reviewing Bd. Feb. 14, 2019) (same); Hall v. Safelite Grp., Inc., No. FF-58850, 2018 VT Wrk. Comp. LEXIS 6, at *26–28 (Vt. Dep't Labor Mar. 28, 2018) (same). *But see* Hager v. M&K Constr., 225 A.3d 137, 148 (N.J. Super. Ct. App. Div. 2020) (holding that medical marijuana reimbursement pursuant to a court order does not constitute criminal aiding and abetting); Lewis v. Am. Gen. Media, 355 P.3d 850, 859 (N.M. Ct. App. 2015) (same); Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *21–22 (Conn. Comp. Review Bd. Oct. 29, 2019) (same).

23. *See infra* Section II.C.

24. *See infra* Section III.A.

that should be made by state legislatures rather than courts or administrative tribunals.[25]

Part II of this Comment discusses the history of marijuana in the United States.[26] First, Part II describes attempts by the federal government to regulate marijuana,[27] culminating in the passage of the Controlled Substances Act.[28] Next, Part II analyzes the federal response to the emergence of state medical marijuana programs[29] and the current federal approach to marijuana possession and regulation.[30] Part II also provides a brief background on workers' compensation laws[31] and the crime of A&A.[32] Finally, Part II discusses the different approaches taken by state courts that have ruled on the issue of whether court- or tribunal-ordered reimbursement of medical marijuana expenses under workers' compensation could constitute criminal A&A.[33]

Part III presents the argument that compliance with a reimbursement order does not constitute criminal A&A.[34] In reaching this conclusion, Part III examines the compulsory nature of court and tribunal orders in the United States and the intent element of A&A.[35] Part III ultimately recommends that if medical marijuana is to be excluded from workers' compensation coverage, that decision should be left to state legislatures and, therefore, state courts and tribunals should issue orders requiring medical marijuana reimbursement until such a properly-legislative decision is made.[36]

Finally, Part IV concludes that requiring reimbursement of employee medical marijuana expenses under workers' compensation does not render an employer or insurer criminally liable for aiding and abetting a violation of the Controlled Substances Act.[37]

II. BACKGROUND

Marijuana is a psychoactive drug derived from the "flowering buds" of cannabis plants.[38] Marijuana is currently available in some form for

25. *See infra* Section III.B.
26. *See infra* Section II.A.1.
27. *See infra* Section II.A.2.
28. *See infra* Section II.A.3.
29. *See infra* Section II.A.4.
30. *See infra* Section II.A.5.
31. *See infra* Section II.B.
32. *See infra* Section II.C.
33. *See infra* Section II.D.
34. *See infra* Section III.A.
35. *See infra* Section III.A.
36. *See infra* Section III.B.
37. *See infra* Part IV.
38. Eric Schlosser, *Reefer Madness*, ATLANTIC, Aug. 1994, https://bit.ly/2PMM0em.

medical treatment in 46 states.[39] But despite marijuana's availability for medical use in these states, employers and workers' compensation insurers often argue before courts and administrative tribunals that they cannot be required to reimburse medical marijuana expenses because doing so would require them to aid and abet a violation of federal law.[40] Courts and administrative tribunals are split on whether ordering medical marijuana reimbursement under workers' compensation equates to ordering employers and insurers to aid and abet violations of the CSA.[41]

A. Marijuana

To understand why the issue of medical marijuana reimbursement is so divisive, one must examine marijuana's use both as a drug and as a political tool.[42] Marijuana is derived from different species of plants in the Cannabis genus; the three main species being Cannabis sativa,[43] Cannabis indica,[44] and Cannabis ruderalis.[45] Marijuana is primarily harvested from the buds of cannabis plants, as the buds contain the highest concentration of psychoactive chemicals that "produce an effect on the brain."[46] Generally, marijuana is consumed for either medical[47] or recreational purposes.[48] Medically, marijuana is commonly used for chronic pain control, easing pain caused by multiple sclerosis, "lessen[ing] tremors" in patients with Parkinson's disease, and treating other conditions such as nausea, weight loss, glaucoma, Crohn's disease, irritable bowel syndrome, and even post-traumatic stress disorder (PTSD).[49] Recreationally, marijuana is commonly used to produce

39. *See State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES, https://bit.ly/33uPvKv (last updated Mar. 10, 2020) (listing the states in which medical marijuana is available in some form).

40. *See infra* Section II.D.

41. *See infra* Section II.D.

42. *See infra* Sections II.A.1–II.A.4 (detailing marijuana use as both a drug and political tool).

43. *See* JOHN HUDAK, MARIJUANA: A SHORT HISTORY 13 (2016) (explaining that Cannabis sativa plants "can grow to significant heights" and typically "produce a euphoric feeling" in users).

44. *See id.* (explaining that Cannabis indica plants "tend to be shorter, stockier plants" and produce a "mellow and relaxing" feeling in users).

45. *See id.* at 14 (explaining that Cannabis ruderalis plants "tend to be the smallest of the cannabis [plants] in height and girth" and are also the least potent of the plants in terms of effect on the user).

46. *Id.* at 10–11.

47. *See* Peter Grinspoon, *Medical Marijuana*, HARV. HEALTH PUB.: HARV. HEALTH BLOG, https://bit.ly/32Z088g (last updated Apr. 10, 2020, 12:00 AM).

48. *See* HUDAK, *supra* note 43, at 149.

49. *See* Grinspoon, *supra* note 47.

feelings of euphoria, relax a person's body and mind, and in some instances, help a person focus.[50]

Marijuana use and regulation in the United States has a tumultuous history.[51] Under federal law, any use of marijuana, even for medical purposes, is currently illegal.[52] However, marijuana is currently legal for medical use in 46 states[53] and for recreational use in 11 states.[54] Since 1996, when California became the first state to legalize marijuana for medical use, federal policy on marijuana and enforcement of marijuana laws has changed frequently.[55]

1. Marijuana in the United States

Marijuana has been used around the world for thousands of years,[56] particularly for its perceived medical benefits.[57] Marijuana use for medical purposes gained popularity among the Western medical community in the mid-nineteenth century.[58] During this time period, doctors prescribed marijuana to treat many different conditions,[59] and consumers could even purchase marijuana at drug stores.[60]

50. *See* HUDAK, *supra* note 43, at 13; *see also id.* at 18–22 (discussing the myriad of methods available for marijuana consumption). This Comment focuses exclusively on the medical use of marijuana.

51. *See infra* Sections II.A.1–II.A.4. (detailing marijuana's transition in the United States from doctors prescribing it commonly to treat various ailments, to the federal government regulating and eventually declaring it illegal, to reemerging in medical uses under state laws).

52. *See* 21 U.S.C. § 812(c)(Sched. I)(c)(10) (2018).

53. *See State Medical Marijuana Laws*, *supra* note 39 (noting that 33 states and the District of Columbia have "comprehensive" medical marijuana programs, while 13 other states allow low doses of medical marijuana to be consumed only under very specific circumstances).

54. *See* Casey Leins, *States Where Recreational Marijuana is Legal*, U.S. NEWS & WORLD REP. (Dec. 17, 2019, 12:22 PM), https://bit.ly/39sAtbz.

55. *See infra* Section II.A.4.

56. *See* LESTER GRINSPOON & JAMES B. BAKALAR, MARIHUANA: THE FORBIDDEN MEDICINE 3 (1997) (explaining that marijuana was "cultivated in China by 4000 B.C." and used medically in the country starting roughly five thousand years ago).

57. *See* Grinspoon, *supra* note 47 and accompanying text.

58. *See* GRINSPOON & BAKALAR, *supra* note 56, at 4.

59. Though doctors today still prescribe marijuana, in many states they may only do so if a patient meets very specific criteria. *See, e.g.*, 35 PA. STAT. AND CONS. STAT. ANN. § 10231.403(a) (West, Westlaw through 2020 Reg. Sess. Act 57) (listing requirements for a physician to prescribe medical marijuana as, *inter alia*, the physician must be registered with the Pennsylvania Department of Health, the patient must have a "serious medical condition" and be under the physician's "continuing care" for that condition, and the physician must make a professional determination that the patient would benefit from medical marijuana use); *see also id.* § 10231.103 (listing conditions that qualify as a "serious medical condition"). Additionally, a person may only purchase medical marijuana at designated dispensaries. *See, e.g.*, *id.* §§ 10231.601–10231.616 (detailing the requirements for an entity to become a medical marijuana dispensary).

60. *See* GRINSPOON & BAKALAR, *supra* note 56, at 4.

Using marijuana for medical purposes started to fall out of favor in the early-twentieth century, when many Mexican immigrants entered the United States due to the political turmoil in Mexico that preceded the Mexican Revolution.[61] American citizens feared the immigrant population because of the perception that the immigrants were taking away jobs from citizens, as well as cultural differences "such as religion, custom, and clothing."[62] Because many of these immigrants used marijuana recreationally, an associational increase in fear of the drug resulted in reduced interest in medical marijuana use.[63] Fear of marijuana led to 29 states declaring marijuana illegal by 1931.[64]

Public perception of marijuana worsened during the 1930s when Harry J. Anslinger,[65] the Commissioner of the Federal Bureau of Narcotics,[66] began a "campaign of propaganda" designed to exacerbate the American public's fear of marijuana.[67] Anslinger hoped to use fear to "control[] a weed that grew wild across the United States."[68] As a result, the federal government soon faced pressure from the public and from lobbyists to respond to the marijuana problem.[69]

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61. *See* Schlosser, *supra* note 38 ("The political upheaval in Mexico that culminated in the Revolution of 1910 led to a wave of Mexican immigration to states throughout the American Southwest."). The Mexican Revolution was an armed rebellion lasting from 1910 to 1920, which sought to overthrow President Porfirio Diaz and establish a new political regime in Mexico. *See* ALAN KNIGHT, THE MEXICAN REVOLUTION: A VERY SHORT INTRODUCTION 1–2 (2016).

62. Ronald Timothy Fletcher, *The Medical Necessity Defense and De Minimis Protection for Patients Who Would Benefit from Using Marijuana for Medical Purposes: A Proposal to Establish Comprehensive Protection Under Federal Drug Laws*, 37 VAL. U. L. REV. 983, 989 (2003).

63. *See* Schlosser, *supra* note 38 (explaining that fear of marijuana was heavily driven by racial biases).

64. *See id.* (explaining that El Paso, Texas enacted the first ordinance in the United States outlawing marijuana in 1914); *see also* Fletcher, *supra* note 62, at 989–90 (discussing how racial biases played a role in marijuana policies in the early-twentieth century).

65. Harry J. Anslinger served as the first commissioner of the Federal Bureau of Narcotics from 1930 until 1962. *See* John C. McWilliams, *Unsung Partner Against Crime: Harry J. Anslinger and the Federal Bureau of Narcotics, 1930-1962*, 113 PA. MAG. HIST. & BIOGRAPHY 207, 207–08 (1989).

66. The Federal Bureau of Narcotics was the federal agency charged with the responsibility of enforcing the drug laws of the United States from 1930 until 1968. *See* WILLIAM C. PLOUFFE, JR., ENCYCLOPEDIA OF DRUG POLICY: FEDERAL BUREAU OF NARCOTICS 295 (Mark A. R. Kleiman & James E. Hawdon eds., 2011).

67. *See* Fletcher, *supra* note 62, at 991.

68. *Id.* at 990–91.

69. *See id.* at 991.

2. Early Federal Marijuana Laws

Congress's first attempt to regulate marijuana was the Marihuana[70] Tax Act of 1937 (the "Marihuana Tax Act").[71] The Marihuana Tax Act required "[e]very person who import[ed], manufacture[d], produce[d], compound[ed], [sold], deal[t] in, dispense[d], prescribe[d], administer[ed], or [gave] away marihuana" to pay a tax to continue engaging in those activities.[72] The Marihuana Tax Act was aimed at discouraging marijuana's recreational, rather than medical, use.[73] Despite Congress's intent, the Marihuana Tax Act made obtaining marijuana through legal channels much more difficult for doctors due to the amount of paperwork required to obtain and prescribe marijuana for medical purposes.[74]

Congress sought to further regulate marijuana with the Narcotic Control Act of 1956 (the "Narcotic Control Act").[75] The Narcotic Control Act amended the Narcotic Drugs Import and Export Act[76] to criminalize the importation, purchase, sale, concealment, or transportation of marijuana that was not reported pursuant to the Marihuana Tax Act.[77] Additionally, possession of marijuana alone was "deemed sufficient evidence to authorize conviction" under the Narcotic Control Act.[78] Thus, the Narcotic Control Act created a presumption that those who possessed marijuana had received it through illegal importation and had knowledge of its illegality.[79] Because possession of marijuana was also a crime in every state,[80] a person who possessed marijuana committed "a per se violation of both federal and state marijuana laws."[81]

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70. Congress generally spells "marijuana" as "marihuana." *See, e.g.*, 21 U.S.C. § 802(16)(A) (2018) (defining "marihuana" as all parts of the Cannabis sativa plant and anything made from the plant's seeds or resin). For consistency, this Comment uses only the "marijuana" spelling unless directly quoting a source that uses the "marihuana" spelling.

71. Marihuana Tax Act of 1937, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970).

72. *Id.* § 2(a), 50 Stat. 551–52.

73. *See* GRINSPOON & BAKALAR, *supra* note 56, at 8.

74. *See id.*

75. Narcotic Control Act of 1956, Pub. L. No. 84-728, 70 Stat. 567 (repealed 1970).

76. Narcotic Drugs Import and Export Act, Pub. L. No. 67-227, 42 Stat. 596 (1922) (repealed 1970).

77. *See* § 106, 70 Stat. at 570–71.

78. *See id.*

79. *See* Emily Farr, Comment, United States v. Oakland Cannabis Buyers' Cooperative*: The Medical Necessity Defense as an Exception to the Controlled Substances Act*, 53 S.C. L. REV. 439, 448 (2002).

80. *See* Leary v. United States, 395 U.S. 6, 16 n.15 (1969) (explaining that every state had some law criminalizing marijuana possession).

81. Allison L. Bergstrom, *Medical Use of Marijuana: A Look at Federal & State Responses to California's Compassionate Use Act*, 2 DEPAUL J. HEALTH CARE L. 155, 159 (1997).

In 1969, the United States Supreme Court held that both the Narcotic Control Act and the Marihuana Tax Act were unconstitutional.[82] The Court in *Leary v. United States*[83] found that the Marihuana Tax Act conflicted with the Fifth Amendment's protection from self-incrimination,[84] and the Narcotic Control Act conflicted with the Fourteenth Amendment's due process guarantees.[85] The Court noted that compliance with the Marihuana Tax Act required individuals who wished to transfer marijuana to disclose possession of the drug to the Internal Revenue Service.[86] Because possession of marijuana was illegal in every state, and because state and local law enforcement received information of reported marijuana possession upon request,[87] the Court reasoned that the Marihuana Tax Act essentially required those individuals to incriminate themselves when disclosing possession.[88] Thus, the Court concluded that the Act violated the self-incrimination provision of the Fifth Amendment.[89] Additionally, the Court held that the Narcotic Control Act was unconstitutional because it presumed a "defendant's knowledge of illegal importation."[90] The Court reasoned that this presumption violated due process rights because determining that a majority of marijuana possessors knew that the marijuana they possessed was not grown within the United States would be impossible.[91]

3. The Controlled Substances Act

After the Court's groundbreaking decision in *Leary*, Congress began to revisit the federal regulation of marijuana.[92] In fact, the following year, Congress replaced the Marihuana Tax Act and the Narcotic Control Act with the Controlled Substances Act ("CSA").[93] The primary purpose of the CSA was to prevent drug abuse and drug dependence by developing education programs and "strengthen[ing] . . .

82. *See Leary*, 395 U.S. at 26, 37.
83. *Id.*
84. *See* U.S. CONST. amend. V; *Leary*, 395 U.S. at 26.
85. *See* U.S. CONST. amend. XIV, § 1; *Leary*, 395 U.S. at 37.
86. *See Leary*, 395 U.S. at 16.
87. *See id.*
88. *See id.* at 16–18.
89. *See id.* at 26.
90. *Id.* at 37.
91. *See id.* at 52.
92. *See* Farr, *supra* note 79, at 449 (explaining that Congress replaced previous federal drug legislation because of both *Leary* and an increased legislative concern regarding recreational marijuana use).
93. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–904 (2018)); *see also* ALCOHOL AND DRUGS IN NORTH AMERICA: A HISTORICAL ENCYCLOPEDIA 210 (David M. Fahey & Jon S. Miller eds., 2013) (detailing the replacement of these laws with the CSA).

law enforcement authority in the field of drug abuse."[94] With the CSA, Congress sought to "provide meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthen law enforcement tools against the traffic in illicit drugs."[95]

The CSA divides drugs into five categories, referred to as "schedules."[96] Schedules are based on factors such as "potential for abuse,"[97] scientific evidence of medical effects,[98] risk to public health,[99] and potential for "psychic or physiological dependence."[100] Congress placed marijuana under Schedule I of the CSA, the most restrictive class of controlled substances.[101] By placing marijuana under Schedule I, Congress declared that marijuana has "a high potential for abuse," that it has no accepted medical use, and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision."[102]

The federal government has never removed marijuana from Schedule I under the CSA, despite receiving numerous petitions to do so.[103] Refusing to remove marijuana from Schedule I indicates that the federal government does not recognize that marijuana has any medical benefits.[104] Despite the federal government's refusal to accept marijuana's potential medical value,[105] shortly after the passage of the

94. 84 Stat. at 1236.

95. Gonzales v. Raich, 545 U.S. 1, 10 (2005) (citing H.R. Rep. No. 94-1444, pt. 2, at 22 (1970)).

96. *See* 21 U.S.C. § 812 (2018).

97. *Id.* § 811(c)(1).

98. *See id.* § 811(c)(2).

99. *See id.* § 811(c)(6).

100. *Id.* § 811(c)(7).

101. *See id.* § 812(c)(Sched. I)(c)(10); *see also* Scott C. Martin, *A Brief History of Marijuana Law in America*, TIME (Apr. 20, 2016, 9:10 AM), https://bit.ly/2PGTL5S (theorizing that Congress placed marijuana under Schedule I primarily because of President Nixon's hostility towards the counterculture movement of the 1960s, which often associated with the drug).

102. 21 U.S.C. § 812(b)(1)(A)–(C).

103. *See generally* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53767 (Aug. 12, 2016) (explaining the government's reasons for refusing to change marijuana's classification).

104. *See FDA and Cannabis: Research and Drug Approval Process*, U.S. FOOD & DRUG ADMIN., https://bit.ly/2N75J6S (last updated Jan. 14, 2020) (noting that the federal government listed marijuana under Schedule I because the drug continues to not have a "currently accepted medical use in the United States").

105. The federal government is not alone in refusing to accept that marijuana has any medical value. *See* Niall McCarthy, *The Arguments For and Against Marijuana Legalization in the U.S.*, FORBES (June 14, 2019, 7:47 AM), https://bit.ly/2TzC7md (describing a recent survey which found that "roughly one-third of Americans" oppose the legalization of marijuana, with more than half of that group believing that it is harmful to people). Others oppose marijuana's legalization because they believe it would lead to an increase in drug-related car accidents or that it would lead to more people "us[ing] stronger and more addictive drugs." *Id.*

CSA, states expressed interest in researching the medical effects of marijuana.[106]

4. State Medical Marijuana Programs and Federal Responses

In 1996, California became the first state to pass legislation legalizing medical marijuana since the CSA's enactment.[107] The Clinton administration,[108] however, disapproved of California's new legislation.[109] To combat California's medical marijuana law, the Department of Justice (DOJ) threatened to revoke the Drug Enforcement Administration (DEA)[110] registration of any physician who recommended or prescribed the drug to a patient pursuant to the California law.[111] Because registration is required for physicians to "legally prescribe, dispense, or possess any controlled substance, including medications," revocation of that registration would severely hinder a physician's ability to practice medicine.[112]

Under the Bush administration,[113] the federal government maintained its anti-medical marijuana stance.[114] When medical marijuana

106. *See* Martin, *supra* note 101 ("Oregon, Alaska and Maine decriminalized marijuana during the [1970s], and New Mexico approved a short-lived medical marijuana research program in 1978."); *see also* GRINSPOON & BAKALAR, *supra* note 56, at 17–18 (explaining the difficulties states faced in implementing medical marijuana programs due to strict federal regulation).

107. *See* Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West, Westlaw through Ch. 27 of 2020 Reg. Sess.).

108. William Jefferson Clinton served as the 42nd President of the United States from 1993–2001. *See William J. Clinton*, THE WHITE HOUSE, https://bit.ly/32kk9Fd (last visited June 10, 2020). *See also* Diana R. Gordon, *Drugspeak and the Clinton Administration: A Lost Opportunity for Drug Policy Reform*, 21 SOC. JUST., Fall 1994, at 30, 31 (discussing the Clinton administration's approach to drug policy).

109. *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164 (Feb. 11, 1997).

110. The DEA is the current federal agency responsible for enforcing the "controlled substance laws and regulations of the United States" and countering drug-related offenses. *See About*, U.S. DRUG ENFORCEMENT ADMIN., https://bit.ly/2ORHdqY (last visited June 10, 2020).

111. *See* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. at 6164.

112. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1466 (2009) (explaining that revocation of a physician's DEA registration could cost the physician his job altogether). *But see* Conant v. Walters, 309 F.3d 629, 632, 639 (9th Cir. 2002) (holding that the federal government is precluded on First Amendment grounds from revoking a physician's registration based on recommending medical marijuana alone, but emphasizing that this does not preclude the government from prosecuting doctors who actually prescribed or distributed the drug).

113. George W. Bush served as the 43rd President of the United States from 2001–2009. *See George W. Bush*, THE WHITE HOUSE, https://bit.ly/34C0Kkq (last visited June 10, 2020).

advocates first challenged the CSA in federal courts,[115] the United States Supreme Court made clear that the federal government had broad authority to prosecute individuals who used marijuana, even for strictly medical purposes.[116] For example, in *United States v. Oakland Cannabis Buyers' Coop.*,[117] the Court held that a medical necessity defense is not available in a CSA prosecution for "manufacturing and distributing marijuana."[118] Therefore, businesses could be prosecuted for distributing marijuana to individuals even if a physician deemed the drug necessary for their treatment.[119]

Three years after *Oakland Cannabis Buyers' Coop.*, in the landmark case of *Gonzales v. Raich*,[120] the Court held that Congress could constitutionally prohibit the intrastate[121] manufacturing and possession of marijuana.[122] The *Gonzales* holding permitted Congressional intervention even when the manufacturing and possession completely complied with a state's medical marijuana laws.[123] The *Oakland Cannabis Buyers' Coop.* and *Gonzales* decisions essentially granted the federal government unlimited authority to prosecute anyone participating in a state medical marijuana program.[124]

However, under the Obama administration,[125] federal policy on medical marijuana prosecutions relaxed greatly.[126] In October 2009,

114. *See* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 638 (2011) (detailing DEA actions taken against medical marijuana dispensaries during the Bush administration, including numerous raids and threats to seize the property of landlords who did not evict tenant dispensaries).

115. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005); United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

116. *See Gonzales*, 545 U.S. at 22; *Oakland Cannabis Buyers' Coop.*, 532 U.S. at 487, 494.

117. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483 (2001).

118. *Id.* at 494.

119. *See id.* at 498–99.

120. *Gonzales*, 545 U.S. 1 (2005).

121. The United States Constitution gives Congress the power to regulate interstate, not intrastate, commerce. *See* U.S. CONST. art I, § 8, cl. 3. However, the Court has held that Congress may regulate purely intrastate activities that "exert[] a substantial economic effect on interstate commerce." *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942). The Court relied on this principle in the *Gonzales* decision. *See Gonzales*, 545 U.S. at 19 ("[T]he regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity.").

122. *See Gonzales*, 545 U.S. at 22.

123. *See id.* at 29.

124. *See* Mikos, *supra* note 114, at 638 ("These decisions left no doubt that the federal government could continue to sanction anyone who cultivated, distributed, or possessed marijuana.").

125. Barack Obama served as the 44th President of the United States from 2009–2017. *See U.S. Presidents/Barack Obama*, U. VA.: MILLER CTR., https://bit.ly/2rau3w6 (last visited June 10, 2020).

former Deputy Attorney General David W. Ogden issued a memorandum (the "Ogden Memo") to United States Attorneys regarding enforcement of federal drug laws in states that legalized medical marijuana.[127] The Ogden Memo instructed U.S. Attorneys not to use "limited federal resources" to pursue prosecutions of "individuals whose actions are in clear and unambiguous compliance" with state medical marijuana laws.[128]

Later, in 2013, former Deputy Attorney General James M. Cole reinforced the relaxed federal policy toward medical marijuana in another memorandum (the "Cole Memo") on federal marijuana enforcement.[129] The Cole Memo established eight marijuana enforcement priorities, such as preventing criminal enterprises from profiting from marijuana sales and preventing minors from obtaining marijuana.[130] The Cole Memo then directed federal prosecutors to focus on prosecuting those whose conduct violated the stated enforcement priorities rather than those using marijuana in compliance with state law.[131] The Cole Memo stressed that conduct in compliance with state medical marijuana laws and regulations was "less likely to threaten" federal enforcement priorities, and in fact, could complement them.[132]

Congress further bolstered the non-enforcement position of the Ogden and Cole memos in 2014 with the passage of the Consolidated and Further Continuing Appropriations Act ("CFCAA").[133] The CFCAA

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126. *See* Mikos, *supra* note 114, at 638.

127. *See* Memorandum from David W. Ogden, Deputy Att'y Gen., for Selected U.S. Att'ys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana, at 1 (Oct. 19, 2009) [hereinafter Ogden Memo], https://bit.ly/2CjcFaV.

128. *Id.* at 1–2.

129. *See* Memorandum from James M. Cole, Deputy Att'y Gen., for All U.S. Att'ys on Guidance Regarding Marijuana Enforcement, at 1 (Aug. 29, 2013) [hereinafter Cole Memo], https://bit.ly/2NTO95L.

130. *See id.* at 1. The full list of priorities includes:

> Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; [p]reventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and [p]reventing marijuana possession or use on federal property.

Id. at 1–2.

131. *See id.* at 2.

132. *Id.* at 3 (reasoning that state laws and regulations could prevent minors from acquiring marijuana, criminal enterprises from profiting from marijuana, and the movement of marijuana across state lines).

133. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014).

prohibited the DOJ from using congressionally-appropriated funds to prevent states from implementing medical marijuana laws.[134] Thus, the efforts of the Obama administration marked the first time since the federal government outlawed marijuana in 1970 that individuals, physicians, and dispensaries could participate in state medical marijuana programs with almost no risk of federal prosecution.[135]

However, the marijuana-tolerant policies created by the Obama administration were not permanent.[136] The Trump administration[137] brought yet another shift in federal policy regarding medical marijuana.[138] In January 2018, former Attorney General Jeff Sessions[139] issued a memorandum (the "Sessions Memo") addressing the marijuana enforcement policies of the prior administration.[140] The Sessions Memo found the previous DOJ guidance contained in the Ogden and Cole memos unnecessary[141] and directed federal prosecutors to instead follow the guidelines contained in the U.S. Attorneys' Manual[142] in deciding which cases to pursue.[143] Consequently, users of medical marijuana in

134. *See id.*; *see also* United States v. McIntosh, 833 F.3d 1163, 1177 (9th Cir. 2016) (holding that the provision prohibiting the use of federal funds to interfere with state medical marijuana programs also prohibits the DOJ from using those funds to prosecute individuals who are in compliance with state medical marijuana laws). Congress again placed this provision in its most recent act appropriating federal funds, amending it only to specify additional states that have implemented medical marijuana programs. *See* Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2431 (2019).

135. *See* Mikos, *supra* note 114, at 638.

136. *See* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 21 (Me. 2018) (describing the DOJ's marijuana enforcement policies as "transitory").

137. Donald J. Trump assumed office as the 45th President of the United States in 2017. *See U.S. Presidents/Donald Trump*, U. VA.: MILLER CTR., https://bit.ly/2NQfchY (last visited June 10, 2020).

138. *See Bourgoin*, 187 A.3d at 21 n.10 (detailing this shift in policy).

139. Sessions resigned from his position as Attorney General on November 7, 2018. *See* Laura Jarrett & Eli Watkins, *Jeff Sessions Out as Attorney General*, CNN (Nov. 7, 2018, 7:15 PM), https://cnn.it/33tYbRl (explaining that Sessions resigned at the request of President Trump).

140. *See* Memorandum from Jefferson B. Sessions, III, U.S. Att'y Gen., for All U.S. Att'ys on Marijuana Enforcement (Jan. 4, 2018) [hereinafter Sessions Memo], https://bit.ly/2K1lHh7.

141. *See id.*

142. The U.S. Attorneys' Manual was renamed to the "Justice Manual" in 2018. *See generally* U.S. DEP'T JUSTICE, JUSTICE MANUAL, https://bit.ly/2rg46LF. The principles and guidelines contained in the Justice Manual "govern all federal prosecutions," not just those regarding marijuana. *See* Sessions Memo, *supra* note 140.

143. *See* Sessions Memo, *supra* note 140. Section 9-27.220 of the Justice Manual provides, in pertinent part, "The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense, and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless . . . the prosecution would serve no substantial federal interest . . . ." U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-27.220 [hereinafter JUSTICE MANUAL], (last updated Feb. 2018) https://bit.ly/33naJKp. *See also id.* § 9-27.230 ("In

compliance with state laws were no longer explicitly protected from federal prosecution as they were under the prior administration.[144]

5. The Current Federal Approach to Marijuana

In contrast to Jeff Sessions, the current U.S. Attorney General, William Barr,[145] has taken a more lenient approach to marijuana enforcement.[146] Barr accepts the guidance laid out in the Cole Memo.[147] He stated during a Senate hearing that his policy is to allow the United States Attorneys "in each state to determine what the best approach [to marijuana enforcement] is in that state."[148] During the same Senate hearing, Barr also stated that he believes allowing the states to set their own marijuana policies without federal interference "would be an improvement over the present scenario, which he refers to as an 'intolerable' conflict between federal and state laws."[149] Although Barr returned the DOJ to more lenient marijuana enforcement policies reminiscent of the Obama administration, marijuana remains illegal under federal law as a Schedule I controlled substance.[150]

In contrast to the federal government's official policy, 33 states[151] and the District of Columbia currently have "comprehensive"[152] medical marijuana programs.[153] Additionally, 13 more states[154] allow limited

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determining whether a prosecution would serve a substantial federal interest, . . . relevant considerations includ[e]: [f]ederal law enforcement priorities . . . ; [t]he nature and seriousness of the offense; . . . [t]he person's culpability in connection with the offense; . . . [and] [t]he person's personal circumstances . . . .").

144. *See* Laura Jarrett, *Sessions Nixes Obama-Era Rules Leaving States Alone that Legalize Pot*, CNN (Jan. 4, 2018, 5:44 PM), https://cnn.it/38q9IUx.

145. William P. Barr replaced Sessions as Attorney General on February 14, 2019. *See* Annie Daniel & Jasmine C. Lee, *How Every Senator Voted on Barr's Confirmation as Attorney General*, N.Y. TIMES (Feb. 14, 2019), https://nyti.ms/2NsctN2.

146. *See* Sara Brittany Somerset, *Attorney General Barr Favors a More Lenient Approach to Cannabis Prohibition*, FORBES (Apr. 15, 2019, 5:00 AM), https://bit.ly/2NtDAac.

147. *See id.*

148. *Id.*

149. *Id.*

150. *See* 21 U.S.C. § 812(c)(Sched. I)(c)(10) (2018).

151. These states are Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, and West Virginia. *See State Medical Marijuana Laws*, *supra* note 39.

152. *See id.* (defining a "comprehensive" medical marijuana program as one which protects medical marijuana users from criminal penalties; allows home cultivation of medical marijuana or purchase through dispensaries; allows a variety of medical marijuana products; allows consumption of medical marijuana via "smoking or vaporizing"; and "is not a limited trial program").

153. *See id.* (listing the requirements to participate in each state program).

access to low-dose medical marijuana products under certain circumstances.[155] However, due to the high price of medical marijuana, accessing state medical marijuana programs can be difficult for many individuals.[156] Consequently, if an individual suffers a workplace injury and the injury necessitates medical marijuana treatment, that individual may turn to workers' compensation in order to pay for the required treatment.[157]

B. Workers' Compensation

Almost every state workers' compensation act[158] requires employers to carry workers' compensation insurance coverage under most circumstances.[159] State workers' compensation laws are remedial in nature and are enacted for the purpose of compensating injured employees.[160] These laws typically hold employers strictly liable[161] for workplace injuries, [162] and in exchange, compensation benefits are the exclusive remedy for injured employees.[163]

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154. These states are Alabama, Georgia, Indiana, Iowa, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, Wisconsin, and Wyoming. *See id.*

155. For a list of these states, the medical marijuana products they allow to be consumed, and the conditions under which they allow consumption, see *id.*

156. *See supra* note 11 and accompanying text.

157. *See supra* note 10 and accompanying text.

158. *See Workers' Compensation Act*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A statute by which employers are made responsible for bodily harm to their workers arising out of and in the course of their employment, regardless of the fault of either the employee or the employer.").

159. *See Workers' Compensation Laws – State by State Comparison*, *supra* note 1.

160. *See* State Indus. Ins. Sys. v. Weaver, 734 P.2d 740, 742 (Nev. 1987) ("[Workers' compensation] acts are enacted for the purpose of giving compensation, not for denial thereof.") (first citing State Indus. Ins. Sys. v. Buckley, 682 P.2d 1387, 1390 (Nev. 1984); and then citing Nev. Indus. Comm'n v. Peck, 239 P.2d 244, 248 (Nev. 1952)).

161. *See Strict Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Liability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms . . . caused by the activity . . . subject to the liability rule.").

162. *See generally* CAL. LAB. CODE § 3600 (Deering, LEXIS through Chapters 1–7, 9 of 2020 Reg. Sess.) (imposing liability on employers "without regard to negligence" for employees injured in the course of their employment); N.Y. WORKERS' COMP. LAW § 10 (Consol. LEXIS through 2020 released Chapters 1–59, 59–127) (requiring employers to compensate employees who are injured in the course of their employment "without regard to fault as a cause of the injury"); 77 PA. STAT. AND CONS. STAT. ANN. § 431 (West, Westlaw through 2020 Reg. Sess. Act 57) (requiring employers to compensate employees who are injured in the course of their employment "without regard to negligence").

163. *See, e.g.*, CAL. LAB. CODE § 3601 (Deering, LEXIS through Chapters 1–7, 9 of 2020 Reg. Sess.); N.Y. WORKERS' COMP. LAW § 11 (Consol. LEXIS through 2020 released Chapters 1–56, 59–127); 77 PA. STAT. AND CONS. STAT. ANN. § 481(a) (West, Westlaw through 2020 Reg. Sess. Act 57); *see also* Cal. Ins. Guarantee Ass'n v. San Diego Cty. Sch. Risk Mgmt. Joint Powers Auth., 254 Cal. Rptr. 3d 354, 360 (Cal. Ct.

Workers' compensation insurance policies pay benefits[164] to employees who are injured in the course of their employment.[165] Under most workers' compensation laws, employers are required to reimburse employees for any reasonable or necessary[166] medical expenses associated with the employees' workplace injuries.[167] Compensable medical expenses may include surgeries, physician and hospital visits, medicines, eye-glasses, prosthetics, crutches,[168] and depending on the state, may also include medical marijuana.[169]

Typically, if a workers' compensation claim is denied by the employer or insurer, a hearing is then conducted by a workers'

App. 2019) ("[A]n employer assumes no-fault liability for workplace injuries in exchange for limits on recoverable compensation; employees gain swift and certain payment without proof of fault but lose broader remedies in tort.") (citing Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund, 14 P.3d 234, 243 (Cal. 2001)).

164. Workers' compensation benefits typically take the form of payment for lost wages and payment for medical expenses. *See* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 671 (1998).

165. *See Cal. Ins. Guarantee Ass'n*, 254 Cal. Rptr. 3d at 360 ("Workers' compensation benefits are automatically paid to an injured worker by a workers' compensation insurer or . . . employer."). For definitions of "in the course of employment," see *supra* note 3 and accompanying text.

166. Generally, the employee's attending physician or the workers' compensation board determines what medical treatment is reasonable or necessary. *See, e.g.*, CONN. GEN. STAT. § 31-294d(a)(1) (LEXIS through 20-1 of 2020 First Reg. Sess.) (stating that the employee's physician determines what treatment is reasonable or necessary); IND. CODE ANN. § 22-3-3-4(a) (West, Westlaw through 2020 Second Reg. Sess. of 121st Gen. Assemb.) (stating that either the employee's attending physician or the workers' compensation board determines what treatment is necessary).

167. *See, e.g.*, CONN. GEN. STAT. § 31-294d(a)(1) (LEXIS through 20-1 of 2020 First Reg. Sess.); IND. CODE ANN. § 22-3-3-4(a) (West, Westlaw through 2020 Second Reg. Sess. of 121st Gen. Assemb.); VA. CODE ANN. § 65.2-603(A)(1) (West, Westlaw through End of 2020 Reg. Sess.); Bockness v. Brown Jug, Inc., 980 P.2d 462, 466 (Alaska 1999) ("Alaska's [workers' compensation] statutory scheme limits an employer's responsibility to medical care that is reasonable and necessary."); Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 Del. Super. LEXIS 434, at *7–8 (Del. Super. Ct. 2018) ("The determination of medical expenses as 'reasonable and necessary,' so as to be covered by the employer, is in the Board's discretion.") (citing Poole v. State, 77 A.3d 310, 323 (Del. Super. Ct. 2012)).

168. *See, e.g.*, CONN. GEN. STAT. § 31-294d(a)(1) (LEXIS through 20-1 of 2020 First Reg. Sess.); N.Y. WORKERS' COMP. LAW § 13(a) (Consol. LEXIS through 2020 released Chapters 1–56, 59–127); 77 PA. STAT. AND CONS. STAT. ANN. § 531(1) (West, Westlaw through 2020 Reg. Sess. Act 57).

169. *See, e.g.*, *Giles & Ransome*, 2018 Del. Super. LEXIS 434, at *11–12 (affirming order for reimbursement of medical marijuana expenses under Delaware workers' compensation law); Hager v. M&K Constr., 225 A.3d 137, 140–41 (N.J. Super. Ct. App. Div. 2020) (affirming order for reimbursement of medical marijuana expenses under New Jersey workers' compensation law); Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 Conn. Wrk. Comp. LEXIS 17, at *30 (Conn. Comp. Review Bd. May 12, 2016) (affirming order for reimbursement of medical marijuana expenses under Connecticut workers' compensation law).

compensation judge[170] or another administrative authority.[171] In many states, the aggrieved party in a hearing may appeal the decision to another administrative tribunal, such as a Compensation Appeal Board.[172] These cases may then be appealed to state courts.[173] Due to the remedial purpose of workers' compensation laws, most courts construe the laws liberally in favor of coverage.[174] To avoid paying workers' compensation claims, employers and insurers may argue that the employee's condition was pre-existing and not a result of employment,[175] that the treatment for which the employee seeks reimbursement is not reasonable or necessary,[176] or that the employee's injury did not occur in the course of employment.[177] When claims involve medical marijuana, employers and insurers frequently argue that reimbursement of medical

170. *See, e.g.*, N.M. STAT. ANN. § 52-5-7 (West, Westlaw through end of Second Reg. Sess. and emergency legislation through Chapter 6 of First Special Sess. of 54th Legislature (2020)); 77 PA. STAT. AND CONS. STAT. ANN. § 710 (West, Westlaw through 2020 Reg. Sess. Act 57).

171. *See, e.g.*, CONN. GEN. STAT. § 31-297 (LEXIS through 20-1 of 2020 First Reg. Sess.) (hearings conducted by member of Workers' Compensation Commission); N.H. REV. STAT. ANN. § 281-A:43 (LexisNexis, LEXIS through Act Chapter 7 of 2020 Reg. Sess.) (hearings conducted by the labor commissioner).

172. *See generally* 3 MODERN WORKERS COMPENSATION § 310:1 n.1, WESTLAW (database updated June 2020) (listing the state statutes regarding administrative appeals to workers' compensation boards). For example, in Pennsylvania, a party may appeal the decision of a workers' compensation judge to the Workers' Compensation Appeal Board if the party believes that the judge committed an "error of law" or that the judge's decision was "unwarranted by sufficient, competent evidence." *See* 77 PA. STAT. AND CONS. STAT. ANN. § 853 (West, Westlaw through 2020 Reg. Sess. Act 57).

173. *See generally* 3 MODERN WORKERS COMPENSATION § 312:1, WESTLAW (database updated June 2020) ("Final administrative decisions or rulings in workers' compensation cases are usually subject to judicial review by the state courts."). Some states allow parties to appeal hearing decisions directly to the courts without further administrative review. *See, e.g.*, FLA. STAT. ANN. § 440.271 (West, Westlaw through 2020 Second Reg. Sess. of 26th Legislature); N.M. STAT. ANN. § 52-5-8 (West, Westlaw through end of Second Reg. Sess. and emergency legislation through Chapter 6 of First Special Sess. of 54th Legislature (2020)).

174. *See, e.g.*, Gould v. City of Stamford, 203 A.3d 525, 534 (Conn. 2019) (stating that workers' compensation laws are remedial and must be "construed generously" to allow access to workers' compensation benefits) (quoting Sullins v. United Parcel Serv., Inc., 108 A.3d 1110, 1114 (Conn. 2015)); Appeal of Panaggio, 205 A.3d 1099, 1102 (N.H. 2019) (stating that workers' compensation statutes are "construed liberally" and all reasonable doubts are resolved in favor of the employee). *See generally* 1 MODERN WORKERS COMPENSATION § 100:4, WESTLAW (database updated June 2020) (discussing the general rule that workers' compensation laws "are to be construed liberally in accordance with their purposes" and providing cases in which courts apply this rule).

175. *See* Tractor Supply Co. v. Kent, 966 So. 2d 978, 979 (Fla. Dist. Ct. App. 2007).

176. *See Panaggio*, 205 A.3d at 1101.

177. *See* Bertelsen v. Allstate Ins. Co., 833 N.W.2d 545, 550–51 (S.D. 2013).

marijuana expenses constitutes aiding and abetting a violation of federal law.[178]

C. Aiding and Abetting

Under federal law,[179] a person who aids and abets in the commission of a federal crime is punishable as if that person committed the substantive offense.[180] A person aids and abets a crime by assisting the perpetrator in the crime's commission.[181] To be liable for aiding and abetting ("A&A"), a person must "(1) take[] an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission."[182] A person need only assist in "one component" of the substantive offense to be found criminally liable for A&A.[183]

Regarding the intent element of A&A, "a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission."[184] The Supreme Court in *Rosemond v. United States*[185] held that "[w]hat matters for the purpose of gauging intent" is whether a person has "chosen" or "elected" to participate in the offense, despite knowing its illegality.[186] When injured employees' workers' compensation claims for medical marijuana reimbursement are denied, subsequent appeals usually address whether compliance with a reimbursement order satisfies the intent element of A&A, thus exposing an employer or insurer to federal prosecution.[187]

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178. *See, e.g.*, *Panaggio*, 205 A.3d at 1104; Hager v. M&K Constr., 225 A.3d 137, 140 (N.J. Super. Ct. App. Div. 2020); Lewis v. Am. Gen. Media, 355 P.3d 850, 859 (N.M. Ct. App. 2015).

179. State aiding and abetting laws are beyond the scope of this Comment because an employer or insurer would not be vulnerable to state prosecution for reimbursing medical marijuana in accordance with state law. *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 427.8 (West, Westlaw through Second Reg. Sess. of 57th Legislature (2020)) (exempting medical marijuana patients and caregivers from "arrest, prosecution or penalty in any manner" for using medical marijuana in accordance with state law); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103 (West, Westlaw through 2020 Reg. Sess. Act 57) (exempting from arrest and prosecution those who use, manufacture, or dispense medical marijuana in accordance with state law).

180. *See* 18 U.S.C. § 2(a) (2018).

181. *See* United States v. Williams, 341 U.S. 58, 64 (1951).

182. Rosemond v. United States, 572 U.S. 65, 71 (2014) (first citing 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 13.2 (2003); and then citing Hicks v. United States, 150 U.S. 442, 449 (1893)).

183. *See id.* at 74–75 (holding that a person need not assist in "each element of the offense" to be found liable for aiding and abetting).

184. *See id.* at 77.

185. *See id.*

186. *See id.* at 79–80.

187. *See infra* Section II.D.

D. Cases Directly Addressing Whether Medical Marijuana Reimbursement Under Workers' Compensation Constitutes Criminal Aiding and Abetting

Employers and insurers may deny medical marijuana reimbursement for injured employees even in states that do not expressly exclude medical marijuana expenses from workers' compensation coverage by statute.[188] If an employee challenges a denial for medical marijuana reimbursement, a workers' compensation judge or other administrative authority may order the employer or insurer to reimburse the employee's medical marijuana expenses.[189] In response, employers and insurers often challenge such orders with several arguments.[190] Specifically, they assert that reimbursing an employee's medical marijuana expenses constitutes aiding and abetting the employee's possession of a controlled substance in violation of the CSA.[191]

The issue of whether reimbursement of medical marijuana under workers' compensation constitutes criminal A&A has been addressed by the workers' compensation tribunals of Connecticut,[192] Massachusetts,[193]

188. *See, e.g.*, Appeal of Panaggio, 205 A.3d 1099, 1101 (N.H. 2019) (describing insurance carrier that denied employee's request for medical marijuana reimbursement). A handful of states expressly exclude medical marijuana expenses from workers' compensation coverage by statute. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2814(A)(1) (Westlaw through Second Reg. Sess. of Fifty-Fourth Legislature (2020)); FLA. STAT. ANN. § 381.986(15)(f) (West, Westlaw through the 2020 Second Reg. Sess. of 26th Legislature); MICH. COMP. LAWS ANN. § 418.315a (West, Westlaw through P.A.2020, No. 142, of 2020 Reg. Sess., 100th Legislature); OKLA. STAT. ANN. tit. 63, § 427.8(I)(2) (West, Westlaw through Second Reg. Sess. of the 57th Legislature (2020)).

189. *See, e.g.*, Hager v. M&K Constr., 225 A.3d 137, 144 (N.J. Super. Ct. App. Div. 2020) ("The [workers' compensation] judge ordered [employer] to reimburse [employee] for the costs of medical marijuana and any related expenses."); Kellner Bros., Inc., No. 2003-PM13133, 2018 NY Wrk. Comp. LEXIS 4855, at *4 (N.Y. Workers' Comp. Bd. May 29, 2018) ("The [workers' compensation judge] . . . directed the [insurer] to reimburse the [employee] for out-of-pocket expenses regarding medical marijuana.").

190. *See, e.g.*, Giles & Ransome v. Kalix, No. N17A-10-001 CEB, 2018 Del. Super. LEXIS 434, at *5 (Del. Super. Ct. Oct. 9, 2018) (arguing that employer should not be responsible for reimbursing employee's medical marijuana expenses while he was experimenting with different dosages); Lewis v. Am. Gen. Media, 355 P.3d 850, 856 (N.M. Ct. App. 2015) (arguing that the CSA preempts state medical marijuana laws); Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 Conn. Wrk. Comp. LEXIS 17, at *23 (Conn. Comp. Review Bd. May 12, 2016) (arguing that employee's use of medical marijuana was not reasonable or necessary). These arguments are beyond the scope of this Comment.

191. *See* 21 U.S.C. § 844 (2018) ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance . . . ."); *see also, e.g.*, *Panaggio*, 205 A.3d at 1104; *Hager*, 225 A.3d at 140; *Lewis*, 355 P.3d at 859.

192. *See* Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *21 (Conn. Comp. Review Bd. Oct. 29, 2019).

193. *See* Wright v. Pioneer Valley, No. 04387-15, 2019 MA Wrk. Cmp. LEXIS 1, at *26 (Mass. Dep't Indus. Accidents Reviewing Bd. Feb. 14, 2019).

and Vermont,[194] as well as courts in Maine,[195] New Jersey,[196] and New Mexico.[197] The appellate courts of New Jersey and New Mexico and the Connecticut workers' compensation tribunal have held that compliance with an order requiring reimbursement of employee medical marijuana expenses does not constitute criminal A&A.[198] Conversely, Maine's Supreme Judicial Court and the workers' compensation tribunals of Massachusetts and Vermont have held that compliance with reimbursement orders does, in fact, require an employer or insurer to violate federal law and risk criminal prosecution for A&A.[199]

Supporting the proposition that medical marijuana reimbursement should be denied in workers' compensation claims, the Supreme Judicial Court of Maine in *Bourgoin v. Twin Rivers Paper Co.*[200] held that an employer is not required to reimburse an injured employee's medical marijuana expenses because doing so requires a violation of federal law.[201] Drawing on the Supreme Court's holding in *Rosemond*, the court found that the act of reimbursement satisfies the intent element of A&A because the employer is knowingly assisting an employee's illegal marijuana possession.[202] The court concluded that, regardless of whether there was an actual risk of federal prosecution, the employer "would be forced to commit a federal crime if it complied with" an order requiring reimbursement.[203]

However, in a dissenting opinion, Justice Jabar argued that A&A is a specific-intent crime.[204] Drawing on language from the United States

194. *See* Hall v. Safelite Grp., Inc., No. FF-58850, 2018 VT Wrk. Comp. LEXIS 6, at *6 (Vt. Dep't Labor Mar. 28, 2018); *see also Kellner Bros., Inc.*, 2018 NY Wrk. Comp. LEXIS 4855, at *11 (addressing a similar conspiracy argument).

195. *See* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 19 (Me. 2018).

196. *See Hager*, 225 A.3d at 148–49.

197. *See* Lewis v. Am. Gen. Media, 355 P.3d 850, 859 (N.M. Ct. App. 2015).

198. *See Hager*, 225 A.3d at 148–49; *Lewis*, 355 P.3d at 859; Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *21–22 (Conn. Comp. Review Bd. Oct. 29, 2019).

199. *See Bourgoin*, 187 A.3d at 19; *Wright*, 2019 MA Wrk. Cmp. LEXIS 1, at *26; *Hall*, 2018 VT Wrk. Comp. LEXIS 6, at *26.

200. *Bourgoin*, 187 A.3d at 10.

201. *See id.* at 22; *see also Wright*, 2019 MA Wrk. Comp. LEXIS 1, at *22 (agreeing with the *Bourgoin* decision).

202. *See id.* ("[W]ere Twin Rivers to comply with the administrative order by subsidizing Bourgoin's use of medical marijuana, it would be engaging in conduct that meets all the elements of criminal aiding and abetting . . . .").

203. *See id.* at 21–22.

204. *See id.* at 26 (Jabar, J., dissenting); *see also* United States v. Nacotee, 159 F.3d 1073, 1076 (7th Cir. 1998) ("To be liable under an aiding and abetting theory . . . a defendant must have had the specific intent to aid in the commission of the crime in doing whatever she did to facilitate its commission.") (first citing United States v. Boyles, 57 F.3d 535, 541 (7th Cir. 1995); and then citing United States v. Barclay, 560 F.2d 812, 816 (7th Cir. 1977)). *See generally Specific Intent*, BLACK'S LAW DICTIONARY (11th ed.

Supreme Court in *Nye & Nissen v. United States*,[205] he maintained that an employer's compliance with a tribunal order requiring reimbursement of medical marijuana expenses does not satisfy the specific-intent element because the employer does not "wish" or "desire" to facilitate the commission of a federal crime.[206] Justice Jabar also argued that merely following a tribunal order for reimbursement does not make an employer an "active participant," in the offense of possession such that the employer would satisfy the intent element of A&A as described in *Rosemond*.[207] Therefore, Justice Jabar concluded, reimbursement pursuant to a tribunal order does not force an employer to commit a federal crime.[208]

Contrary to *Bourgoin*, the decision of the New Mexico Court of Appeals in *Lewis v. American General Media*[209] supports the reimbursement of medical marijuana expenses under workers' compensation.[210] In *Lewis*, the court reaffirmed a previous decision, *Vialpando v. Ben's Automotive Services*,[211] in which the court ordered an employer to reimburse an injured employee's medical marijuana expenses under workers' compensation.[212] The court in *Vialpando* did not address whether reimbursing medical marijuana expenses under workers' compensation constitutes a federal crime because the employer did not "cite to any federal statute it would be forced to violate" in its

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2019) (defining specific intent as "[t]he intent to accomplish the precise criminal act that one is later charged with").

205. Nye & Nissen v. United States, 336 U.S. 613 (1949); *see Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting) (citing *Nye & Nissen*, 336 U.S. at 618–19 (1949)); *see also Nye & Nissen*, 336 U.S. at 619 ("In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he *wishes* to bring about . . . .'" (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938))) (emphasis added).

206. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting) (disagreeing with the majority that acting with knowledge of an activity's illegal nature is sufficient to establish aiding and abetting liability); *see also id.* at 25 (Jabar, J., dissenting) ("[T]he accomplice must *wish* or *desire* to bring about the success of the principal in committing the underlying substantive offense in order to be punishable as principal.") (citing United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991)).

207. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting); *see also Rosemond*, 572 U.S. at 77 (explaining that the intent element of aiding and abetting is "satisfied when a person *actively participates* in a criminal venture" knowing that he is participating in a crime) (emphasis added).

208. *See Bourgoin*, 187 A.3d at 27–28 (Jabar, J., dissenting); *see also* Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *21 (Conn. Comp. Review Bd. Oct. 29, 2019) (agreeing with the *Bourgoin* dissent).

209. Lewis v. Am. Gen. Media, 355 P.3d 850 (N.M. Ct. App. 2015).

210. *See id.* at 859 (affirming the order of a workers' compensation judge to reimburse an employee's medical marijuana expenses).

211. Vialpando v. Ben's Auto. Servs., 331 P.3d 975 (N.M. Ct. App. 2014).

212. *See Lewis*, 355 P.3d at 850 (reaching the same conclusion as the court in *Vialpando*).

argument.[213] However, in *Lewis*, the employer argued that reimbursing an employee's medical marijuana expenses would render the employer criminally liable for aiding and abetting the employee's possession of a controlled substance.[214] The court found the employer's argument merely speculative.[215] Examining the DOJ's enforcement policy,[216] as well as Congressional action,[217] the court concluded that complying with a tribunal order requiring reimbursement would not expose the employer to federal prosecution.[218]

Further supporting the proposition that reimbursement pursuant to a court order would not expose an employer or insurer to federal prosecution, the Appellate Division of the New Jersey Superior Court in *Hager v. M&K Construction*[219] also held that compliance with an order requiring medical marijuana reimbursement does not constitute A&A.[220] In *Hager*, the court held that an employer is not an "active participant in the commission of a crime" when complying with a reimbursement order.[221] The court also held that reimbursement pursuant to a tribunal order "does not establish the specific intent element of an aiding and abetting offense under federal law."[222] Therefore, the court concluded that an employer would not be exposed to federal prosecution for A&A when complying with an order requiring medical marijuana reimbursement.[223]

In sum, though prescription opioid medications are a compensable method of pain-relief under workers' compensation, they come with a significant risk of addiction, overdose, and other negative side effects.[224] To avoid serious consequences, injured employees often turn to medical

213. *Vialpando*, 331 P.3d at 980.

214. *See Lewis*, 355 P.3d at 859 ("As distinguished from *Vialpando*, Employer cites the federal statutes it believes would implicate him . . . .").

215. *See id.*

216. At the time of the *Lewis* decision, the DOJ's enforcement policy was that described in the Cole Memo. *See id.* at 858 (discussing federal marijuana enforcement policies under the Cole Memo); *see also supra* notes 129–32 and accompanying text (discussing the Cole Memo).

217. The court specifically referred to Congress expressly prohibiting the DOJ from using federal funds to interfere with state medical marijuana programs. *See Lewis*, 355 P.3d at 859 (citing Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014)); *see also supra* notes 133–34 and accompanying text (discussing the Appropriations statutes).

218. *See Lewis*, 355 P.3d at 859.

219. Hager v. M&K Constr., 225 A.3d 137 (N.J. Super. Ct. App. Div. 2020).

220. *See id.* at 148.

221. *See id.*

222. *Id.* at 140.

223. *See id.* at 148–49.

224. *See* Matzo & Dawson, *supra* note 9 and accompanying text; *see also Hager*, 225 A.3d at 143 (describing the expert testimony of two different doctors who discussed the various negative effects of opioids, including possible overdose and death).

marijuana for long-term pain management.[225] When employees are denied reimbursement for medical marijuana expenses, the drug may become nearly impossible for them to afford out-of-pocket.[226] Employers and insurers may genuinely fear that medical marijuana reimbursement exposes them to federal A&A liability, but this fear is unfounded when the reimbursement is pursuant to a court or tribunal order.[227] Additionally, courts and administrative tribunals should not be deciding to exclude medical marijuana from workers' compensation coverage; that decision is properly left to state legislatures.[228]

III. ANALYSIS

The argument that medical marijuana reimbursement constitutes criminal A&A is flawed because compliance with a reimbursement order negates the voluntariness element of A&A, which is implicit in the Supreme Court's holding in *Rosemond*. Aiding and abetting requires a defendant to *choose* to assist in the commission of a crime, meaning that a defendant knew they were assisting in an illegal act.[229] Compliance with a reimbursement order is strikingly different from choosing to assist in the commission of a federal crime because such compliance is not voluntary.[230]

When presented with a reimbursement order by a court or tribunal, employers and insurers have no choice but to comply.[231] As a result, compliance with a reimbursement order is not the kind of voluntary or willful conduct that makes employers or insurers active participants in a crime and, therefore, does not satisfy the intent element of A&A.[232] Without possessing the necessary intent, employers or insurers cannot be guilty of A&A under federal law.[233]

225. *See supra* note 10 and accompanying text.

226. *See supra* note 11 and accompanying text.

227. *See infra* Section III.A.

228. *See infra* Section III.B.

229. *See* Rosemond v. United States, 572 U.S. 65, 79 (2014).

230. *See* Kellner Bros., Inc., No. 2003-PM13133, 2018 NY Wrk. Comp. LEXIS 4855, at *11 (N.Y. Workers' Comp. Bd. May 29, 2018) ("[C]ompliance with a directive by a tribunal does not constitute a 'voluntary' act.").

231. *See In re* Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986) ("[A] party subject to a court order must abide by its terms or face criminal contempt. Even if the order is later declared improper or unconstitutional, it must be followed until vacated or modified.").

232. *See* Hager v. M&K Constr., 225 A.3d 137, 148 (N.J. Super. Ct. App. Div. 2020).

233. *See In re* Winship, 397 U.S. 358, 364 (1970) (requiring every element of an offense to be proven beyond a reasonable doubt in order to secure conviction).

A. The Argument Against Aiding and Abetting

Compliance with a reimbursement order satisfies neither intent nor active participation, which the Supreme Court in *Rosemond* found necessary for a successful A&A prosecution.[234] In *Rosemond*, the Court stated that the intent requirement for A&A is met when a "defendant has chosen, with full knowledge, to participate in [an] illegal scheme" or "has knowingly elected to aid in the commission of . . . [an] offense."[235] The common meaning of the word "choose" is "to select freely[236] and after consideration."[237] Similarly, the common meaning of the word "elect" is "to choose (something, such as a course of action) especially by preference."[238] Therefore, the Court's use of "chosen" and "elected" implies that A&A liability attaches only when defendants become part of a criminal scheme by their own volition.[239]

When employers or workers' compensation insurers comply with a reimbursement order, they have not "chosen" or "elected" to do so.[240] Indeed, if a court or tribunal issued a reimbursement order, there would be no choice for the employer or insurer but to comply.[241] The court in *Bourgoin* focused exclusively on *Rosemond*'s requirement that defendants have knowledge that they are assisting in an illegal scheme.[242] The court in *Bourgoin*, however, failed to consider *Rosemond*'s implied requirement of willful conduct.[243] Because employers and workers' compensation insurers cannot "choose" or "elect" to refuse to follow a

234. *See Rosemond*, 572 U.S. at 77, 79.

235. *Id.* at 79.

236. "Freely" is defined as "in a free manner: such as of one's own accord." *See Freely*, MERRIAM-WEBSTER.COM DICTIONARY, https://bit.ly/37MeevD (last visited June 8, 2020).

237. *See Choose*, MERRIAM-WEBSTER.COM DICTIONARY, https://bit.ly/39TPCTs (last visited June 8, 2020).

238. *See Elect*, MERRIAM-WEBSTER.COM DICTIONARY, https://bit.ly/35DtWHY (last visited June 8, 2020).

239. *See* Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1447 (2002) (stating that the words "aid and abet" in 18 U.S.C. § 2(a) "sufficiently convey the concept" that a defendant must act willfully).

240. *See* Caye v. Thyssenkrupp Elevator, No. 6296 CRB-1-18-11, 2019 Conn. Wrk. Comp. LEXIS 45, at *21 (Conn. Comp. Review Bd. Oct. 29, 2019) ("[A]n employer or insurer reimbursing a claimant for medical marijuana prescriptions clearly would not be acting volitionally, but under an order from a state agency exercising its statutory police powers and empowered to sanction noncompliance."); *see also supra* note 230 and accompanying text.

241. *See supra* note 231 and accompanying text.

242. *See* Bourgoin v. Twin Rivers Paper Co., 187 A.3d 10, 17 (Me. 2018).

243. *See id.* at 26–27 (Jabar, J., dissenting) (citing Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1447 (2002)) (expressing the view that there must be an element of willfulness for the purpose of aiding and abetting liability under federal law).

reimbursement order, they do not engage in willful conduct when reimbursing an employee's medical marijuana expenses pursuant to such an order.[244] Thus, compliance with a reimbursement order under workers' compensation fails to satisfy a necessary element of A&A: that the defendant intends to facilitate the commission of a federal crime.[245]

Moreover, the Court in *Rosemond* endorsed the view that "[t]o aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as something he wishes to bring about' and 'seek by his action to make it succeed.'"[246] The Court acknowledged a distinction between those who "actively participate" in an offense and those who "incidentally facilitate" one.[247] An employer or workers' compensation insurer complying with a reimbursement order does not "wish to bring about" the offense of possession.[248] Rather, the employer or insurer likely wishes to avoid the immediate criminal penalties it would face for failing to comply with the order, even if the employer or insurer believed the order was improper.[249] Therefore, the employer or insurer is an incidental facilitator of, rather than an active participant in, possession of a controlled substance.[250]

Compliance with a reimbursement order eliminates any willful conduct, desire, and active participation that a prosecutor would need to prove in a successful A&A prosecution.[251] Though the Court in *Rosemond* stated that the intent element of A&A is satisfied when a defendant acts with knowledge of a scheme's criminal nature, such

244. *See* Weiss, *supra* note 239, at 1348–49 (explaining that the actions of the aider and abettor "must be the result of a volitional choice to act or not to act").

245. *See* Rosemond v. United States, 572 U.S. 65, 71 (2014).

246. *Id.* at 76 (quoting Nye & Nissen v. United States, 336 U.S. 613, 619 (1949)).

247. *See id.* at 77 n.8 ("We did not deal in [previous aiding and abetting] cases, nor do we here, with defendants who incidentally facilitate a criminal venture rather than actively participate in it.").

248. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting) (stating that the employer is "completely disinterested in [an employee's] use or possession of marijuana" when reimbursing medical marijuana expenses pursuant to a tribunal order).

249. *See In re* Providence Journal Co., 820 F.2d 1342, 1346 (1st Cir. 1986) ("[A] party may not violate an order and raise the issue of its unconstitutionality collaterally as a defense in the criminal contempt proceeding.").

250. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting) (expressing the view that an employer reimbursing an employee's medical marijuana expenses pursuant to a tribunal order "is not an active participant in the substantive 'offense' of . . . possession"); *see also* Hager v. M&K Constr., 225 A.3d 137, 148 (N.J. Super. Ct. App. Div. 2020) (holding that, when an employer reimburses medical marijuana pursuant to a court or tribunal order, the employer "is not an active participant in the commission of a crime").

251. *See Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting) (expressing the view that, under these circumstances, the federal government would not be able to prove the intent element of aiding and abetting); *see also Hager*, 225 A.3d at 148 (finding that, under these circumstances, the employer did not "establish[] the requisite intent . . . necessary for an aiding and abetting charge").

knowledge must be combined with willful conduct.[252] If the Court did not believe that A&A requires a willful, voluntary action, the Court would not have used the words "chosen" or "elected" in its opinion.[253]

Compliance with court- or tribunal-ordered medical marijuana reimbursement is not a voluntary or willful action,[254] nor does compliance with such an order constitute active participation in the offense of possession of a controlled substance.[255] Therefore, a federal prosecutor could not establish the intent element in prosecuting an employer or insurer for reimbursing an employee's medical marijuana expenses under workers' compensation.[256] Without establishing the requisite intent, court- or tribunal-ordered reimbursement for medical marijuana expenses cannot expose an employer or insurer to criminal liability for A&A.[257]

Because the A&A argument fails, employers and workers' compensation insurers should be required to reimburse medical marijuana expenses when such treatment is deemed reasonable or necessary.[258] By refusing to order medical marijuana reimbursement, courts and tribunals force injured employees to choose between enduring the harmful physical and psychological effects of opioid medications[259] and enduring the harmful financial effects of paying for medical marijuana out-of-pocket.[260] Consequently, refusing to order medical marijuana reimbursement constricts the scope of workers' compensation coverage in direct defiance of the remedial purpose of workers' compensation laws.[261] Therefore, if medical marijuana is to be excluded from workers' compensation coverage, that decision should be made by state legislatures rather than courts or administrative tribunals.[262]

252. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting) (expressing the view that "mere knowledge" does not satisfy the intent element of aiding and abetting because the defendant must also "wish or desire" to facilitate the offense); *see also Hager*, 225 A.3d at 140 (holding that aiding and abetting requires specific intent).

253. *See* Harris v. J.B. Hunt Transp., Inc., 423 F. Supp. 2d 595, 603 (E.D. Tex. 2005) ("Supreme Court justices . . . choose their words carefully and deliberately."); *see also* Rosemond v. United States, 572 U.S. 65, 79–80 (2014).

254. *See* Kellner Bros., Inc., No. 2003-PM13133, 2018 NY Wrk. Comp. LEXIS 4855, at *11 (N.Y. Workers' Comp. Bd. May 29, 2018).

255. *See Bourgoin*, 187 A.3d at 27 (Jabar, J., dissenting); *Hager*, 225 A.3d at 148.

256. *See Bourgoin*, 187 A.3d at 25 (Jabar, J., dissenting) ("[T]he government would not be able to prove that the employer would be acting with the . . . intent necessary to establish the requisite mens rea element of the offense of aiding and abetting.").

257. *See supra* note 233 and accompanying text.

258. *See supra* note 167 and accompanying text.

259. *See supra* note 9 and accompanying text.

260. *See supra* note 11 and accompanying text.

261. *See supra* note 174 and accompanying text.

262. *See infra* Section III.B.

B. Recommendation

To conform with the remedial purpose of workers' compensation laws, state courts and tribunals should issue orders requiring employers and workers' compensation insurers to reimburse employee medical marijuana expenses and leave the decision to exclude medical marijuana from workers' compensation coverage to the legislature.[263] Workers' compensation laws are established by state legislatures and represent a policy choice in favor of compensating injured employees.[264] A common theme among state medical marijuana laws is the protection of medical marijuana users from being denied any right or privilege based solely on their medical marijuana use.[265] Employees who are injured in the course of their employment have a right to be reimbursed by their employer or a workers' compensation insurer for reasonable or necessary medical care associated with that injury.[266] In some cases, medical marijuana is reasonable or necessary to alleviate the pain caused by an employee's work-related injury.[267] Therefore, when employers and workers' compensation insurers deny reimbursement of medical marijuana

263. *See supra* note 169 (listing examples of courts and tribunals that have issued orders for medical marijuana reimbursement).

264. *See, e.g.*, Valdez v. Himmelfarb, 51 Cal. Rptr. 3d 195, 198–99 (Cal. Ct. App. 2006) (discussing how the legislature carries out the "strong public policy" in favor of compensating injured employees); Touchard v. La-Z-Boy, Inc., 148 P.3d 945, 950 (Utah 2006) (finding that the Utah Workers' Compensation Act establishes clear legislative public policy that injured employees have the right to be compensated).

265. *See, e.g.*, DEL. CODE ANN. tit. 16 § 4903A(a) (LEXIS through 82 Del. Laws, Chapters 241, 245, 246) ("A registered qualifying patient shall not be subject to . . . denial of any right or privilege . . . for the medical use of marijuana pursuant to [state law] . . . ."); MD. CODE ANN., HEALTH-GEN. § 13-3313(a)(1) (LexisNexis, LEXIS through legislation 2020 Reg. Sess. of the General Assemb.) (prohibiting medical marijuana patients from being denied any right or privilege for their use of medical marijuana); N.H. REV. STAT. ANN. § 126-X:2(I) (LexisNexis, LEXIS through Act 7 of 2020 Reg. Sess.) ("A qualifying patient shall not be . . . denied any right or privilege for the therapeutic use of cannabis in accordance with [state law] . . . ."); 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(a)(1) (West, Westlaw through 2020 Reg. Sess. Act 57) (protecting medical marijuana patients from being subject to the denial of any right or privilege "solely for lawful use of medical marijuana").

266. *See, e.g.*, CAL. LAB. CODE § 4600(a) (West, Westlaw through Chapter 27 of 2020 Reg. Sess.); 77 PA. STAT. AND CONS. STAT. ANN. § 531(1)(i) (West, Westlaw through 2020 Reg. Sess. Act 57).

267. *See, e.g.*, Appeal of Panaggio, 205 A.3d 1099, 1101 (N.H. 2019) (describing Compensation Appeals Board's finding that employee's medical use of marijuana was reasonable and necessary); Vialpando v. Ben's Auto. Servs., 331 P.3d 975, 979 (N.M. Ct. App. 2014) (finding medical marijuana to be reasonable and necessary treatment for workers' compensation purposes); Petrini v. Marcus Dairy, Inc., No. 6021 CRB-7-15-7, 2016 Conn. Wrk. Comp. LEXIS 17, at *25 (Conn. Comp. Review Bd. May 12, 2016) (finding that employee's use of medical marijuana to relieve the pain caused by his workplace injury satisfied the reasonable and necessary standard).

expenses, employees are denied a right granted to them by state legislatures through workers' compensation laws.[268]

Requiring reimbursement of medical marijuana expenses comports with both workers' compensation laws and state medical marijuana laws.[269] Moreover, requiring reimbursement does not require employers or insurers to run afoul of any federal laws.[270] Thus, when medical marijuana is deemed reasonable or necessary to treat a workplace injury, requiring reimbursement by employers or insurers simply enforces the remedial purpose of state workers' compensation laws.[271]

Because state legislatures, not courts or administrative tribunals, create workers' compensation laws for the purpose of compensating injured employees, any decision to exclude medical marijuana from compensability under workers' compensation should be made by those legislatures.[272] Therefore, unless medical marijuana is specifically excluded from workers' compensation coverage by statute,[273] state courts and administrative tribunals should treat medical marijuana as they would any other reasonable or necessary treatment and order employers and insurers to reimburse medical marijuana expenses.

IV. CONCLUSION

When employees are injured in the course of their employment, workers' compensation laws create a right for those employees to receive compensation for reasonable or necessary medical expenses,[274] which

268. *See Panaggio*, 205 A.3d at 1103 ("[T]he effect of denying [medical marijuana] reimbursement to [employee] . . . is to deny him his right to medical care deemed reasonable under the Workers' Compensation Law.").

269. *See, e.g.*, 35 PA. STAT. AND CONS. STAT. ANN. § 10231.2103(a)(1) (West, Westlaw through 2020 Reg. Sess. Act 57) (prohibiting the denial of any right or privilege based solely on lawful medical marijuana use); 77 PA. STAT. AND CONS. STAT. ANN. § 531(1)(i) (West, Westlaw through 2020 Reg. Sess. Act 57) (conferring a right on employees to have their employer pay for reasonable medical services associated with workplace injuries).

270. *See supra* Section III.A.

271. *See supra* note 160 and accompanying text.

272. *See* Herman v. Sherwood Indus., Inc., 710 A.2d 1338, 1342 (Conn. 1998) ("[W]e do not construe the [workers' compensation] act to impose limitations on benefits that the act itself does not specify clearly.") (first citing Doe v. City of Stamford, 699 A.2d 52, 55 (Conn. 1997); and then citing Misenti v. Int'l Silver Co., 575 A.2d 690, 693 (Conn. 1990)); Damme v. Pike Enters., Inc., 856 N.W.2d 422, 435 (Neb. 2014) ("[D]efenses that defeat a worker's right to . . . receive . . . benefits for a work-related injury are a matter of public policy that the Legislature should decide."); *see also Panaggio*, 205 A.3d at 1103 ("Had the legislature intended to bar patients in the [medical marijuana] program from receiving reimbursement under [workers' compensation], it easily could have done so, and we will not add language that the legislature did not see fit to include.") (citing Appeal of Phillips, 144 A.3d 882, 885 (N.H. 2016)).

273. *See supra* note 188 and accompanying text.

274. *See supra* note 167 and accompanying text.

may include medical marijuana.[275] Unfortunately, some employers and workers' compensation insurers attempt to avoid reimbursing injured employees for medical marijuana expenses by arguing that reimbursement forces them to aid and abet a violation of the CSA.[276] This argument ignores the fact that compliance with a court or tribunal order negates the intent necessary to expose an employer or insurer to liability for aiding and abetting.[277]

Aiding and abetting requires a person to choose to facilitate the commission of a crime,[278] but compliance with a court or tribunal order is not a choice.[279] Moreover, when complying with a reimbursement order, an employer or insurer is not an active participant in an employee's possession of marijuana.[280] Therefore, compliance with a reimbursement order cannot violate the Controlled Substances Act because the requisite intent to aid and abet the possession of a controlled substance is not present.[281]

By requiring medical marijuana reimbursement, courts and administrative tribunals merely afford workers' compensation laws the liberal construction they deserve.[282] Workers' compensation laws are created by state legislatures for the purpose of compensating injured employees.[283] Therefore, state legislatures, rather than courts or administrative tribunals, should decide whether to exclude medical marijuana from workers' compensation coverage.[284] Until and unless that legislative decision is made, courts and administrative tribunals should order employers and workers' compensation insurers to reimburse medical marijuana expenses.[285]

275. *See supra* notes 169, 267 and accompanying text.
276. *See supra* Section II.D.
277. *See supra* Section III.A.
278. *See supra* Section II.C.
279. *See supra* notes 230–31 and accompanying text.
280. *See supra* Section III.A.
281. *See supra* Section III.A.
282. *See supra* note 174 and accompanying text.
283. *See supra* note 160 and accompanying text.
284. *See supra* Section III.B.
285. *See supra* Section III.B.