



## “MENTAL-MENTAL” EXCLUSION CHALLENGES

Currently before the Ohio Senate is Bill No. 5, which would amend the Revised Code and allow peace officers, firefighters, and emergency medical responders to file claims for post-traumatic stress disorder (PTSD) without first experiencing physical injury.

Ohio’s WC system is designed to compensate employees for physical injuries and those mental conditions, including PTSD, that arise directly from such injuries.

Senate Bill 5 has had a long life and was initially assigned to the Transportation, Insurance and Commerce Committee where it was voted out of committee but did not go to the full Senate. The bill was then assigned to the Senate Finance Committee, where the requisite three hearings were held, but no vote was taken. Instead Committee leader, Senator Oelslager, held a meeting on May 14, 2015, for interested parties to further discuss the issues involved.

Testimony provided before these Committees included an estimate from the BWC that the prevalence and impact of PTSD among the targeted group of employees would add approximately \$180 million to annual WC costs of the affected employers, who are mostly public sector.

While the scope of Senate Bill No. 5 is limited, it is still troubling. How long before the Revised Code is amended for all employees?

## MEDICAL MARIJUANA IN WC

Over the last several years, more states have adopted laws that govern the use of marijuana for medicinal purposes. While marijuana remains a Schedule I controlled substance under federal law, more states are considering its legalization for medical treatment.

There are roughly 23 states that currently allow the use of marijuana for medicinal purposes. The laws in these states vary on how they can be used. For instance, in Minnesota, the use of this drug is limited to liquid, pill or vaporized forms (smoking marijuana remains illegal). In other states such as California, possession of marijuana is limited to a specific number of plants a person may cultivate and otherwise possess, and allows for state-issued cardholders to smoke marijuana to treat a medical condition. Medical conditions also vary from state to state. Most allow it to be used for the following conditions:

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### See “Physical Therapy”

*“both surgery and physical therapy are reasonable choices; the person who goes down either path ends up in the same place a year or two later.”*

## MEDICAL MARIJUANA, *continued*

- Most forms of cancer;
- Glaucoma;
- HIV/AIDS;
- Tourette's Syndrome;
- Amyotrophic lateral sclerosis/Lou Gehrig's Disease (ALS);
- Seizures and epilepsy;
- Severe and persistent muscle spasms;
- Crohn's Disease;
- Terminal illness with a life expectancy of less than a year; and
- Chronic pain conditions.

States that currently allow the use of marijuana for medical (and recreational use) are in conflict with federal law and the Controlled Substances Act, which is found under Title 21 of the United States Code. Federal law enforcement has not taken dramatic steps for force compliance with federal law. Under a 2015 federal budget act, the U.S. Department of Justice is specifically prohibited from using appropriations to shutdown state-legal medical marijuana programs.

Notwithstanding this capitulation by federal law enforcement, it is unclear how employers can comply with federal **and** state workplace safety laws if an employee has marijuana present in their system; even if they are not under the influence of the drug. Most states with legalized marijuana are struggling to reconcile these laws with WC programs seeking to promote "drug free" workplaces.

One example from New Mexico is *Vialpando v. Ben's Auto. Services*, 331 P.3d 975 (NM Ct. App. 2014), where the employer was ordered to reimburse an injured employee for payments made to acquire medical marijuana. According to the court, the *Lynn and Erin Compassionate Use Act*, in conjunction with the New Mexico WC Act, require employers/insurers to provide "a worker [to] receive through employer reasonable and necessary health care services, which the regulations define to include drugs...." In this instance, because marijuana was legal for medical use, it was compensable for purposes of WC and "reasonable and necessary" medical care.

The possession and use of marijuana remains illegal in Ohio, but talks of legalization abound and legislation could certainly throw employers and WC program managers into a tailspin. (Originally reported by [www.workerscompensation.com](http://www.workerscompensation.com).)

## PHYSICAL THERAPY VS. SURGERY

According to a recent study summarized by Reuters Health and reported by [www.employmentlawacademy.com](http://www.employmentlawacademy.com), physical therapy may work as well as surgery for easing symptoms of lumbar spinal stenosis, which is a common cause of nerve damage and lower back pain among older people. Lumbar spinal stenosis is a compression of open spaces in the lower spinal column and can lead to pinched nerves, tingling, weakness, and numbness in the back and the lower extremities. This condition becomes more common with age and

## PHYSICAL THERAPY VS. SURGERY, *continued*

an estimated 2.4 million Americans may have this condition by 2021, according to the American Academy of Orthopedic Surgeons.

"Surgery is a riskier procedure, with about a 15 percent complication rate, and half of those are life-threatening," said Dr. Anthony Delitto, chair of physical therapy at the School of Health and Rehabilitation Sciences at the University of Pittsburgh. "It isn't a life-risking procedure to do physical therapy." Delitto and colleagues set out to see if they could show that physical therapy, long known to be safer than surgery, could work as well as at easing symptoms. Between 2000 and 2005, they asked 481 patients who consented to surgery if they would be willing to join a study where they would be randomly chosen to proceed with the operation or receive physical therapy. Most declined, to avoid being assigned to the non-surgical group, but 169 patients agreed to participate in the experiment. Ultimately, 87 patients had surgery and 82 were assigned physical therapy.

No matter what group they started in, participants achieved similar reduction of pain and other symptoms after 2 years. "The study demonstrates that both surgery and physical therapy are reasonable choices; the person who goes down either path ends up in the same place a year or two later," said Dr. Jeffrey Katz, director of the Orthopedic and Arthritis Center for Outcomes Research at Brigham and Women's Hospital in Boston. Dr. Katz, who wrote an accompanying editorial on this study, noted that there's still a role for surgery in treating lumbar spinal stenosis. But there's no harm in trying physical therapy first, he said.

## IMPROVEMENTS TO WC SET-ASIDES

The American Insurance Association (AIA) recently welcomed the introduction of bipartisan legislation entitled the "Medicare Secondary Payer and Workers' Compensation Settlement Agreements Act of 2015." This legislation would require the Centers for Medicare and Medicaid Services (CMS) to adhere to state laws when reviewing WC Medicare set-asides. Currently, CMS fails to provide consistent standards for determining amounts to be set-aside and provides no avenue to appeal CMS determinations. This is a pervasive WC claims problem that impacts all employers and insurers nationwide. The legislation seeks to:

- Establish clear criteria in the determination of the settlements that are qualified for acceptance and that may be submitted for review;
- Create certainty for calculating the amounts to be included in set-asides;
- Provide a reasonable time frame in which CMS is to review set-aside submissions;
- Provide an appeals process for parties to CMS determinations;
- Provide an optional direct payment of set-aside amounts to Medicare;
- Assure that settlements that meet the terms of federal statute at the time of settlement are not disapproved based on later changes in law, regulations or administrative interpretations.

## OSHA'S GUIDE TO RESTROOM ACCESS

The Occupational Safety and Health Administration (OSHA) recently issued a Guide to Restroom Access for Transgender Workers. The Guide was developed at the request of the National Center for Transgender Equality, who is an OSHA Alliance partner that works collaboratively with OSHA to develop products and materials to protect the safety and health of transgender workers.

OSHA's Sanitation standard requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them.

"The core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity," said Dr. David Michaels, Assistant Secretary of Labor for OSHA. "OSHA's goal is to assure that employers provide a safe and healthful working environment for all employees." Many companies have implemented written policies to ensure that all employees, including transgender employees, have prompt access to appropriate sanitary facilities.

OSHA's Guide includes a description of best practices and also makes employers aware of federal, state, and local laws that reaffirm the core principle of providing employees with access to restroom facilities based on gender identification. Under the Occupational Safety and Health Act of 1970, employers are responsible for providing safe and healthful workplaces for their employees. OSHA's role is to ensure these conditions are being met by setting and enforcing standards, and providing training, education and assistance. The Guide can be found at [www.osha.gov](http://www.osha.gov).

## LEGISLATION WATCH LIST

The following House Bills were introduced in May 2015 by Representative Michael Henne:

1. HB-205: Self-Insuring Employers. To modify the requirements for an employer to become a self-insuring employer for purposes of the Workers' Compensation Law, to transfer authority over the workers' compensation self-insurance program to the Superintendent of Insurance, and to allow certain employers and groups of employers to obtain workers' compensation coverage from a private workers' compensation insurer.
2. HB-206: Industrial Commission Claim Statistics. To require the Industrial Commission to keep statistics on individual hearing decisions of contested workers' compensation claims.
3. HB-207: Workers' Compensation Surplus Fund. To allow a state fund employer to have a workers' compensation claim that it is likely to be subrogated by a third party paid from the surplus fund account rather than charged to the employer's experience.