THE LEGAL
BUZZ

WCF INSURANCE

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UTAH CANNABIS ACT

Utah voters approved Proposition 2 by majority vote during the November 6, 2018 election, which officially legalized medical marijuana in Utah. The Utah legislature passed the "Utah Medical Cannabis Act" (HB 3001) less than one month later on December 3, 2018 during a special legislative session. The Medical Cannabis Act was designed as a replacement for Proposition 2. Though surrounded by controversy, the replacement bill was considered by the legislature to be a compromise crafted by both sides of the Proposition 2 debate in the weeks leading up to the election. The Medical Cannabis Act is a complex law that creates and amends many sections of the Utah Code. In brief summary, the Act includes the following key provisions:

- Provides for licensing and regulation of a state-run medical-cannabis cultivation facility, processing facility, independent testing laboratory, and medical-cannabis pharmacy.
- Processed medical cannabis can be in the form of a tablet, capsule, concentrated oil, liquid suspension, topical preparation, transdermal, sublingual preparation, a gelatinous cube, a resin or wax, or an unprocessed cannabis flower in a blister pack. No smoking of cannabis is allowed under the law.
- Provides for secure tracking of medical cannabis from cultivation to distribution.
- Requires specific medical cannabis labeling and childproof packaging.
- Requires creation of an electronic verification system to facilitate recommendation, dispensing, and record keeping for medical-cannabis transactions.
- Allows physicians, osteopathic physicians, advanced-practice registered nurses, and physician assistants to "recommend" medical cannabis for their patients depending on if they have a "qualifying condition."
- "Qualifying conditions" as enumerated in the act include HIV, Alzheimer's disease, amytrophic lateral sclerosis, cancer, cachexia, persistent nausea that is not responsive to traditional treatment, Crohn's disease, ulcerative colitis, epilepsy/debilitating seizures, multiple sclerosis, PTSD that has been diagnosed and is being monitored/treated by a licensed mental-health therapist, autism, a terminal illness with less than 6-month life expectancy, a condition resulting in hospice care, or a rare condition that affects less than 200,000 people in the United States and cannot be adequately managed with conventional medications.

QUESTIONS about one of these cases or workers'compensation news items? One of WCF's attorneys would be happy to help you:

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- Creates a "compassionate use board" that can approve medical cannabis use for individuals without an enumerated "qualifying condition" on a case-by-case basis.
- A recommendation for medical cannabis must be approved by the Department of Health, which will then issue a "medical cannabis patient card" for recommended cannabis use.
- Provides for a parent or legal guardian to obtain a medical-cannabis guardian card for an eligible minor patient.
- Limits the form and amount of medical cannabis available to a patient at one time.
- Prohibits a minor from entering a medical-cannabis pharmacy.
- Requires the Department of Health to establish a central state medical-cannabis pharmacy.

The effective date is the date the Medical Cannabis Act was passed on December 3, 2018. However, it will probably take years for the bureaucratic apparatus that has been created by the Act to be set up and running before medical cannabis will actually be dispensed to patients.

IMPACT ON WCF - The Medical Cannabis Act amends the Workers Compensation Act to provide that "the employer and the insurance carrier are not required to pay or reimburse for cannabis, a cannabis product, or a medical cannabis device . . ." Although WCF will not be required to pay for medical cannabis, it is important for WCF personnel to be aware of the law because questions about it will likely arise from policyholders and injured workers.

UTAH LABOR COMMISSIONS DECISIONS

Rhinehart v. Elwood Staffing,

UTAH LABOR COMMISSION
September 19, 2018

A worker was packing pillows into boxes and stacking the boxes onto pallets. He retrieved a pallet weighing between 10 and 30 pounds from a stack of pallets with his right hand by swinging the pallet off the stack and letting it fall to the ground. The worker experienced a popping sensation in his right hand as he retrieved the pallet. He then proceeded to fill a large box with pillows by pushing them down with his fists axially with his arms in a vertical position. As he pushed one of the pillows down into the box, he heard a pop and noticed pain in his right hand. He was diagnosed with a fracture of the fifth metacarpal in his right hand. Because the worker had a history of a prior fracture in that area, he had to satisfy *Allen*'s more stringent standard of legal causation; he had to prove that his industrial accident was unusual and extraordinary when compared to the stresses and exertions present in non-employment life. The worker argued that his accident as a whole, including the handling and moving of pallets, should be included in the legal causation analysis. He argued that moving so many heavy objects, as well as the repetitive nature of loading and unloading the pallets, was unusual and extraordinary. However, the Commission pointed out that a medical panel had identified only the pushing of his fists into pillows as the activity that had precipitated his injury, and not the prior exertions. It was just these precipitating exertions that would be compared to the stresses and exertions of non-employment life. The Commission held that the precipitating exertions in this case were similar to using one's fists to press clothing into a tightly packed suitcase. Although the worker described having to push down with almost all of his force, the Commission was not convinced that pushing or pressing on a relatively soft, lightweight item was unusual or extraordinary.

IMPACT ON WCF - There have been a number of cases coming from the Commission this year that have emphasized the importance of identifying which specific exertions precipitated an industrial injury. Although injured workers may include many different exertions in the description of their accidents, it is important to exclude non-precipitating exertions from our legal-causation analysis. This may require us to not only ask utilization reviewers or independent medical examiners whether the accident caused an injury, but to also ask what particular exertions caused an injury.

Cash v. CR England

UTAH LABOR COMMISSION
June 6, 2018

A worker was sitting sideways in the driver's seat of his pickup truck while his trailer was being loaded with the use of a forklift. While loading material into the bed of the truck, the forklift bumped the truck, causing the vehicle to lurch forward. This sudden movement caused the worker's head to jerk to the side in a whiplash type motion and led him to strike his left shoulder against the steering wheel of the truck. The worker argued that although he had pre-existing conditions that contributed to his injuries, that the more stringent standard of legal causation should not apply to him. The worker argued that the higher standard should only be applied to injuries that occur while the worker is exerting force, such as lifting or pushing a heavy object. But it should not be applied to injuries that occur due to some force affecting the worker, such as a slippery surface that leads to a loss of balance. The Commission disagreed, holding that the application of the more stringent standard of legal causation requires a consideration of the exertion to which the injured worker is subjected, whether that exertion comes from the worker or an outside condition affecting the worker. Ultimately, the Commission held that the exertion the worker experienced while being jostled in the seat of his truck was similar to experiencing an unexpected head jerk and shoulder strike against a seat or wall while riding a bus that decelerates suddenly or encounters a defect in the road.

Mejia v. Elwood Staffing,

LABOR COMMISSION APPEALS BOARD
September 11, 2018

A worker was carrying a box and other lightweight items while walking on top of the slats of a pallet when his left foot fell through the space between the slats and became caught, causing it to rotate and twist into the space. He did not fall down and was able to steady himself by grabbing a pallet-jack handle before quickly pulling his left foot out from between the pallet slats. He felt a pop, a burning sensation, and pain in his left ankle when his ankle twisted. Because the worker had a history of a prior injury that contributed to his industrial injury, he had to satisfy *Allen*'s more stringent standard of legal causation; he had to prove that his industrial accident was unusual and extraordinary when compared to the stresses and exertions present in non-employment life. The employer argued that walking on the wooden slats of a pallet with one foot falling through the slats and twisting was comparable to walking on a lawn, pavement, or a sewer grate and then taking a misstep onto a lower surface such as a sprinkler head or off of a curb. The Appeals Board did not agree. The Board recognized that stepping in a hole or off a stair while walking on a floor or a lawn would not be unusual or extraordinary. In this case, however, the pallet's surface contained several gaps and spaces not intended to be walked on. Such circumstances made the work activity somewhat more precarious and risky than the non-employment activities referenced by the employer. The Board therefore concluded that the worker had satisfied the more stringent standard of legal causation.

IMPACT ON WCF - It is interesting that the Appeals Board did not focus on the stresses and exertions of the accident itself. Instead, the Board focused on how the riskier act of walking on a pallet made this accident unusual and extraordinary. The Board made it a point to comment that a similar misstep into a hole and a similar twist of the ankle would not be unusual or extraordinary if it occurred while walking on a normal floor. But because this worker experienced the same misstep and twist while walking on a pallet, which was "somewhat more precarious," then it was unusual and extraordinary. If this employer appeals this decision to the Utah Court of Appeals then the Legal Buzz will provide an update. For now this case cautions us to consider not only the physical and traumatic results of an accident, but also the unusualness of the circumstances that provoked those results.

Manning v. Promise Hospital

UTAH LABOR COMMISSION
October 2, 2018

A nurse was filling out a patient chart when a housekeeper approached her from behind and pressed on the back of her knees as a practical joke, causing the knees to buckle. The nurse began to fall and her left knee hit the wall, but she was able to catch herself by holding onto a railing without falling to the ground. Because the nurse had a history of a prior injury that contributed to her industrial injury, she had to satisfy *Allen*'s more stringent standard of legal causation; she had to prove that his industrial accident was unusual and extraordinary when compared to the stresses and exertions present in non-employment life. The nurse argued that her accident was unusual and extraordinary because it was unexpected and because it was the result of a deliberate act on the part of her coworker. Despite the Commission's finding that the nurse was simply pushed from behind, the nurse also argued that her accident was extraordinary because it *felt* as if the housekeeper had forcefully kicked her. The Commission explained that the unexpectedness of her accident did not make it unusual, as most accidents both industrial and non-industrial are unexpected. The Commission was also unconvinced that the accident was unusual because it was the result of the deliberate act of the housekeeper. Lastly, the Commission rejected the nurse's argument that the accident was extraordinary because it felt as forceful as a kick. Instead, the Commission held that the accident was similar to other types of everyday forces that lead to a temporary loss of balance, such as standing on a moving bus or train that turns or stops suddenly. The Commission therefore concluded that the worker had not satisfied the more stringent standard of legal causation.

IMPACT ON WCF - The Commission has consistently held that accidents are not unusual or extraordinary solely because they are unexpected. One example of another similar case was *Schreiber v. Labor Comm'n*. In *Schreiber*, a playground supervisor was hit in the back from behind by a fast-moving rubber ball. The force of the unexpected and subjectively forceful impact in that case led to the supervisor temporarily losing her balance and aggravating a pre-existing back condition. The Commission concluded that the exertion was not unusual or extraordinary as it was comparable to being jostled in a crowd.

Barker v. Burrell Mining Products

UTAH LABOR COMMISSION
October 9, 2018

A worker filed an application for hearing claiming entitlement to permanent total disability compensation. His employer and the employer's workers' compensation insurance carrier made arrangements for an independent medical evaluation ("IME") and functional-capacity evaluation ("FCE") but the worker refused to attend his appointments unless he was allowed to record audio during the evaluations. The employer asked the Commission to compel the worker to attend his appointments. The Commission decided that there was nothing in the applicable statutes or rules that would prohibit recording of a medical examination and that the judge assigned to the case should make the decision on whether to allow recording of a medical examination on a case-by-case basis. The decision went on to comment that judges should consider the facts and circumstances specific to each particular case. The Commission did not identify any circumstances that would make the worker's recording unfeasible or inappropriate. The Commission ultimately ordered that the worker be allowed to record the examinations.

IMPACT ON WCF - While the Commission allowed this claimant to record his IME and FCE evaluations, the decision specifically states that the determination in this case is not intended to serve as a precedent for future cases. Instead, the decision states that future requests to record evaluations should be considered on a case-by-case basis. This issue may require the Commission to adopt new rules. For now, claimants seeking to record their employers' expert evaluations will have to make a case for why it is appropriate for them to do so. Employers would then have the opportunity to make a case against the evaluations being recorded.

UTAH COURT OF APPEALS

Benson v. UDABC, Utah Court of Appeals, 2018 UT App 228

UTAH COURT OF APPEALS
December 20, 2018

A Utah Division of Alcoholic Beverage Control worker injured his right knee while stocking alcoholic beverages in 1992. WCF accepted liability and paid medical benefits for many years, but in 2013 denied liability for ongoing care, which included a recommended total-knee replacement. After filing for a hearing with the Labor Commission, the ALJ concluded that ongoing medical care was not related to the 1992 accident. The case ultimately was appealed to the Utah Court of Appeals. In affirming the Labor Commission's denial of benefits, the Court addressed several foundational legal principles that govern workers' compensation claims in Utah. Mr. Benson argued his constitutional rights were violated because he was not granted a jury trial before the Labor Commission to determine if he is entitled to benefits. The Court affirmed a long-held principle that an injured worker is not entitled to a jury trial in Labor Commission proceedings. The Court also recognized that the standard under which an appellate court reviews a workers' compensation claim is sometimes a moving target. Generally, if the issue is how the Labor Commission applied a law then no deference is given to the Labor Commission's order. However, if the issue being reviewed is a challenge to the Labor Commission's factual findings, then the court of appeals will defer to the Labor Commission's finding unless the challenged finding of fact is not supported by "substantial evidence." The Court of Appeals concluded that a finding of medical causation is "fundamentally a factual determination" and deference should be given to the Labor Commission's finding on that issue. In this case, the Court held there was substantial medical evidence to support the denial of benefits and upheld the Labor Commission's order.

IMPACT ON WCF - This decision will not drastically alter how WCF manages its workers' compensation claims. Rather, it solidifies well-established legal principles and appellate standards that govern how the courts will review appealed workers' compensation claims. It is important for adjusters and attorneys to be aware of the legal standards under which a denied claim may be reviewed by the courts and assure there is adequate factual support in a claim file for any denial that may be made on a claim.