

**ARTICLE FOR
WORKERS' COMPENSATION ASSOCIATION OF NEW MEXICO
MONTHLY NEWSLETTER**

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RECENT APPELLATE OPINION

In the October 1, 2014, edition of the *New Mexico Bar Bulletin*, two workers' compensation cases were reported. The first case is entitled Sandy Allen Jones v. Holiday Inn Express and AIG Claims Service v. ALEA North American Insurance Company and CHUBB Services Corporation. This was an appeal from a decision by Judge Shanon S. Riley. This Opinion was issued by the New Mexico Court of Appeals. Judge Michael E. Vigil wrote the Opinion, and Judge Linda M. Vanzi and Judge Monica Zamora concurred in the Opinion. This case involved a dispute between two insurance carriers, AIG Claims Service and ALEA North American Insurance Company. The Court found that the dispute had no effect on the rights of the injured Worker. The Worker sustained an on the job injury to his back, which was not in dispute. Thirteen days prior to the accident, the Employer had changed its workers' compensation carrier from AIG Claims Service (AIG) to ALEA North American Insurance Company (ALEA). The Employer's assistant manager was apparently unaware of the change and sent notice of the accident to AIG. AIG processed the claim as an accepted claim and paid both indemnity and medical benefits. Apparently, a miscalculation was made by the AIG Claim specialist regarding the amount of benefits the Worker was entitled, which resulted in the Worker being provided with 700 weeks rather than 500 weeks of indemnity benefits. After the claim was made, AIG and the Worker entered into a Stipulated Order in which the Worker received a lump sum for indemnity benefits.

Four years after the settlement was made, AIG discovered that it was not the correct insurer, and made demand on ALEA to reimburse them for the benefits that had been paid. AIG filed a Complaint before the Workers' Compensation Administration to seek reimbursement from ALEA.

There were two judges assigned to this case. The case was originally assigned to Judge Lori Martinez and when she was not reappointed to the Bench, the case was reassigned to Judge Shanon Riley. While she had jurisdiction over the case, Judge Martinez found that the WCA lacked jurisdiction to determine whether or not ALEA had to reimburse AIG for the benefits paid. However, Judge Martinez held that she had jurisdiction over the issue of which company should continue to pay the Worker's benefits.

When Judge Riley was assigned to the case, she concluded that Judge Martinez' Order regarding the WCA's lack of jurisdiction was the law of the case, but ruled that ALEA would be responsible for paying the Worker's future indemnity benefits in an amount agreed to by the parties.

In his Opinion, Judge Vigil determined that the Workers' Compensation Administration did not have any jurisdiction to determine AIG's claim that it be reimbursed by ALEA for benefits previously paid to the Worker, since the Legislature did not grant the Workers' Compensation Administration jurisdiction to decide such issues. The Opinion does point out that there are states such as Nebraska, Louisiana and Oregon that find that their commission or workers' compensation board does have jurisdiction to determine such disputes.

From the Opinion, it would appear that if, in fact, there has been an overpayment of benefits to a Worker, the proper course of action for the insurance carrier is to file suit in district or federal court to resolve that issue since the Workers' Compensation Administration, in the Opinion of Judge Vigil, does not have jurisdiction to determine that issue.

The lesson to be learned here is that an adjuster should review the file when a claim is submitted to the adjuster, in order to insure the injury was incurred during the period of time the insurance company had coverage. In my experience, most claims adjusters are very good at doing so. This case clearly shows that relying on an employee of the Employer's opinion as to which insurance company has coverage can be very expensive and time consuming.

The second case reported was Gregory Vialpando v. Ben's Automotive Services and Redwood Fire & Casualty. This was an appeal from Judge Terry Kramer's decision, in which he ordered the Employer to reimburse the Worker for medical marijuana that was prescribed for the Worker. The majority Opinion was written by Judge James J. Wechsler, with Judge Fry and Judge Vigil concurring. This is another classic example of the appellate court not really seeming to grasp the practical impact of some of their decisions in either completely ignoring or paying little attention to issues, and failing to appreciate the difficulties the parties will have in implementing their decision. In this particular case, the Employer objected to Judge Kramer's Order on the grounds the Order was illegal and unenforceable under federal law and, therefore, contrary to public policy, in that the Workers' Compensation Act does not recognize reimbursement for medical marijuana. Judge Wechsler along with Judge Fry and Judge Vigil affirmed the decision of Judge Kramer.

The Worker in this case had a compensable injury to his low back and had been subjected to numerous surgical procedures. The Worker had reached maximum medical improvement and the parties agreed to a 99% permanent partial disability rate.

In this case, the Worker had been certified by his healthcare provider and another medical doctor for the medical marijuana program, based on their opinion that the Worker was suffering from chronic and debilitating pain. Judge Wechsler discussed the obligation of the Employer to provide medical care to the Worker under the Workers' Compensation Act. He discussed the definition of designated healthcare providers, and noted that the Court of Appeals made reference to the fact that regulations have been adopted by the Workers' Compensation

Administration to address the providing of healthcare services to the Worker. It was Judge Wechsler's opinion that the regulations require that reasonable and necessary healthcare services be provided even if they are not necessarily available through an authorized healthcare provider. Judge Wechsler is of the opinion that the fact that the medical marijuana is not dispensed by a licensed pharmacist or healthcare provider is not a problem, as long as a doctor provides a written prescription allowing the Worker to enroll in the medical marijuana program. He also seems to make the distinction that the Employer is not paying for the marijuana, but is reimbursing the Worker for the marijuana he purchases. He also discusses the Compassionate Use Act that also justifies the use of medical marijuana. The Court of Appeals acknowledges the fact that, under federal law, marijuana is a scheduled one control substance and there are no exceptions under federal law for the use of marijuana for medical purposes. It is Judge Wechsler's opinion that the conflict between the federal law and the Compassionate Use Act would be determined in favor of the Compassionate Use Act. I did not find a compelling argument to support that opinion. Judge Wechsler stated that the Department of Justice has, in his opinion, not indicated they would necessarily prosecute individuals if there was a state law authorizing the use of medical marijuana.

The Court of Appeals does not address in any manner the issues involving the type of marijuana, the potency, or any potential side effects. They did not address how an Employer with a substance abuse and alcohol policy would deal with a Worker who was taking medical marijuana, or how they would deal with a Worker who decided to "light up" during a break or during lunch.

It appears that, at the present time, New Mexico is one of the few, if not the only state, that has allowed the use of medical marijuana in workers' compensation cases. I assume we will be hearing further from the appellate courts on this issue.