



[Back to News](#) | [Print News](#)

State: N.H.

Supreme Court May Be Leaning in Favor of Marijuana Reimbursement: Top [2019-03-11]

State law might require insurers to reimburse injured workers for medical marijuana, according to a decision Thursday by the New Hampshire Supreme Court, which left unanswered the question of whether such a practice conflicts with federal law.

Attorney Jared O'Connor, a shareholder with Shaheen & Gordon in Manchester, called the decision a "50% win" for his client, Andrew Panaggio, who hurt his lower back at work in 1991.

In its [opinion](#), the Supreme Court said New Hampshire's medical marijuana laws do not bar a request for reimbursement, overruling a decision by the Workers' Compensation Appeals Board.

But the court said it needed more explanation from the appeals board on why it believes reimbursement for marijuana would not be legal under federal law. The case was sent back to the appeals board to flesh out its arguments on the federal issue.

O'Connor said he expects the board to hold a hearing on the case within the next few months. After that, he said, it's likely the case will be brought back to the Supreme Court for a final decision on the federal question.

The decision from the New Hampshire high court comes after the Maine Supreme Judicial Court in June [ruled](#) that an employer cannot be ordered to reimburse an injured worker for medical marijuana, because such a payment would be "aiding and abetting" a violation of federal law.

Some saw the Maine decision in *Bourgoin v. Twin Rivers Paper Co.* as a sign that the tide was turning when it came to court rulings on medical marijuana. The case followed what had seemed to be a "green wave" of court decisions supporting the compensability of marijuana, according to Albert Randall, a workers' comp defense attorney and president of Franklin & Prokopik in Baltimore.

Connecticut, New Jersey, New Mexico, Minnesota and Massachusetts have accepted marijuana as a compensable treatment for injured workers. Maine seemed to be on the same path until the state Supreme Court ruled on the *Bourgoin* case.

But the opinion from the New Hampshire Supreme Court seems to indicate that the *Bourgoin* case was more of an isolated incident, Randall said.

"*Bourgoin* is going to end up being seen more as an outlier rather than a trend," Randall predicted.



At the same time, Randall said, many employment law cases involving employee use of medical marijuana are coming down on the side of the worker. One key case is *Noffsinger v. SSC Niantic Operating Co.*

In that case, a federal judge last year granted summary judgment for plaintiff Katelin Noffsinger on her claim that the defendant company violated Connecticut's medical marijuana law when it rescinded a job offer after she tested positive for marijuana in a pre-employment screen.

In the Panaggio case in New Hampshire, Randall sees hints in the Supreme Court opinion that the court will ultimately decide in favor of reimbursement for the injured worker's marijuana. For example, he said, the court "goes out of its way" to explain in a footnote that the Department of Justice had a policy for at least a decade of declining to prosecute individuals whose possession and use of medical marijuana was in compliance with state law.

Workers' comp claimants' attorney Jenifer Dana Kaufman in Abington, Pennsylvania, had a similar interpretation of the court's opinion.

"Certainly I think it reads pro-reimbursement," Kaufman said.

Kaufman said the issue of marijuana reimbursement is heating up in Pennsylvania. She's aware of a handful of injured workers in the state who are being reimbursed for medical marijuana. In other cases, she said, carriers are fighting reimbursement, including one claim where utilization review found that medical marijuana was a reasonable and necessary treatment. The carrier appealed.

Kaufman said she's representing a worker who was injured in a catastrophic fall in 2009. After multiple neck surgeries, the man became addicted to opioids, lost all his teeth and became suicidal. In January 2018, he started using medical marijuana and has been off opioids ever since, Kaufman said.

"He has better pain relief, no longer uses a cane and feels life is worth living again," Kaufman said.

While the carrier agrees that marijuana is reasonable and necessary, it has denied payment based on federal law, she said.

Similarly, Panaggio in the New Hampshire case had suffered ongoing pain as a result of his work injury and experienced negative side effects from taking prescription opioids, according to court documents.

But CNA Insurance Co. denied payment for Panaggio's medical marijuana, which he began buying in 2016 after qualifying as a patient in the state's therapeutic cannabis program.

A hearing officer with the New Hampshire Department of Labor upheld the denial. Panaggio took the decision to the appeals board.

The appeals board found that Panaggio's use of medical marijuana was reasonable and necessary. But it concluded that reimbursement by the carrier would not be legal under state or federal law.

The appeals board pointed to the state's medical marijuana law, which says "nothing in this chapter shall be construed to require ... any health insurance provider, health care plan or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis."

But the Supreme Court noted that the statute also does not prohibit any of the listed entities from providing reimbursement for marijuana.

And “the effect of denying reimbursement of Panaggio under these circumstances is to deny him his right to medical care deemed reasonable under the Workers’ Compensation Law,” the court concluded.

The Supreme Court contrasted New Hampshire’s medical marijuana law with those in other states, such as in Florida, that expressly prohibit workers’ comp insurance carriers from reimbursing claimants for medical marijuana.

In Michigan, the workers’ comp law specifies that an employer is not required to reimburse an injured worker for medical marijuana.

Arizona Gov. Doug Ducey in 2015 signed a bill exempting employers from liability for medical cannabis.

O’Connor, Panaggio’s attorney, didn’t say how much his client had spent on medical marijuana so far.

“But I can confirm that, as even the (appeals) board found, his use of cannabis is helpful in treating his pain and that the carrier has not paid for any of it since he began the therapy in 2016,” he said.