



**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019**

ON THE FOLLOWING MEASURE:

H.B. NO. 1534, RELATING TO WORKERS' COMPENSATION.

BEFORE THE:

HOUSE COMMITTEE ON LABOR AND PUBLIC EMPLOYMENT

DATE: Thursday, February 7, 2019 **TIME:** 9:30 a.m.

LOCATION: State Capitol, Room 309

TESTIFIER(S): Clare E. Connors, Attorney General, or
Robyn M. Kuwabe, Deputy Attorney General

Chair Johanson and Members of the Committee:

The Department of the Attorney General provides the following comments.

The bill makes medical cannabis reimbursable under the Workers' Compensation laws, Chapter 386, Hawaii Revised Statutes (HRS), by amending section 386-21.7 to include medical cannabis as medication employers must furnish to employees as long as reasonably needed, provided the employees enroll in the medical cannabis program pursuant to chapter 329, HRS. It also provides conditions for obtaining reimbursement for medical cannabis and proposes to amend section 329-124, HRS, which currently does not require insurance coverage for the medical use of cannabis, to require coverage for medical use of cannabis as provided in chapter 386, HRS.

Cannabis is a Schedule I controlled substance which is illegal to produce, possess, sell, or use according to the federal government and the Controlled Substances Act (CSA), 21 U.S.C. §§801-904. The Food and Drug Administration (FDA) has not approved cannabis as a safe or effective drug for any purpose. Thus, any laws the State enacts purporting to legalize any activities pertaining to cannabis may conflict with federal law, and federal authorities could take enforcement actions. The validity of such laws could also be subject to civil challenges.

State laws that require employers and their insurance carriers to reimburse claimants for medical use of cannabis have been successfully challenged. In Bourgoin v. Twin Rivers Paper Company, LLC, 187 A.3d 10 (Me 2018), the Maine

Supreme Court ruled that the CSA preempted the Maine Medical Use of Marijuana Act (MMUMA) when used “as a basis for requiring an employer to reimburse an employee for the cost of medical marijuana.” Id. at 21. The Bourgoin court stated, “[a]s invoked against [employer], the MMUMA requires what federal law forbids, and the authority ostensibly provided by the Maine law is ‘without effect.’” Id. at 21.

Thus, the provisions requiring employers and their insurance carriers to reimburse employees for cannabis for medical use may be subject to challenge.

In addition, if the bill is passed out, the following provisions need to be amended to be consistent with the wording in chapter 329, HRS.

- (1) Page 2, line 20, “medical cannabis” should be changed to “cannabis for medical use.” This change should be made throughout the bill.
- (2) Page 4, line 13, there is no health care provider fee schedule for cannabis.
- (3) Page 4, lines 14-20, the authorized health care provider determines medical treatment reasonable and necessary under chapter 386; however, conditions of use must be consistent with section 329-122, HRS.
- (4) Page 5, line 2, the physicians and APRNs certify a person for the medical use of cannabis based on the criteria in section 329-122, HRS; they are not certifying them for participation in a program.
- (5) Page 5, line 5, an individual is registered in accordance with section 329-123, HRS, rather than enrolled in a cannabis program.
- (6) Page 5, lines 15 and 17, there is no such thing as a licensed producer. There are licensed dispensaries and they have production centers and retail dispensing locations.
- (7) Page 6, lines 7-8, “pre-filled and sealed containers” is not the whole description of the allowed product in section 329D-10.

Thank you for the opportunity to provide testimony.

DAVID Y. IGE
GOVERNOR

JOSH GREEN
LIEUTENANT GOVERNOR



SCOTT T. MURAKAMI
DIRECTOR

LEONARD HOSHIJO
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February 7, 2019

To: The Honorable Aaron Ling Johanson, Chair,
The Honorable Stacelynn K.M. Eli, Vice Chair, and
Members of the House Committee on Labor & Public Employment

Date: Thursday, February 7, 2019

Time: 9:30 a.m.

Place: Conference Room 309, State Capitol

From: Scott T. Murakami, Director
Department of Labor and Industrial Relations (DLIR)

Re: H.B. No. 1534 RELATING TO WORKERS' COMPENSATION

I. OVERVIEW OF PROPOSED LEGISLATION

HB1534 seeks to make medical cannabis reimbursable through the workers' compensation statute by amending Section 386-21.7, Hawaii Revised Statutes (HRS), to specify the conditions under which a worker may be reimbursed for out of pocket costs.

DLIR opposes this measure as it is in direct conflict with Federal law and may subject employees to liability.

II. CURRENT LAW

Section 386-21, HRS, limits the liability of the employer for medical care, services and supplies to the charges prescribed in the Medicare Resource Based Relative Value Scale applicable to Hawaii as prepared by the United States Department of Health and Human Services.

Section 386-21.7, HRS, specifies the basis of reimbursement to prescription and compound drugs as identified by its National Drug Code (NDC) and as published by Micromedex in the Red Book.

III. COMMENTS ON THE HOUSE BILL

DLIR appreciates alternative medical treatment for injured workers, including

cannabis, as well as the findings of the working group pursuant to Act 161 (SLH, 2018), that other states reimburse medical cannabis through legislation, court rulings and administrative agency decisions. DLIR finds this measure premature as such decisions from some of the states are still under appeals. Furthermore, there is no evidence that payments have been made on such rulings.

DLIR recognizes medical cannabis is legal in the State of Hawaii, however, cannabis is still illegal at the federal level as a Schedule I drug under the Federal Controlled Substances Act. The Schedule I status of cannabis prohibits the assigning of a National Drug Code by the Federal Drug Administration. Therefore, there is no standardized reimbursement rate for the drug. The Centers for Medicare and Medicaid Services (CMS) requires CMS healthcare providers to operate in compliance with federal law. CMS will not pay and or reimburse any providers for this substance.

Section 2(d) of the measure sets forth reimbursement subject to the health care providers fee schedule. DLIR notes that Hawaii's health care providers do not have a cannabis fee schedule.

DLIR has concerns with this measure as there is no protection for State employees administering the workers' compensation program. If medical cannabis is requested for a workers' compensation claim, there is no assurance that the Department, its employees, or any other entity is not protected by the federal law if the employee authorizes a treatment plan, reimbursement, or orders an employer to make such reimbursement.

Potential criminal charges or lawsuits brought against any State employee performing these duties will not be defended by the State Attorney General. Those employees would be financially responsible for their own private attorney fees to defend actions performed in the course of their job.

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Submitted on: 2/6/2019 9:05:47 AM

Testimony for LAB on 2/7/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Michael Takano	Hawai'i Educational Association for Licensed Therapeutic Healthcare (HEALTH)	Support	No

Comments:

Blake Oshiro Esq. will be available to testify on behalf of HEALTH.

American Property Casualty Insurance Association

To: The Honorable Aaron Ling Johanson, Chair
The Honorable Stacelynn Eli, Vice Chair
House Committee on Labor & Public Employment

From: Mark Sektnan, Vice President

Re: **HB 1534 – Relating to Workers’ Compensation**
APCIA Position: In Opposition

Date: Thursday, February 7, 2019
9:30 a.m., Conference Room 309

Aloha Chair Johanson, Vice Chair Eli and Members of the Committee:

The American Property Casualty Insurance Association (APCIA) is opposed to HB 1534 which would require that workers registered with the department of health's medical cannabis program be reimbursed for the out of pocket cost of medical cannabis through the workers' compensation system in certain circumstances. Representing nearly 60 percent of the U.S. property casualty insurance market, the American Property Casualty Insurance Association (APCIA) promotes and protects the viability of private competition for the benefit of consumers and insurers. APCIA represents the broadest cross-section of home, auto, and business insurers of any national trade association. APCIA members represent all sizes, structures, and regions, which protect families, communities, and businesses in the U.S. and across the globe.

APCIA respects the fact that Hawaii allows qualified patients to access medical marijuana and voluntarily assume the risk of federal prosecution. However, no state should adopt legal decisions, agency rules, or law that forces an unwilling person to participate in a crime and involuntarily assume the risk of federal prosecution. Until the US Congress resolves the conflicts between federal law and state law, states should respect the Supremacy Clause and not force unwilling stakeholders to violate federal law.

The Controlled Substances Act (CSA) does not exempt marijuana used for medical purposes from its prohibition of possession or distribution of even small amounts of marijuana. By requiring reimbursement for medical cannabis for a work-related injury, the state is forcing the employer and/or insurance carrier to become an accomplice to the commission of a federal crime as clearly identified in the Controlled Substances Act¹ and as further expanded in the “aiding and abetting”² and “conspiracy”³ statutes found in

¹ 21 U.S. Code §§ 812, 822, 823(f)

² 18 U.S. Code §2

³ 18 U.S. Code §371

Title 18 of the federal criminal statutes. Furthermore, transporting or transmitting funds known to have been derived from the distribution of marijuana is illegal.⁴ Financial institutions, including insurance companies, that conduct transactions generated by marijuana related conduct face criminal liability under the Bank Secrecy Act.⁵ The United States Supreme Court has addressed the conflict between state medical marijuana laws and federal CSA and unequivocally held that any conflict must be resolved in favor of the CSA pursuant to the Supremacy Clause of the US Constitution.⁶

Arizona, Florida, Louisiana, North Dakota, and Vermont have language in their medical marijuana statutes that expressly excludes reimbursement under workers compensation. This provision was recently upheld in Vermont. (*Hall v. Safelite Group*). Other states do exempt property and casualty insurers or private insurance carriers as well.

In Maine, the state Supreme Court overturned underlying decisions that ordered employer reimbursement for medical marijuana on a workers compensation claim. In June 2018, the Maine Supreme Court ruled in *Bourgoin v. Twin Rivers Paper Co.* overturned a prior order that had required reimbursement, citing the supremacy of federal law (the CSA over the Maine Medical Use of Marijuana Act).

The New Mexico Court of Appeals has issued a series of decisions in which they held that the employer and/or workers compensation carrier can be required by the Workers Compensation Administration to reimburse for medical cannabis under the Lynn and Erin Compassionate Use Act. Those decisions are primarily based on the Court of Appeals interpretation of federal law and federal public policy as enunciated in two memorandums issued by the United States Department of Justice.⁷ The DOJ guidance may inform patients and industry participants that they may not be a current enforcement priority, but it is not a promise not to prosecute in the future.⁸ In addition, federal courts remain duty bound to enforce the legal proscriptions arising out of the Controlled Substances Act.⁹ The Department of Justice memorandums are not law and DOJ has no authority to create federal public policy. Only the United States Congress has those powers. Congress has not yet resolved the conflict between the Controlled Substances Act and the state medical marijuana statutes.

⁴ 18 U.S. Code §1960

⁵ 31 U.S. Code §5318(g); DOJ memorandum February 14, 2014 at page 2

⁶ *Gonzales v. Raich*, 545 U.S. 1 (2005)

⁷ Memorandums from James M. Cole, Deputy Attorney General, to United States Attorneys (August 29, 2013 and February 14, 2014) frequently referred to as the "Cole Memos"

⁸ The Cole Memos expressly acknowledge that the memorandum "does not alter in any way the Department's authority to enforce federal law, including laws relating to marijuana, regardless of state law."

⁹ See *In re Arenas*, 535 B.R. 845 (10th Cir. BAP 2015) refusal to give debtors bankruptcy relief because their marijuana business activities are federal crimes; *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*, (Civil Action No. 15-cv-01633-RBJ, US District Court for District of Colorado) decision January 5, 2016 upholding federal reserve bank refusal to grant master account to credit union formed to provide banking services to marijuana businesses in compliance with state law but in violation of CSA

Most support for medical marijuana use is anecdotal. Without high quality scientific study into the efficacy and treatment applications of medical marijuana, it is not appropriate for use in evidence-based treatment plans. The lack of FDA approval and variances in purity and potency makes the development of standards difficult.

Legislation to require workers compensation carriers would clearly need language to create a federal safe harbor to protect insurers from being in violation of federal law as they seek to comply with state law. In addition, workers compensation reimburses for benefits, including pharmacy benefits based on the state adopted fee schedule. Medical marijuana would need to be added to the pharmacy fee schedule.

For these reasons, APCIA asks the committee to hold this bill in committee.

LATE

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Submitted on: 2/6/2019 9:41:10 AM

Testimony for LAB on 2/7/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:



LATE

Dedicated to safe, responsible, humane and effective drug policies since 1993

TO: House Committee on Labor & Public Employment
FROM: Carl Bergquist, Executive Director
HEARING DATE: February 7, 2019, 9:30AM
RE: HB1534, Relating to Workers' Compensation, **SUPPORT**

Dear Chair Johanson, Vice Chair Eli, Committee Members:

The Drug Policy Forum of Hawai'i (DPFHI) **strongly supports** this measure to make medical cannabis reimbursable through the workers' compensation system in certain circumstances. This would increase consumer choice while fostering public health. It also helps decrease stigma around a medicine that became legal in Hawai'i nearly 20 years ago, and which is now more widely available via a regulated dispensary system. This bill, together with SB1524 (that prohibits discrimination of medical cannabis patients by employers), will work to promote a safer work environment.

Presently, a worker who is injured on the job and who chooses or needs to use medical cannabis as part of their treatment faces two Hobson's choices. First, they must pay for the medicine themselves, take other reimbursable medicines, such as opioids, or suffer in pain. Second, should they decide to pay for medical cannabis out of pocket, they risk being terminated by their employer for merely doing what works best for them. In issuing a ruling holding that the Department of Public Works in Freehold Township, New Jersey must pay for an injured worker's medical cannabis, a New Jersey Worker's Compensation Judge recently addressed the issues at stake:

Because the Workers' Compensation statute "is social legislation and it changes with the times," the court properly determined that "it's time for us, as the Division of Compensation, to try to get away from these opioids which are killing people." In fact, the court found that not only is marijuana cheaper, safer and less addictive than opioids in general, in this particular case it was better for the immediate treatment of the muscular spasticity from which McNeary suffers, and the long term prognosis is better.¹

The Judge also held that by simply signing a check, the employer would "never possess, never distribute, never intend to distribute" the medical cannabis and put it in the crosshairs of the federal law that still holds all forms of cannabis to be illegal.

A New Mexico appellate court reached a similar conclusion, while the Minnesota Department of Labor rewrote its regulations to explicitly hold that medical cannabis is reimbursable for workers' compensation claims.²

This legislation addresses the issues raised in the other states as well as here in Hawai'i by the 2018 Hawaii Employers' Mutual Insurance Company (HEMIC) decision to not reimburse a mother of four who was trying to get off addictive opioids for her use of medical cannabis. We humbly request that you passed it out of your committees.³

Mahalo for the opportunity to testify.

¹ <https://www.law.com/njlawjournal/2018/09/24/workers-compensation-payments-include-medical-marijuana/?slreturn=20190105042418>.

² <https://www.defenselitigationinsider.com/2017/10/06/medical-marijuana-and-workers-compensation-coverage/>.

³ <https://www.staradvertiser.com/2018/07/02/hawaii-news/insurer-rescinds-pot-payout/>.

LATE

HB-1534

Submitted on: 2/7/2019 9:28:05 AM

Testimony for LAB on 2/7/2019 9:30:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Carmen Mitsuyasu-Gapero	Individual	Support	No

Comments:

Support for House Bill 1534

As a chronic pain patient advocate, I strongly support HB 1534.

Having medical cannabis as an allowable medication to be reimbursable by the Worker's Compensation System in Hawaii should be just like obtaining approval for any other type of medication. In some cases, this is the only type of medication that has been proven to relieve and alleviate symptoms and pain of an illness or disease an individual employee is inflicted with. This is much preferred than having the employee self-medicate in other ways to the possible detriment of themselves.

Thank you for the opportunity to submit this testimony.