MEDICAL MARIJUANA IN UNEMPLOYMENT INSURANCE LAW

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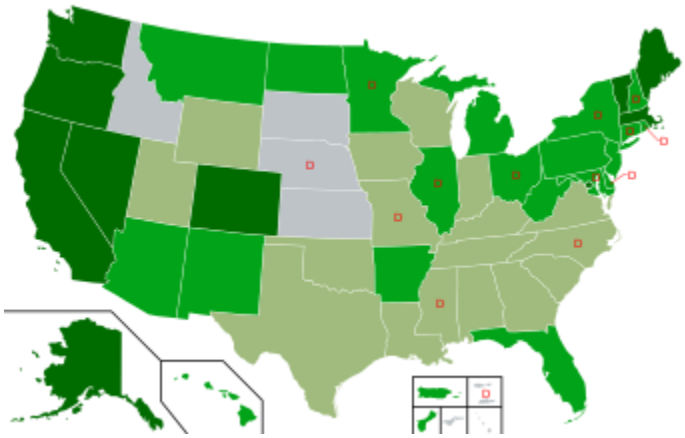
I. Current Landscape in Marijuana Laws

a. Overwhelming Trend Among States Toward Some Degree of Legalization

California was the first state to legalize medical marijuana in 1996. Before the millennium, four additional states legalized medical marijuana. After 2000, a significant trend developed toward legalization. In 2012, Washington became the first state to legalize recreational marijuana. Currently, medical marijuana is legal in 29 states, low-THC products are legal in 17 states, and recreational marijuana is legal in 9 states.



Legality of cannabis in the United States Legal Legal for medical use Legal for medical use, limited THC content Prohibited for any use D Decriminalized

b. Federal Marijuana Prohibition Continues, But…Seeds of Change?

Under federal law marijuana remains illegal as a Schedule I controlled substance under the Controlled Substances Act. 21 U.S.C. § 812(c). Schedule I includes those drugs that are considered to have a high potential for abuse, have no currently accepted medical use for treatment, and for which there is a lack of accepted safety for use of the drug under medical supervision. 21 U.S.C. § 812(b)(1).

No prescriptions may be written for Schedule I drugs. 21 U.S.C. § 829. Federal law also penalizes simple possession. 21 U.S.C. § 844(a). Moreover, for any testing conducted under the federal Drug-Free Workplace Program, a medical review officer must not accept a physician's recommendation that a patient use medical marijuana as a valid medical explanation for the presence of marijuana or marijuana metabolite. *See* Div. of Workplace Programs, Ctr. for Substance Abuse Prevention, Substance Abuse & Mental Health Serv. Admin., Dept. of Human Serv., Medical Review Officer Guidance Manual for Federal Workplace

Drug Testing Programs, Section 4.5.4 (revised Mar. 2018).[1] *See also, e.g.*, 49 C.F.R. 40.137 (U.S. Department of Transportation drug testing regulations).

The remaining schedules are drugs or other substances that may have medical use but also have varying potential for abuse or addiction. Marinol, a synthetically made THC compound, is listed in Schedule III; therefore, it may be prescribed.

However, there are indications that the federal position on medical marijuana may change sooner rather than later. A recent Forbes article by Julie Weed (yes, that is her real name) discusses the proposed legislation known as the Strengthening the Tenth Amendment Entrusting States Act ("STATES Act"). *See* Julie Weed, Art Of The Deal: Trump Looks To Trade Cannabis Legalization for Justice Department Nominees, Forbes.com (Jun. 12, 2018). According to the article, President Trump has stated that he would support the legislation, which would make the following changes to federal law regarding marijuana:

- removes cannabis from the Controlled Substances Act for those states that have cannabis programs
- opens up banking to legal cannabis companies so the billion-dollar industry no longer has to operate and pay taxes in cash
- restricts industry employment to workers over 18, prohibits distribution or sales to anyone under 21 except for medical purposes, and prohibits sales of marijuana at transportation facilities such as rest areas and truck stops
- removes industrial hemp (which contains less than 1% the psychoactive ingredient THC) from the legal definition of marijuana

II. Discharge for Medical Marijuana Use: Key Factors for Consideration

a. Introduction

Despite the fact that legalization of medical marijuana began over twenty years ago, relatively few cases address the intersection of medical marijuana and unemployment insurance. More plentiful are cases addressing other aspects of labor and employment law such as wrongful termination, disability discrimination, and disability accommodation, which ought to be taken into consideration in UI cases.

An overview of the law suggests that the following may be the best analytical framework for analyzing UI benefit entitlement where an employer has discharged a claimant for reasons relating to qualified use of medical marijuana:

[1] Available at: https://www.samhsa.gov/sites/default/files/workplace/mro_guidance_manual_508_final_march_2018.pdf

- Does state law protect a qualified user from adverse government action, such as the denial of benefits?
- If not, does state law protect a qualified user from adverse action by the employer?
- If not, is the claimant's conduct otherwise disqualifying under the state UI law?

Below is a summary of current case law bearing on each of these three steps of analysis. For a recent comprehensive state-by-state chart of medical marijuana laws, see Medical Marijuana Policy Project, State by State Laws Report 2016 Supplement (updated Dec. 2016).

b. Is Claimant as a Qualified User Protected from Adverse *Government* Action?

In the UI case law, the threshold issue perhaps ought to be whether the state protects a qualified user from adverse government action. This is a threshold issue because, if the law does offer such protection, the matter of whether the employer's actions were prohibited, or whether the claimant's conduct would ordinarily be disqualifying under UI law, is moot.

The seminal case on this issue is *Braska v. Challenge Mfg. Co.*, 861 N.W.2d 289 (Mich. Ct. App. 2014), in which the court held that benefits could not be denied to a qualified user discharged for use in compliance with the state medical marijuana law. Michigan's immunity clause provides that a qualifying patient "shall not be subject to arrest, prosecution, or *penalty* in any manner, or denied a right or privilege, including but not limited to *civil penalty or disciplinary action* by a business or occupational or professional licensing board bureau" for the medical use of marijuana. The court held the denial of benefits would constitute a "penalty" within the meaning of the medical marijuana law, which superseded the UI law.

Several states have a "no penalty" provision in their respective medical marijuana laws that are similar to Michigan. See the Resources list at the end of these materials for a recent comprehensive state-by-state chart of medical marijuana laws.

c. Is Claimant's *Off-Duty* Use of Medical Marijuana Protected from *Employment* Action?

All but one state (Montana) follows the employment-at-will doctrine. Thus, in the absence of an established exception to the doctrine, a cause of action against an employer's adverse action will not stand. Accordingly, the case law addresses the existence *vel non* of an exception.

Historically, challenges to adverse employment actions resulting from medical marijuana use have been unsuccessful. However, more recent state legislation and case law reflects a minority of states that have begun to offer greater protections to employees who use medical marijuana. Thus, the analytical framework for such cases is state-specific, depending upon the various types of protections each state may offer qualified users.

State legislation in this area tends to change somewhat rapidly. Consequently, reports on the present state of the law, such as this document, can become quickly outdated. Accordingly, one is cautioned to stay abreast of the evolving law in her/his jurisdiction. The following summary, therefore, is intended to help one spot potential issues by addressing the broad classes of current employee protections.

i. No Protection from Adverse Employment Action Required by Federal Law or for On-Duty Use/Impairment

At present, there are a couple universal policies. First, **no state has interfered with an employer's obligations under federal law.** Second, **no state has prevented an employer from enforcing its policies prohibiting on-duty use of, or impairment from, medical marijuana**. The relevant question then is whether state law protects a qualified user's *off-duty use* of medical marijuana. The various types of protections are covered separately below.

ii. Qualified User Anti-Discrimination Laws

Some states, through marijuana laws, specifically protect a qualified user from adverse employment action based on medical marijuana use. For example, Arizona prohibits employers from taking adverse action against a qualified user for a positive drug test for marijuana or its metabolites unless the employee use, possessed, or was impaired on the job or if it would cause the employer to lose a benefit under federal law. Ariz. Rev. Stat. § 36-2813(B).

Employer challenges to these qualified user anti-discrimination laws have not been successful thus far. See *Callaghan v. Darlington Fabrics Corp.*, No. PC-2014-5680 , 2017 WL 2321181 (R.I. Super. 2017). In *Callaghan*, the employer declined to hire an applicant who disclosed she was using medical marijuana due to her allergy to other painkillers. The court held that the employer's refusal to hire the plaintiff violated state law.

In *Noffsinger v. SSC Niantic Operating Co. LLC.*, 273 F. Supp 326 (D. Conn 2017), the court denied an employer's motion to dismiss plaintiff's state employment discrimination claim. The employer here rescinded a job offer after the plaintiff tested positive for marijuana. The plaintiff used Marinol, a synthetic form of cannabis, to treat post-traumatic stress disorder. Connecticut's law specifically prohibits employers from discriminating against an employee who uses medical marijuana in compliance with state law. The employer removed the case to federal court and moved to dismiss on several federal preemption grounds under the Controlled Substances Act (CSA); the Federal Food, Drug, and Cosmetic Act; and the Americans With Disabilities Act.

With respect to the federal Controlled Substances Act (CSA) and the Federal Food, Drug, and Cosmetic Act (which does not approve medical marijuana), the court noted that because those laws do not regulate employment relationships, the type of positive conflict necessary for

preemption did not exist, noting that the CSA "nowhere prohibited employers from hiring applicants engaged in illegal drug use."

The court similarly found no preemption with respect to the Americans with Disabilities Act (ADA) because it did not address a state's authority to prohibit this type of discrimination. The court also rejected an argument that the ADA permits an employer to hold an employee who engages in the illegal use of drugs to the same qualification standards as other employees. The court disagreed that the drug test itself could be viewed as constituting a "qualification standard" within the meaning of the ADA because under the act a qualification standard must be job-performance or behavior-related. Finally, the court relied on the ADA's saving clause in that it allowed for states to provide greater protection for the rights of disabled individuals than are afforded by the act. [**AUTHOR's NOTE**: The *Noffsinger* court apparently gave no consideration to the fact that Marinol is not illegal under federal law. It is in the CSA's Schedule III and, therefore, may be prescribed.]

Where medical marijuana laws do not explicitly protect qualified users in the employment context, courts generally have not found that such protection is implied. *See* *Roe v. TeleTech Customer Care Mgmt., LLC*, 257 P.3d 586 (2011); *Johnson v. Columbia Falls Aluminum Co., LLC*, 350 Mont. 562 (2009); *Ross v. RagingWire Telecomm.*, Inc. 174 P.3d 200 (Cal. 2008). The federal Sixth Circuit declined to find a private action where the medical marijuana law protects qualified users from "disciplinary action by a *business* or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act." The court held the word "business" modifies "licensing board," and therefore does not regulate private employment. *Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428 (6th Cir. 2012); *see also* *Savage v. Maine Pretrial Services, Inc.*, 58 A.3d 1138 (Me. 2013) (reaching same conclusion based on nearly identical medical marijuana law language).

iii. Disability Anti-Discrimination Laws

1. States Declining to Apply

Garcia v. Tractor Supply Company, CV-00735 (D. N.M. 2016) (disability anti-discrimination law covered condition but not the medical marijuana treatment for the condition since the treatment is not a symptom of the condition).

In *Curry v. MillerCoors, Inc.*, 12-CV-02471-JLK, 2013 WL 4494307 (D. Colo. 2013), the court declined to apply state disability anti-discrimination law to discharge for testing positive for marijuana.

In *Emerald Steel Fabricators., Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010), the plaintiff filed a state disability discrimination claim. The court held that the law did not provide protection from employment action based on the illegal use of drugs and defines illegal

use of drugs as any use unlawful under state or the federal CSA. Therefore, the employee was engaged in the illegal use of drugs and was not protected.

In *Ross v. RagingWire Telecomm., Inc.*, 174 P.3d 200 (Cal. 2008), the court held the claimant could not state a claim under state disability anti-discrimination law because the medical marijuana did not require employers to accommodate the use of illegal drugs.

2. States Applying Disability Anti-Discrimination Laws

Some states medical marijuana laws (e.g. New York) specifically provide that being a qualified user is deemed a disability for purposes of the state disability anti-discrimination law. In addition, some courts have construed the disability law as extending to qualified users.

Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 , 2017 WL 2321181 (R.I. Super. 2017) (rejection of job applicant based on medical marijuana use violated state disability anti-discrimination law).

Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37 (Mass. 2017) (discharge following pre-employment drug test positive due to medical marijuana use violative of state disability anti-discrimination law).

iv. Duty to Accommodate Laws

Among the states, medical marijuana laws vary as to whether they expressly provide an employer has no duty to accommodate use, are silent as to a duty, or expressly provide there is an affirmative duty to accommodate. Where the law provides an employer has no duty to accommodate medical marijuana use in the workplace, some states have found an implied duty to accommodate off-duty use. Below is a sample of case law addressing some of these varying laws.

1. States with No Duty to Accommodate

Garcia v. Tractor Supply Company, CV-00735 (D. N.M. 2016) (declining to find a duty to accommodate where medical marijuana did not specifically provide for it and the disability anti-discrimination law covered his condition but not the treatment for the condition since the treatment is not a symptom of the condition).

Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011) (disqualifying UI claimant/qualified user from benefits after discharge for a positive drug test where the medical marijuana law specifically provided that it does not require any employer to accommodate the use of medical marijuana in any workplace.

Roe v. TeleTech Customer Care Mgmt., LLC, 257 P.3d 586 (2011) (declining to find an implied duty for an employer to accommodate offsite use where the medical marijuana law stated only that an employer need not accommodate use in the workplace). *But see Callaghan, infra*.

Emerald Steel Fabricators., Inc. v. Bureau of Labor & Indus., 230 P.3d 518 (Or. 2010) (no duty to accommodate where state's medical marijuana law did not bar employment discrimination).

Johnson v. Columbia Falls Aluminum Co., LLC, 350 Mont. 562 (Mont. 2009) (no duty to accommodate under state law).

2. States with Duty to Accommodate

Barbuto v. Advantage Sales & Mktg., LLC, 78 N.E.3d 37 (Mass. 2017) (finding a right to reasonable accommodation based on medical marijuana law providing that qualified users shall not be denied "any right or privilege" on the basis of their medical marijuana use, and state disability law that provides reasonable accommodation is "right or privilege").

Callaghan v. Darlington Fabrics Corp., No. PC-2014-5680 , 2017 WL 2321181 (R.I. Super. 2017) (interpreting medical marijuana law provision of no duty for an employer to accommodate use in the workplace to imply a duty to accommodate use outside the workplace). *But see Roe, supra*.

v. Lawful Activity Laws

Some employees have launched challenges to adverse employment action based on medical marijuana use based upon "lawful activities" laws, which prohibit adverse employment action based on an employee's lawful off-duty conduct away from the jobsite. Not all states have such laws. However, at least one state has declined to consider medical marijuana use a "lawful activity" given its continued unlawfulness under federal law. *See Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015).

d. Is Claimant's Off-Duty Use Disqualifying Under UI Law?

i. Import of Employer's Policy

All of the identified cases involved employers that had some sort of policy addressing drug use and proof of the policy's requirements was critical to a disqualification from benefits whether the tribunal was applying a UI disqualification statute aimed at positive drug tests or

general misconduct provisions. In general, courts have given deference to employer policies, at least if they are deemed "reasonable" under the circumstances.

For example, in *Las Vegas Club Hotel & Casino, LLC v. State Employment Sec. Div*., No. 67725, 2016 WL 2957134 (Nev. 2016), the court held that the employer did not meet its burden of establishing the claimant was discharged for misconduct where it argued the claimant's offsite use of medical marijuana violated its drug and alcohol policy but it did not submit the policy for the hearing.

Moreover, the specific language of the policy controls. In Docket 19228-2017 (Colo. 2017), Colorado's higher authority looked to the precise wording of the employer's policy in affirming the hearing officer's decision holding the claimant not disqualified from benefits. In that case the claimant was discharged after the employer questioned him about his smelling of marijuana and he admitted smoking ¼ gram ("a small bowl") of self-prescribed, recreational marijuana prior to his shift. However, the employer's policy prohibited only working while *under the influence* of drugs. Since the employer did not drug test the employee, it could not show impairment or, consequently, that he violated its policy.

In Docket 10401-2017 (Colo. 2017), Colorado's higher authority reversed disqualification of an employee discharged for violating the employer's employee housing policy prohibiting illegal drugs or paraphernalia in employees' rooms. The claimant's violated the housing rule by having marijuana and a pipe in his bedroom. The tribunal declined to apply a statute, which provided for disqualification of an employee who is discharged for violating company rule if the violation could have resulted in serious damage to the employer's interests or property. It reasoned that the employer's rule governed only resident behavior rather than employee workplace behavior. It also rejected the hearing officer's finding that the claimant's actions could have a negative effect on the employer's interests in the workplace since consumption of marijuana even off duty could result in one coming to work with the substance in their system. The tribunal characterized that finding as "attenuated at best" and instead found that the claimant's violation could not have resulted in any damage to the employer's interests or the employer's workplace property.

Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011), involved a claimant who was discharged following a random drug test positive for marijuana. The employer had a policy provided that a drug test result positive for illegal drugs is a terminable offense. Colorado's statute provided for disqualification for the presence of "not medically prescribed controlled substances" in the worker's system during working hours. The claimant's challenge was based on his erroneous assumption that his authorization to use medical marijuana amounted to a medical prescription. However, Colorado's medical marijuana law does not contemplate a prescription, and federal law prohibits physicians from prescribing medical marijuana. Instead, the physician may only recommend its use. The court stated that the claimant was not shielded from being at fault for his separation and was disqualified from benefits.

In Review No. 2010-5417 (Wash. 2010), a wine steward was discharged following post-accident drug test administered in accordance with the employer's policy which was positive for marijuana. The employer's policy prohibited an employee's being at work under the influence and specifically defined "under the influence" to include "having any detectable levels, in excess of a trace (specific levels available on request) of alcohol and/or drugs or controlled substances in the body." The policy further provided that an employee must notify his employer prior to his beginning work that he is on a medication that may affect work performance or safety.

The claimant was validly using medical marijuana for irritable bowel syndrome and a pancreatic condition because he had difficulty taking pills. Even though the claimant smoked marijuana daily and at times used the marijuana shortly before his shift, he never notified his employer of it until he reported to provide his post-accident drug test sample.

Washington's higher authority reasoned that, even though there was no evidence of impairment, the claimant was "under the influence" as defined by the employer's policy. The claimant also violated the rule requiring him to notify his employer of his use before work. Because the employer's rule was reasonable and the claimant's violations harmed the employer's interests in maintaining a safe and productive workplace, the claimant's actions constituted misconduct that disqualified him from unemployment benefits.

However, at least one court has held that an employer's policy that prohibits an employee's off-duty marijuana use that has no impact on job performance and where the employee was not in a safety-sensitive position is not "reasonable" and violation of such policy could not, by itself, establish misconduct that would disqualify one from UI benefits. See *Eastham v. Housing Authority of Jefferson County*, 22 N.E.3d 499 (Ill. App. 5th 2014). Notably, this case did not involve medical marijuana and was in a state that has not legalized recreational marijuana. The court distinguished prior precedent, *McAllister v. Bd. of Review of Dept. of Empl. Security*, 635 N.E.2d 596 (Ill. App. 3d 1994), which denied UI benefits to a bus driver who was discharged for testing positive for cocaine. The court reasoned that the bus driver was in a safety-sensitive position but Eastham was not.

ii. No Distinction Between Marijuana and Its Derivatives

In Docket 2880-2018 (Colo. 2018), the claimant was subjected to a random drug test in accordance with the employer's policy. He tested positive for marijuana and was discharged. He admitted using doctor-recommended cannabidiol (CBD) twice weekly to treat back pain. Colorado law disqualifies a claimant for "the presence in an individual's system, during work hours, of not medically prescribed controlled substance" as evidenced by a test administered pursuant to statute, regulation, or employer policy and conducted by a licensed or certified medical facility or lab. The hearing officer found that the claimant had used CBD, not marijuana and declined to apply the statute, apparently believing the difference was significant. However, the higher authority noted that both marijuana and marijuana derivatives, such as CBD, are

Schedule I controlled substances according to the Federal Drug Enforcement Administration and Colorado law. Therefore, neither may be prescribed by a physician, who instead may only recommend such use. The case, however, was remanded for a factual finding as to whether the lab was licensed or certified in accordance with the statute; whether the lab test was accurate, and, if it was accurate, whether the claimant was at fault for the positive result.

In Docket 28296-2017 (Colo. 2018), the Colorado higher authority applied the same statute to disqualify a claimant who was discharged after, pursuant to an employer policy-dictated random drug test, he tested positive for marijuana and conceded the drug test may have been positive for THC because he consumed industrial hemp by smoking it and ingesting liquid extracts. Since THC is a Schedule I controlled substance under Colorado law, the higher authority held the claimant disqualified from benefits, rejecting any distinction drawn by the hearing officer between marijuana and industrial hemp.

iii. Federally-Mandated Drug Testing

Board Case No.: 340-BR-17 (Conn. 2017) involved a city refuse laborer whose job description required him to hold a commercial driver's license. Federal law requires employers to randomly drug test all employees who operate commercial motor vehicles. The claimant's random drug test was positive for marijuana and the claimant admitted he validly consumed medical marijuana. The employer discharged the claimant because his positive drug test disqualified him under federal law from performing the job for which he was hired.

The Connecticut higher authority affirmed the claimant's disqualification under a statutory provision that disqualifies from benefits a claimant discharged because he has been disqualified under a state or federal law from performing the work for which he was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law. The higher authority noted that the medical review officer is prohibited under federal regulation from verifying a test negative based on a physician's recommendation to use a drug listed in Schedule I of the Controlled Substances Act.

Though Connecticut has very broad protections for qualified medical marijuana users including a prohibition against employment discrimination based on qualified-user status (as addressed in *Noffsinger, supra*), the higher authority was not called upon to address that matter as the claimant did not assert the employer discharged him based solely on his status as a qualified user.

III. Quitting Due to Medical Marijuana Use: Key Considerations

Review No. 2018-0810 (Wash. 2018), involved a landscape laborer who quit due to his concern over marijuana use by co-workers and the consequent potential safety issues. The claimant complained to the employer but it did not take any action, so he quit. The court noted that Washington had legalized recreational marijuana, restricting only its use in "public" places. Here, the claimant did not establish his co-workers had illegally used marijuana, violated a policy of the employer, or deteriorated the safety of the workplace. Thus it held he was disqualified because he did not have good cause to quit.

RESOURCES

A recent comprehensive state-by-state chart of medical marijuana laws. *See* Medical Marijuana Policy Project, State by State Laws Report 2016 Supplement (updated Dec. 2016).

Medical review officer guidelines. *See* Div. of Workplace Programs, Ctr. for Substance Abuse Prevention, Substance Abuse & Mental Health Serv. Admin., Dept. of Human Serv., Medical Review Officer Guidance Manual for Federal Workplace Drug Testing Programs, Section 4.5.4 (revised Mar. 2018). *See also, e.g.*, 49 C.F.R. 40.137 (U.S. Department of Transportation drug testing regulations).

Article discussing proposed federal legislation known as the Strengthening the Tenth Amendment Entrusting States Act ("STATES Act"). *See* Julie Weed, Art Of The Deal: Trump Looks To Trade Cannabis Legalization for Justice Department Nominees, Forbes.com (Jun. 12, 2018).

AN OVERVIEW OF MARIJUANA-RELATED DRUG TESTING ISSUES FOR NAUIAP HEARINGS PROFESSIONALS

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The number of states which have adopted some form of decriminalized marijuana continues to grow, with five states doing so in the 2016 election cycle. This trend presents hearings officers and administrative law judges with new questions regarding eligibility for Unemployment Insurance (UI) benefits. Perhaps the biggest question for us is whether an employee's off-site use of marijuana, allowed under state law, constitutes disqualifying misconduct when determining UI eligibility. The answer to that question is highly dependent on each state, territory, or district's laws. This article will focus on one question within that larger issue, namely, how do we assess the evidentiary value of drug test results when determining whether misconduct has been established? This is a rapidly developing area of law, and it is vitally important to understand what federal and state laws say regarding the adjudications conducted in your state.

First, we should remember that although state law may decriminalize the possession and use of marijuana, the federal government's position has not wavered. Marijuana is still a Schedule 1 substance illegal under the federal Controlled Substances Act.[1] It is still a crime under federal law to possess or ingest marijuana.

In the exercise of its' regulatory authority, the federal government has enacted the Drug Free Workplace Act.[2] This Act applies to occupations including those employing federal contractors and grant recipients, and requires the employer to adopt a "zero tolerance" drug policy in the workplace. Affected employers are also required to certify that their workplace is drug-free to the federal government. Zero-tolerance policies are also likely to be applicable to "safety sensitive" positions such as interstate trucking and heavy-equipment operators. With regard to other driving positions requiring a Commercial Driver's License (CDL), the Omnibus Transportation Employee Safety Act of 1991 requires drug testing of all employees whose duties require a CDL.

Although there is nothing in the Drug Free Workplace Act which requires employers to drug test employees as evidence of compliance, there is also nothing prohibiting such testing. As adjudicators, it is good to remember that although the employer in an unemployment hearing may be a state business, if the separated employee was working under a federal contract or grant, or worked in a "safety sensitive" position, you could likely see a zero-tolerance policy in effect. It is recommended that you closely examine the policy, if available, to ensure that you clearly understand its' terms.

Zero-tolerance policies typically prohibit any use of marijuana, and are not primarily concerned with issues such as level of intoxication or impairment. Therefore, a drug test which identifies use only is likely to be sufficient to determine compliance with the policy. And that is why we typically see the standard urine test in cases involving over-the-road truck drivers who are regulated by the U.S. Dept. of Transportation.

The standard urine test is the older, and generally most accepted test for identifying marijuana usage. Unlike newer tests, it does not identify the levels of tetrahydrocannabinol (THC), which is the psychoactive ingredient in marijuana. This means that the urine test does not conclusively establish impairment, only past usage. The standard urine test looks for metabolites of THC, which are compounds resulting from the breakdown of THC in the human body. Because the rate of breakdown is fairly uniform, the urine test can estimate the time that marijuana was last used. And if the last use is determined to have occurred very near to the time of the urine test, certain inferences may be drawn regarding the possibility of impairment.

Most urine tests, including those performed under DOT oversight, establish confirmation cutoff standards for the initial test, and for any second confirmatory test. The test result is generally expressed as “ng/mL” or nanograms of marijuana metabolites per milliliter of urine. If the ratio of marijuana-related metabolites exceeds the confirmation cutoff standard, a “positive” test result is reported. For example, in most DOT required urine tests, the initial test confirmatory cutoff is 50 ng/mL. If a second confirmatory test is performed, a more exacting test procedure, known as “Gas chromatography–mass spectrometry” is generally used. The cutoff for the second test is typically15 ng/mL or 20 ng/mL.

There are also three other tests that you may see in marijuana-related discharges. The newest form of testing is the oral fluids or “saliva” test which specifically tests only for THC, and may be used when employee impairment is at issue. The saliva test is designed to detect very recent marijuana use and up to three days after use. Because this testing technology is fairly new, the validity and accuracy of the saliva test has not yet been firmly established in the medical and scientific communities. A very recent study published by the Journal of Analytical Toxicology concludes the standard urine test is significantly more accurate in identifying marijuana usage than the existing oral fluids test.[3]

Another type of test you may see is the blood test. The blood test has a confirmed accuracy, and determines both THC and metabolite levels. It can identify marijuana use which occurred within the past couple of hours, and with heavy or frequent use up to seven days. A blood test may be used in situations where impairment is at issue.

The fourth test is the “hair” test. This test searches only for marijuana metabolites, and again, is therefore able to determine past use, but is not necessarily impairment. The ability of the hair test to accurately confirm past marijuana use has been disputed by some labs. The advantage of the hair test is that if the hair sample is at least one and

one-half inches long, it is able to confirm marijuana use up to three months prior to the test.

While federal and state laws control when drug testing may occur, we must remember that drug tests are considered a “search” within the context of the Fourth Amendment to the U.S. Constitution. Accordingly, public employers such as state and federal government entities are subject to scrutiny under the Fourth Amendment, while private employers are not. This places a greater responsibility on public employers to ensure that the drug test is “reasonable”. In most cases the employer is required to demonstrate that the drug test search is based upon “individualized suspicion of wrongdoing” (with certain exceptions). Blood tests are generally viewed as more invasive that the other types of tests, which may require even greater justification for the drug test, and may explain an employer’s hesitancy to require a blood test in most employment relationships.

When we consider the impact that drug testing has on the determination of disqualifying misconduct in UI hearings, we should also be mindful of two related issues. Specifically, whether the employer has any duty to accommodate the employee’s off-site use of marijuana, and the role that impairment may have in determining misconduct.

When Washington State passed the Medical Use of Marijuana Act in 1998, the legislation specifically stated that nothing in the Act “…requires any accommodation of medical marijuana use in any place of employment…”. Similarly, when Colorado voters amended their State Constitution in 2000, the Amendment stated that nothing in the relevant language shall require employers to accommodate an employee’s medical marijuana use in any work environment. However, as decriminalized marijuana laws were enacted in other states and relevant issues and concerns have become clearer, attitudes regarding an employer’s responsibility to accommodate an employee’s legal, off-site use of marijuana appear to be changing.

In 2007, Washington State amended its’ authorizing legislation to state that nothing in the Act “…requires accommodation of any **on-site** medical use of marijuana in any place of employment,…”. RCW 69.51A.060(4). (Emphasis added). Considering the bolded language, does Washington’s law now infer that employers have some duty to accommodate an employee’s off-site use of medical marijuana? More recently, there have been a number of states which have passed laws which expressly address an employer’s responsibility to accommodate medical marijuana use by employees. In New York, an employee who has been certified as a medical marijuana patient is considered to have a “disability” under the state’s human rights law, and can avail themselves of the protections afforded by that law.

Other states including Arizona, Connecticut, Delaware, Illinois, Maine, Minnesota and Nevada have enacted provisions establishing either anti-discrimination or reasonable accommodation requirements applicable to employers. Any requirement to accommodate an employee’s legal marijuana use might still be negligible however in

safety sensitive positions or those subject to federal oversight or regulation. As hearings officials evaluating the impact of drug test results in misconduct cases, it is critical for each of us to be fully aware of the law which applies in our state. This includes an awareness of any competing state laws which may limit the evidentiary value of a positive drug test result when determining misconduct in unemployment hearings.

Another issue to be touched upon in this article is the issue of impairment. As has been discussed above, there appears to be a general trend by states to require employers to extend greater accommodation to employees who engage in legal off-site use of marijuana, and particularly medical marijuana. As part of that approach, employers are justifiably concerned with the prospect of employees legally ingesting marijuana off-site, and then reporting for work impaired, which could have serious implications for workplace safety and production. This concern draws obvious comparison to workplace impairment due to alcohol consumption, except, as will be discussed below, it appears much easier for medical science to determine impairment due to alcohol than for marijuana consumption.

One of the first cases to discuss the issue of impairment from marijuana is the Michigan Court of Appeals case Braska v. Challenge Manufacturing Co., 861 N.W. 2d 289 (2014). The Michigan Medical Marihuana Act (MMMA), passed in 2008, not only grants criminal immunity to those using marijuana as allowed under state law, but also establishes a broad preemption stating that to the extent other state laws conflict with the MMMA, those conflicting laws are preempted by the MMMA.

Michigan unemployment law establishes certain types of conduct which will result in disqualification from receiving unemployment insurance benefits including: "… Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner." MCL 421.29(1)(m).

Mr. Braska held a valid medical marijuana card at the time he was injured at work, and used marijuana under the terms of that card. According to the employer's policy, Mr. Braska was directed to submit to a post-accident drug test. The test returned positive for the presence of marijuana metabolites. Mr. Braska was then discharged and unemployment benefits were initially denied.

In its' decision, the Michigan Court of Appeals noted that there was no evidence that Mr. Braska ingested or inhaled marijuana on the employer's premises, and that Mr. Braska did not refuse to take the drug test. The Court also noted that there was no showing that Mr. Braska was **impaired or under the influence of marijuana** at the time of the work-related ankle injury. (Emphasis added). The Court ultimately reversed the denial of unemployment benefits to Mr. Braska.

The decision of the Michigan Court of Appeals was clearly based upon the specific provisions of Michigan's laws, and this case clearly emphasizes the responsibility that we have as hearings professionals to ensure that we are fully aware of the specific provisions of our state's laws relating to decriminalized marijuana use.

Another interesting case which will not be discussed here, but is nevertheless informative on the issue of impairment and unemployment benefits is a case from Illinois, Eastham III v. The Housing Authority of Jefferson County et al., 2014 IL App (5th) 13209.

If marijuana related impairment is presented as an issue in one of your unemployment cases, how do you evaluate the scientific or medical evidence presented? My research reveals that states are struggling mightily to identify and adopt a valid "per se" standard for marijuana impairment or intoxication as has been done for alcohol. As you might expect, the issue of marijuana impairment is being most actively pursued in relation to state motor vehicle and driving laws. The states of Arizona, Delaware, Georgia, Illinois, Indiana, Iowa, Michigan, Oklahoma, Rhode Island, South Dakota, Utah and Wisconsin have adopted "zero tolerance" laws under which any detectable level of marijuana metabolites will result in a per se inference of impairment while driving. Colorado, Montana and Washington have adopted a per se level for impairment at 5 ng/mL. (Colorado also adopted a "reasonable inference" of impairment for test results between 0 and 5 ng/mL). Nevada and Ohio have adopted a per se standard of 2 ng/mL, and Pennsylvania has adopted a per se standard of 1 ng/mL.

Despite state efforts to establish and adopt a valid per se standard of marijuana impairment, there is still on-going criticism of the validity of such standards. A recent detailed study completed by the American Automobile Association (AAA) in May 2016, entitled "An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to *Per se* Limits for Cannabis" concluded:

"There is no evidence from the data collected, particularly from the subjects assessed through the DRE (Drug Recognition Expert) exam, that any objective threshold exists that established impairment, based on THC concentrations measured in specimens collected from cannabis-positive subjects placed under arrest for impaired driving. An association between the presence and degree of indicators of impairment or effect from cannabis use were evident when comparing data from cannabis-positive and cannabis-negative subjects. However, when examining differences in performance in these parameters between subjects with high (>5 ng/mL) and low (<5 ng/mL) THC concentrations, minimal differences were found. There was no correlation between blood THC concentration and scores on the individual indicators, and performance on the indicators could not reliably assign a subject to the high or low blood THC categories."[4]

Just as states are grappling with the establishment of a valid per se standard of impairment for motor vehicle laws, it is likely that administrative hearings officers will be confronting similar challenges when asked to consider the existence of impairment based upon existing drug testing technology and standards.

And finally, the issues of drug testing and drug test results may also require us to consider chain of custody issues related to the test sample. Specifically, verifying the chain of custody allows the hearings officer or administrative law judge to be reasonably certain that the drug test result offered by the employer is based upon the specific test sample provided by the claimant of benefits. When questions arise regarding the accuracy or validity of the reported test result, the party carrying the burden of proof, or the presiding officer, may wish to call as a witness the drug testing facility's medical review officer, typically a physician, to explain testing procedures and to verify the test result.

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[1] 21 U.S.C. sec.812 (2015).

[2] 41 U.S.C. Sec. 81 (1988).

[3] J. Anal. Toxicol. 2016 Sep; 40(7): 479-485.

[4] https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf

2016 WL 2957134
Unpublished Disposition
Only the Westlaw citation is currently available.
This is an unpublished disposition. See Nevada Rules of Appellate Procedure, Rule 36(c) before citing.
Supreme Court of Nevada.

LAS VEGAS CLUB HOTEL & CASINO, LLC, a Domestic Limited Liability Company, Appellant,
v.
The STATE of Nevada EMPLOYMENT SECURITY DIVISION; Renee Olson, In her Capacity as Administrator of the Employment Security Division; Katie Johnson, In her Capacity as Chairperson of the Employment Security Division; and Jeffrey Simmons, an Employee, Respondents.

No. 67725.
|
May 19, 2016.

Attorneys and Law Firms

Cohen–Johnson, LLC

State of Nevada/DETR

Richard Segerblom

ORDER OF AFFIRMANCE

***1** This is an appeal from a district court order denying a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Las Vegas Club Hotel & Casino (the Las Vegas Club) employed Jeffery Simmons (Simmons) from August 11, 2004, to February 27, 2014, as a surveillance technician. In 2013, Simmons began using medical marijuana to treat a disability. In 2014, Simmons filed an industrial injury claim with the Las Vegas Club and was directed to report for a drug test. Simmons tested positive for marijuana and was terminated by the Las Vegas Club for violation of its drug and alcohol policy. Simmons applied for unemployment benefits, which the Las Vegas Club opposed. The Employment Security Division (the ESD) denied Simmons' application, concluding that Simmons was discharged for misconduct under NRS 612.385 for violating the Las Vegas Club's drug and alcohol policy. Simmons appealed, and an evidentiary hearing was held before an administrative tribunal (referee). The referee issued a decision reversing the determination that Simmons' use of medical marijuana was misconduct and concluded that Simmons was eligible for benefits. The referee concluded that the Las Vegas Club failed to provide a copy of its drug and alcohol policy and so it was unknown what the specifics of the policy were and whether Simmons actually violated the policy. The Las Vegas Club filed an appeal and the ESD's Board of Review affirmed the referee's decision. Thereafter, the Las Vegas Club filed a petition for judicial review, which the district court denied.

On appeal, the Las Vegas Club argues that the ESD's conclusion that Simmons' off-site medical marijuana use was not misconduct under NRS 612.385 was arbitrary and capricious because Simmons violated the Las Vegas Club's drug and alcohol policy, and because Simmons failed to seek clarification about his medical marijuana use in violation of the Las Vegas Club's drug and alcohol policy. We disagree. The Las Vegas Club failed to provide the drug and alcohol policy to the ESD. Thus, the content of the policy and whether Simmons' conduct violated the policy are unknown. Accordingly, we affirm the district court's order.

This court's role in reviewing an administrative agency's decision is identical to that of the district court. Therefore, "[t]his court is limited to the record before the agency and cannot substitute its judgment for that of the agency on issues concerning the weight of the evidence on questions of fact." *Bob Allyn Masonry v. Murphy,* 124 Nev. 279, 282, 183 P.3d 126, 128 (2008). "We review an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *Elizondo v. Hood Mach. Inc.,* 129 Nev., Adv. Op. 84, 312 P.3d 479, 482 (2008) (internal quotations omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion...." *Law Offices of Barry Levinson, P.C. v. Milko,* 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). This court will "not reweigh the evidence or revisit an appeals officer's credibility determination." *Id.*

***2** We conclude that substantial evidence supports the ESD's determination that Simmons' actions did not

amount to wrongful misconduct for the purposes of NRS 612.385. The referee determined that the Las Vegas Club provided no probative evidence to show that Simmons violated a known drug and alcohol policy. Although the Las Vegas Club provided Simmons' termination form and discipline report, which generally refer to its drug and alcohol policy, it failed to provide a copy of the policy itself such that the referee could make any conclusions regarding the specific details of the policy or whether Simmons knowingly or willfully violated the policy. Additionally, the Las Vegas Club provided no evidence to show that Simmons was aware that his conduct constituted a violation of the policy. Accordingly, there is substantial evidence in the record to support the referee's conclusion that, under these facts, Simmons' actions did not amount to misconduct under NRS 612.385, Accordingly, we

ORDER the judgment of the district court AFFIRMED. [1]

All Citations

Slip Copy, 2016 WL 2957134 (Table)

Footnotes

1 We have considered the parties' remaining arguments and conclude that they are without merit.

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 19228-2017
Social Security: XXX-XX-[redacted]

IN THE MATTER OF THE CLAIM OF

[redacted],

Claimant,

v.

[redacted].,

Employer.

FINAL ORDER

The employer has appealed the hearing officer's decision that awarded the claimant unemployment benefits. We affirm and do not change the hearing officer's decision.

The claimant worked as a deli clerk. On May 5, 2017, after arriving for his shift, the claimant reported to the office manager's office to complete some paperwork. He smelled strongly of marijuana. His odor of marijuana lingered in the office and in the hallways after he left the area. [redacted], store manager, approached him in the deli and asked him if he was "stoned". The claimant responded with "it's medical marijuana." [redacted] sent the claimant home and told him he was not allowed to work anymore shifts until he provided documentation from a licensed physician showing that he had a "prescription" for medical marijuana. The claimant left. In fact, the claimant had smoked about ¼ gram of marijuana (a small bowl) about an hour before his shift. As he testified, this was not enough to be inebriated but enough to alleviate his back pain for the duration of his eight hour shift.

The employer had a written policy prohibiting working while under the influence of drugs, including marijuana. The claimant did not have a prescription for the marijuana he smoked prior to his shift on May 5, 2016. It was recreational marijuana.

The hearing officer found the employer discharged the claimant for allegedly working while under the influence of marijuana. However, there was no credible evidence that the claimant had performed any job duties when he was asked to leave or that his ability to perform any such duties was impaired. [redacted] did not want to give him the chance to perform any duties because he believed he was under the influence of

marijuana. The employer did not ask the claimant to submit to a drug or alcohol test. The employer did not have a written drug or alcohol testing policy.

Although the employer argued the claimant quit by failing to return to work with a doctor's note substantiating his alleged prescription for medical marijuana, the hearing officer was more persuaded by the claimant's testimony that he was fired by [redacted] on May 6, 2017 over the telephone. The claimant had heard from his husband that he had been fired, and he called to find out what was going on. At that time, [redacted] told the claimant he no longer had a job. The claimant also happened to be ill with a contagious illness on May 6 and was unable to work. He had a doctor's restriction approving him to be off work through May 22 due to that illness. However, the hearing officer found that had nothing to do with his separation. The employer decided to fire the claimant on May 6 because he allegedly came to work under the influence of marijuana the day before. The hearing officer found that [redacted] initially told the claimant to bring in a doctor's note showing that he had a prescription for marijuana because he was considering excusing the incident if the claimant really did have a prescription for medical marijuana. However, he subsequently changed his mind and decided to fire the claimant over the incident. The fact that the claimant happened to be suffering from a short term contagious illness at the time he was fired was a coincidence.

If [redacted] had known the claimant had smoked recreational marijuana before his shift, not medical marijuana, he would have fired him on the spot. However, the claimant was not fired for lying. The employer did not even know the claimant had lied when he was fired.

The claimant knew that being under the influence of marijuana while at work was prohibited by the employer's policies, despite his testimony to the contrary. That is why he was careful not ever to ingest marijuana while at work (even on his breaks). However, there was no credible evidence that he was "under the influence" of marijuana while at work on May 5. There was also no credible evidence that he would have been aware that he was prohibited from ingesting about ¼ gram of marijuana about an hour before his shift.

The hearing officer considered whether disqualification was warranted under § 8-73-108(5)(e)(VIII) (off-the-job use of an intoxicating beverage or a not medically prescribed controlled substance to the extent that the use interferes with job performance). However, since there was no credible evidence that the claimant actually performed any work before leaving the employer's premises or that his smoking of marijuana prior to the shift interfered with his job performance in any way, the hearing

officer found this section was not applicable. Mere speculation of possible job interference is not enough to be disqualifying as the statute requires actual interference ("resulting in interference with job performance").

She also rejected a disqualification pursuant to § 8-73-108(5)(e)(IX) (on-the-job use or distribution of an intoxicating beverage or a not medically prescribed controlled substance) because there was no credible evidence or contention that the claimant consumed alcohol or drugs while on the job.

The hearing officer found a disqualification under § 8-73-108(5)(e)(IX.5) was not warranted. This section provides for a disqualification when, as relevant here, a worker has present in his system, during working hours, a not medically prescribed controlled substance. The test must be given pursuant to a statutory or regulatory requirement or the employer's previously established written policy. The drug test must be conducted by a medical facility or laboratory licensed or certified to conduct such tests. Although the lack of an actual test can be overcome by a claimant admitting to consuming the controlled substance in question, there still needs to be a written drug testing policy. Here, the employer did not have a written drug testing policy.

The hearing officer awarded the claimant benefits.

On appeal, the employer contends it can provide names and statements of other employee[s] in the area who will state the claimant was working. However, parties are to present all of their evidence at the appointed hearing. *See Frank v. Industrial Commission*, 96 Colo. 364, 43 P.2d 158 (1935). We also perceive no basis for ordering another hearing so the employer may present additional evidence. Based on our review of the record, we conclude that the employer was provided a fair opportunity to present evidence in the scheduled hearing. *See Wafford v. Industrial Claim Appeals Office*, 907 P.2d 741 (Colo. App. 1995).

The employer argues the claimant was clocked in and on the jobsite, had his work apron on, and was working and should be disqualified.[1] The employer is essentially asking us to reweigh the factual record and enter findings of our own or draw inferences different from those of the hearing officer; however, we may not do so. Rather, it is solely the responsibility of the hearing officer to weigh the evidence, to assess credibility, to resolve conflicts in the evidence, and to determine the inferences to be drawn. *See*

[1] The employer cites § 8-73-108(5)(e)(IX). However, it is undisputed that the claimant did not consume or distribute marijuana on the job. We presume the employer meant § 8-73-108(5)(e)(VIII) or possibly § 8-73-108(5)(e)(IX.5).

Goodwill Industries of Colorado Springs v. Industrial Claim Appeals Office, 862 P.2d 1042 (Colo. App. 1993). Here, the hearing officer weighed the evidence, and her resulting factual findings are not contrary to the weight of the evidence in the record. Therefore, we may not alter them. *See Federico v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo. 1990).

We are persuaded the hearing officer appropriately considered possible disqualification sections. We agree that the record and the hearing officer's findings do not support a disqualification. An award is warranted pursuant to § 8-73-108(4). *See Santa Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

We are not persuaded otherwise by the employer's remaining arguments in its brief.

IT IS THEREFORE ORDERED that the hearing officer's decision issued July 27, 2017 is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Lisa A. Klein

Robert M. Socolofsky

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown below.

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Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

[redacted]
Docket Number: 19228-2017
Page 6

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

8/25/2017 by KG.

[redacted]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 10401-2017
Social Security: XXX-XX-[redacted]

IN THE MATTER OF THE CLAIM OF

[redacted],

Claimant,

v.

FINAL ORDER

[redacted],

Employer.

The claimant has appealed the hearing officer's decision that was issued on May 25, 2017. The hearing officer determined that the claimant is disqualified from receipt of unemployment benefits pursuant to § 8-73-108(5)(e)(VII), C.R.S. (violation of a company rule that resulted or could have resulted in serious damage to the employer's property or interests). We reverse.

The claimant was a warehouse worker for the employer's resort properties and lived in employer-provided housing. Under the employer's housing policy, residents are not allowed to have illegal drugs—including any drug considered illegal under federal law—or paraphernalia in their rooms. According to the employer, this policy ensures that workers do not come to work with prohibited drugs in their system. The claimant was aware of the policy.

The employer conducted an inspection of the claimant's room. A pipe of the type commonly used for smoking marijuana as well as marijuana itself was found in the claimant's room. A photo of the items found was entered into the record as Exhibit AA. The claimant identified the keyboard in the photo as his and did not deny that the pipe and marijuana-looking substance were in his room. He did not identify the substance as marijuana, but the hearing officer found, based on a review of the photo, that the substance was marijuana. The employer fired the claimant for violating the rule prohibiting these items in employer-provided housing. The hearing officer was persuaded that the claimant had a pipe and marijuana in his room which violated the rule prohibiting such items. The violation could have had a negative effect on the employer's interests, as consumption of marijuana even off duty could result in one coming to work with the substance in their system. Moreover, the requirement to keep such items out of

the employer-provided housing was a clearly defined performance standard. The claimant knew what was expected and violated the rules and standards due to circumstances within his control. The hearing officer imposed a disqualification.

On appeal, the claimant reiterates the pipe and marijuana were not his. He questions the hearing officer's findings related to Division's Exhibit AA (a copy of a photo). He argues that section 12 of the housing rules, entered into the record as Exhibit A, states that if there are continued inspection fails, "he/she may be asked to leave Employee Housing" and termination of employment is not specified. He contends that "in no way" did he cause or could have caused serious damage to the employer's interest because of this supposed housing violation. We agree that the findings do not support a disqualification.

It is the direct and proximate cause of a separation from employment that determines the claimant's entitlement based on wages earned in that employment. Section 8-73-108(1)(a), C.R.S. Here, the hearing officer found the claimant was discharged because he had items in employer-provided housing which violated the employer's housing policy. Since this finding is supported by the evidence, we may not change it. *See Pero v. Industrial Claim Appeals Office*, 46 P.3d 484 (Colo. App. 2002). It is therefore those circumstances that determine the claimant's entitlement.

It is undisputed that (1) the items were in the claimant's residence—albeit provided by the employer—and not on the jobsite and (2) the items violated the "employee housing rules and regulations" and *not* a rule or policy that dictated his behavior while performing job duties and/or while he was at work. The hearing officer's finding that the requirement to keep such items out of the employer-provided housing was a clearly defined [*job*] *performance* standard, therefore, is not supported by the record. Consequently, this finding is set aside as contrary to the weight of the evidence. *See Federico v. Brannan Sand & Gravel Co.,* 788 P.2d 1268 (Colo. 1990).

Although we agree a violation of *housing* rules could impact the interests of the *landlord,* we conclude that the hearing officer's finding that a violation of the *housing* rule could have a negative effect on the employer's interests in the *workplace* as consumption of marijuana even off duty could result in one coming to work with the substance in their system is attenuated at best. Here, the violation of the housing rules was that marijuana and a pipe were found in the claimant's bedroom not that he was bringing these items to work to use them or he actually used them before going to work. Although the statute does not require actual damage to the employer's property or interests for a violation to be disqualifying, the damage cannot be presumed. *See Morris*

v. City and County of Denver, 843 P.2d 76 (Colo. App. 1992). In addition, it is apparent that the hearing officer conflated the two different roles [redacted] has here: employer and landlord. "Almost every employee rule is designed … to provide for the betterment of the *workplace*." *Morris* at 78. [Emphasis added.] However, the policy at issue here is a *housing* policy, presumably for the safety and protection of the building and the residents. *See for example* Exhibit A, § 12 (inspections are "to assure all residents a safe and sanitary living environment"). Various sections of the policy warn of charges, fines, written notice, and/or eviction for violations. *See* Exhibit A, §§ 3, 4, 5, 6, 7, 8, 10, 12.

An individual is entitled to unemployment benefits if he is unemployed through "no fault" of his own. "Fault," for these purposes, is not necessarily related to culpability. Instead, it is defined as a volitional act or the exercise of control in the totality of the circumstances, such that the individual can be said to be responsible for his discharge. *See Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). It is apparent from this definition that, to determine the claimant is at "fault" for the discharge, there must be some relationship to the claimant's employment.

Section 8-73-108(5)(e)(VII) provides for a disqualification where an employee is fired for violating a company rule, where the violation could have resulted in serious damage to the employer's interests or property. To be at fault and disqualified under this section, the claimant has to have been aware of the rule, have violated the rule, and the violation resulted or could have resulted in serious damage to the employer's interests or property. We conclude that although the claimant was aware of the "rule", the rule at issue was a rule that governed the behavior of the claimant as a resident in the housing *not* as an employee in the workplace. We also conclude that this violation of the housing rule could not have resulted in any damage to the employer's interests or the employer's workplace property. Consequently, we conclude the claimant was not responsible for his separation. *See Santa Fe Energy Co. v. Baca*, 673 P.2d 374 (Colo. App. 1983).

IT IS THEREFORE ORDERED that the hearing officer's decision issued May 25, 2017 is reversed, and the claimant is awarded benefits pursuant to § 8-73-108(4), C.R.S.

INDUSTRIAL CLAIM APPEALS PANEL

Lisa A. Klein

Robert M. Socolofsky

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1300 Broadway 6th Floor
Denver, CO 80203

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

6/23/2017 by KG.

[redacted]

[redacted]

Marijuana discharge -

Washington State Employment Security Department Precedential Decisions of Commissioner

In re: ROBERT F. DOLAN

Commissioner of the Employment Security Department.
December 17, 2010
Empl. Sec. Comm'r Dec. 2d 957 (WA), 2010 WL 6795723

Commissioner of the Employment Security Department.

State of Washington.

*1 In re: ROBERT F. DOLAN

*1
Case No. 957
*1
Review No. 2010-5417
*1
Docket No. 02-2010-25686
*1 December 17, 2010

DECISION OF COMMISSIONER

*1 On October 20, 2010, FRED MEYER STORES, by and through Dawn Gibson, Appeal Board Specialist of TALX, petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on September 20, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings findings of fact and conclusions of law, and instead enter the following.

FINDINGS OF FACT

I

*1 Claimant worked for the interested employer as a wine steward from November 26, 1996 through June 19, 2010. The position was primarily part time, Union, UFCW, Local 21, day shift, with an hourly wage of $18.90.

II

*1 The interested employer is QFC (also referred to as Fred Meyer Inc.), a large employer engaged in retail sales of a wide variety of products, which has employees in a variety of job classifications, involving differing degrees of safety concern.

III

*1 Claimant was discharged by the employer on June 19, 2010, for violations of employer's written Policy on Alcohol and Drug Use. The Policy was received and signed by claimant on October 15, 2004. See Exhibit No. 11, p. 4. By signing the Policy, claimant affirmed that "I have read the above policy, fully understand its meaning, and realize that compliance of this policy is a condition of employment."

IV

*1 The "Purpose and Scope" of the Policy are stated as follows:

*1 "QFC is committed to providing an environment that encourages employees to develop their abilities, use their full potential and to share ideas to further the success of the business. Part of that commitment requires the company to provide a safe, productive work environment free from the potential harmful effects of alcohol and drugs. Therefore, as a condition of employment, QFC shall have the right to require any employee involved in any of the following situations to submit him or herself to a urinalysis or other generally accepted test for drug, controlled substance or alcohol use." *See* Ex. 11, p. 4, section *I*.

*1 One of the specified situations is "being involved in an on-the-job accident that results in time loss, personal injury, damage to company property and/or involves a violation of a safety policy or procedure." *Id.*, section 1(4).

V

*1 The Policy goes on in a section entitled "Unacceptable Actions" to provide in pertinent part as follows:

*1 "In an effort to provide a safe and productive work environment and to reduce the possibility of loss caused by an unsafe act or condition, the following actions are prohibited and may be grounds for disciplinary action up to and including termination:

*2 ...

*2 "2. Being at work under the influence of alcohol and/or drugs or controlled substances. 'Under the influence' is defined to include the smell of alcohol on his/her breath, being unable to perform work in a safe and productive manner, being in a physical or mental condition which creates a risk to the safety and well-being of the individual, other employees, the public, or company property; and/or having any detectable levels, in excess of a trace (specific levels available upon request) of alcohol and/or drugs or controlled substances in the body.

*2 "3. Failing to notify the supervisor prior to beginning work that he/she is on medication that may affect the work performance or the safety of the employee or others. Depending on label warnings or cautions by a physician or pharmacist, the employee may be temporarily reassigned, put back to work or sent home." (Emphasis supplied.)

VI

*2 Claimant developed an unspecified condition of the pancreas and irritable bowel syndrome approximately two and one-half years prior to the hearing. Because claimant has difficulty taking pills, claimant's physicians recommended the use of medical marijuana for relief of symptoms. Claimant obtained Documentation of Medical Authorization to Possess Marijuana for Medical Purposes in Washington State (commonly called a "medical marijuana card"), which expired on February 25, 2010. See Exhibit No. 7. According to claimant, as of June 4, 2010, claimant had "left over" marijuana because, as he put it, he was allowed to acquire "a ridiculous amount" prior to expiration of his medical marijuana card. On June 17, 2010, claimant obtained another medical marijuana card. See Exhibit No. 6.

VII

*2 The incident giving rise to claimant's discharge from employment occurred on June 4, 2010, after expiration of claimant's first medical marijuana card and prior to issuance of his new card.

VIII

*2 Claimant was experiencing difficulty eating and sleeping due to intestinal symptoms for approximately two or three weeks prior to the night of June 3, 2010. Claimant had continued difficulty sleeping on the night of June 3, 2010. Claimant was scheduled to report to work at 10 a.m. on June 4, 2010. At approximately 3:30 a.m. that morning claimant used an unspecified amount of his "left over" marijuana for an unspecified period of time, in an effort to relieve discomfort and aid him in sleeping.

IX

*2 Claimant did not notify his supervisor on June 4, 2010, or on any other date, that he used medical marijuana before reporting to work. According to claimant, he sometimes used marijuana at approximately 8 a.m. before reporting to work for a scheduled 10 a.m. shift. In claimant's own words at the hearing, "I kept it [claimant's use of medical marijuana] from [the employer] because I thought I would lose my job."

X

*2 Had claimant notified his employer of his use of medical marijuana before reporting for work on June 4, 2010, the employer would have considered the available information from physicians, and would have taken steps other than terminating claimant, such as allowing him to work, giving him alternative assignments, or sending him home.

XI

*3 Claimant reported to work as scheduled at 10 a.m. on June 4, 2010. At approximately 11 a.m. claimant bent over to clean some tar-like substance from the floor in his work area. As claimant described it, his "back snapped," resulting in serious back pain. Claimant called his supervisor and informed her that he had "pulled his back out" while bending over on the job to clean the floor and needed to go to his doctor.

XII

*3 As noted above, the employer's policy requires employees who are injured on the job to undergo drug and alcohol testing. When claimant went to see his supervisor for the taking of a test sample, claimant expressed concern about testing positive for marijuana, and stated that he had a medical marijuana card. After the test sample was taken, claimant went to visit his doctor.

XIII

*3 Upon returning from his doctor visit, claimant met with his supervisor. Contrary to his previous statements, he now told his supervisor that he had not suffered his back injury on the job, but instead had suffered his injury at home. At hearing, claimant's story shifted again. He testified that he had injured his back during a bus ride on June 3, 2010. In his reply to the Petition for Review before us, claimant states that "I hurt my back at work," but that the bus ride on June 3, 2010, had aggravated his digestive condition and left his back "feeling 'tight'." In light of claimant's contradictory statements, we find that claimant lacks credibility regarding when and how he injured his back. Under these circumstances, we find that, after injuring his back while on the job, claimant intentionally changed his story to his supervisor in an effort to prevent submission of his test specimen for analysis by the medical review officer retained by the employer, and that claimant did so because he believed that, due to his use of marijuana a relatively short time before reporting to work, his sample would test positive for marijuana.

XIV

*3 Under the employer's policies, once a post-accident test sample is taken, it must be submitted to the medical review officer for analysis. After consulting with human resources personnel, claimant's supervisor therefore submitted the sample, despite claimant's changed story. Pursuant to its Policy on Alcohol and Drug Use (Exhibit 11, p. 4), prohibiting more than a trace amount of alcohol, drugs or controlled substances on the job, the employer utilizes an acceptable level for marijuana metabolites of 0.5 ng/ml (nanograms per milliliter). The claimant's sample tested positive for marijuana at 4.0 ng/ml., eight (8) times higher than the employer's cut-off testing level. See Exhibit No. 10.

XV

*3 Claimant does not believe that he was "under the influence" of marijuana at the time of his accident, and believes that his use of marijuana before coming to work was not the cause of his injury at work. Claimant's supervisor believed claimant did not seem to be "impaired" at the time the sample was taken, but with the caveat that claimant told her at that time he smoked marijuana daily. Notwithstanding the subjective perception of claimant as to whether he was "under the influence" or his supervisor's non-expert impression concerning whether claimant was "impaired," the test results objectively demonstrate that claimant was, in fact, "under the influence" of marijuana *as that term is defined in the employer's Policy on Alcohol and Drug Use*, as quoted in Finding of Fact No. V above.

XVI

*4 The employer discharged claimant because he violated the employer's Policy on Alcohol and Drug Use by (1) reporting to work and testing positive while at work for marijuana in excess of the employer's acceptable level, and (2) failing to notify his supervisor that he had used medical marijuana a relatively short period of time before reporting for work. Claimant told the employer prior to his discharge that he had a valid medical marijuana card, and the employer believed that he did. The employer did not discharge claimant for illegal possession or use of marijuana while off duty.

XVII

*4 During the weeks at issue, claimant made at least three job search contacts each week, had no physical or transportation limitations and was otherwise able to and available for work.

XVIII

*4 As a result of the Department's July 9, 2010 Determination Notice (Exhibit No. 2), allowing benefits to claimant, and the Office of Administrative Hearings' Initial Order affirming the Determination Notice, it is likely that benefits have been paid to claimant in an unknown amount.

ISSUES PRESENTED

I

*4 Was claimant discharged for misconduct within the meaning of RCW 50.04.294 and therefore subject to disqualification from benefits pursuant to RCW 50.20.066(1)?

II

*4 Was claimant able to, available for and actively seeking work within the meaning of RCW 50.20.010(1)(c) during the weeks at issue?

CONCLUSIONS OF LAW

I

*4 In its Petition for Review, the employer argues that claimant not only violated company policy, but illegally used marijuana at a time when his medical marijuana card had expired and before he renewed it. However, employer's witnesses admitted at hearing that claimant was not discharged for off-duty illegal possession or use of marijuana. Rather claimant was discharged for violating a known company policy in the two respects identified in Finding of Fact No. XVI above. Therefore, we need not address the issues of whether claimant's possession or use of marijuana on June 4, 2010, was unlawful, and, if so, whether his off-duty possession or use constituted disqualifying misconduct.

II

*4 RCW 50.20.066(1) provides that, with respect to claims having an effective date on or after January 4, 2004, a claimant is disqualified from benefits for the period of time specified in the statute if the claimant was discharged for misconduct connected with work. RCW 50.04.294(1) provides in pertinent part that, with respect to claims having an effective date on or after January 4, 2004, misconduct includes, but is not limited to "(a) [w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; [or] (b) deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee."

III

*4 The legislature went on in RCW 50.04.294(2) to specify a non-exclusive list of employee actions that "are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or fellow employee." (Emphasis supplied.) In

RCW 50.04.294(2)(f), the legislature included among these delineated acts of misconduct "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule." Thus, by the legislature's definition, if a claimant violates a reasonable company rule and if the claimant knew or should have known of the rule, the claimant's conduct constitutes misconduct.

IV

*5 In ruling that claimant's conduct in this case did not constitute misconduct, the administrative law judge relied primarily on the rationale that claimant's conduct in using marijuana at his home before reporting to work was not *work-connected*, and therefore applied the misconduct standards articulated in Nelson v. Employment Security Dep't, 98 Wn.2d 370, 374, 655 P.2d 242 (1982). That case involved an employee who was a cashier of the employer and who pleaded guilty to shoplifting at another store while off duty. As the Court in Nelson noted, there was no nexus between the off-duty, off-premises conduct and the claimant's work for the employer. That is not the case here.

V

*5 Based on our decision in In re Wittersheim, Empl. Sec. Comm'r Dec.2d 822 (1990), discussed in more detail below, we will apply the on-duty misconduct standards articulated in Macey v. Department of Employment Security Dep't, 110 Wn.2d 308, 752 P.2d 372 (1988), rather than the off-duty standards set forth in Nelson, supra.

VI

*5 In Macey, supra, 110 Wn.2d at 319, the Court set forth the three general criteria for establishing on-duty disqualifying misconduct: (1) The rule must be reasonable under the circumstances of the employment; (2) the conduct of the employee must be connected with the work; and (3) the conduct of the employee must in fact violate the rule. Each of the three Macey criteria is addressed below.

VII

*5 Applying the first Macey criterion, we conclude that the employer's rules were reasonable under the circumstances of claimant's employment in this case. An employer has a legitimate interest in maintaining a workplace that is both safe and productive. To that end, the employer adopted a policy which required an employee to notify the employer before reporting to work if the employee was using alcohol, illegal drugs or prescribed controlled substances, so that the employer could make an informed decision whether to allow the employee to perform his or her regular duties, give the employee an alternative assignment, or send the employee home. Also to that end, the employer's policy prohibited employees from reporting to and being at work with more than specified levels of alcohol, illegal drugs or prescribed controlled substances in their systems. Those levels were available to employees on request. The employer's policy required testing under specified circumstances, including on-the-job accidents resulting in physical injury. The policy was applicable to all employees, irrespective of job classification. Employers, including large employers with employees in numerous job classifications which have varying degrees of safety concern, are not required to adopt different drug and alcohol policies applicable to different job classifications in order for the policy to be reasonable. Moreover, it is reasonable for an employer to adopt an alcohol and drug policy which is based on objective test criteria, rather than a policy based on subjective impressions and beliefs about whether employees are "under the influence" or "impaired." For these reasons, although claimant's position as a wine steward was not one that might be considered safety critical, the employer's policy as applied to claimant under the circumstances of his employment was reasonable.

VIII

*6 Applying the second Macey criterion, we conclude that the conduct of claimant was work connected. In Wittersheim, supra, the claimant was discharged for violation of a company policy which provided in part that it was a dischargeable offense to report for work or be on duty with any amount of illegal or prohibited drugs in the employee's body. In a random drug test, the claimant was found to have a detectable amount of marijuana in his body. We held that the claimant's conduct in reporting to work with an illegal or prohibited drug in his body was work connected because it occurred on the employer's premises during working hours. Wittersheim, supra, at pp. 2-3. The same reasoning applies in this case. Claimant reported for and was present at work with marijuana metabolites in his system eight times higher than the employer's allowable level.

IX

*6 Applying the third Macey criterion, we conclude that claimant violated the employer's policy in two distinct ways. First, claimant knowingly failed to notify his supervisor before reporting to work that he was using marijuana for medicinal purposes. Claimant admitted that he intentionally kept this information from the employer. Secondly, claimant reported to work with a prohibited amount of marijuana in his system, as evidenced by objective test results. Claimant's awareness of the latter violation of employer policy is shown by his statements to his supervisor about his medical marijuana card at time of testing, and his subsequent change of story to his supervisor about how and when he injured his back. Claimant's contradictory statements were made in an effort to prevent his post-accident test results from being submitted for laboratory analysis, demonstrating claimant's knowledge at the time of his violation of the employer's policy. Claimant's violations of the employer's policy harmed the employer interests in maintaining a productive workplace and a safe workplace.

X

*6 In Wittersheim, supra, we distinguished our prior decisions concerning drug and alcohol-related misconduct in In re Tanner, Empl. Sec. Comm'r Dec.2d 794 (1987) and In re Orr, Empl. Sec. Comm'r Dec.2d 795 (1987), on the grounds that the claimant in Wittersheim was an airline mechanic, whereas the claimant in Tanner was an industrial plumber and the claimant in Orr was a production utility worker in a glass plant. Solely to the extent Wittersheim holds that the existence of drug or alcohol-related misconduct depends on a claimant's job classification, it is overruled. Tanner is more readily distinguished from Wittersheim on the grounds that in Wittersheim, as in this case, the employee violated a clear, objectively based drug testing policy, whereas in Tanner the employee had allegedly violated a subjective policy

prohibiting "entering company premises under the influence of alcoholic beverages or drugs," and there was no evidence the employee was "under the influence" within the meaning of the employer's policy. The employer in Tanner argued that it had "amended" its policy via an article in its company newsletter which warned employees not to smoke marijuana during lunch breaks, regardless of whether employees were "under the influence" upon returning to work. We rejected the employer's argument that the "article" was a policy or rule, and instead applied the employer's formal policy prohibiting employees from being "under the influence" at work. We held in Orr that a work-connected nexus was not established because no impairment of job performance was detectable. Orr. at 3. Since our decision in Orr, it has been held that a work-connected nexus may be established absent evidence of job impairment. *See, e.g.*, Henson v. Employment Security Dep't, 113 Wn.2d 374, 381, 779 P.2d 715 (1989), where the offending employee's mere presence on the employer's premises satisfied the nexus requirement. This rationale is consistent with our decision in Wittersheim. To the extent Orr might be interpreted as requiring subjective evidence of "impairment" in order to establish violation of an employer's alcohol and/or drug testing policy, it relied upon a statement in the Department's Benefit Policy Guide which is no longer in effect. Orr at 3-4. To the extent Orr may be interpreted as inconsistent with this decision, it is overruled.

XI

*7 For the reasons set forth above, we conclude that claimant was discharged for misconduct within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294(1)(a) and (2)(f).

XII

*7 During the weeks at issue, claimant was able to, available for and actively seeking work as directed by the Department as required by RCW 50.20.010(1)(c).

*7 Accordingly

*7 IT IS HEREBY ORDERED that the Initial Order of the Office of Administrative Hearings issued on September 20, 2010, is REVERSED in part and AFFIRMED in part. Claimant is disqualified pursuant to RCW 50.20.066(1) beginning June 13, 2010, and thereafter for ten calendar weeks and until he has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his weekly benefit amount. The claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). Under RCW 50.20.066(5), the claimant must repay all benefits paid in error because of a disqualification from benefits based on misconduct. The amount of the overpayment owed by the claimant is REMANDED to the Department for calculation. *Employer:* If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. See RCW 50.29.021.
*7 DATED at Olympia, Washington, December 17, 2010.[a1]

*7 Steven L. Hock
*7 Chief Review Judge Commissioner's Review Office

RECONSIDERATION

*7 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

*8 If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is. filed, the attached decision/order will become final.

*8 If you choose to file a judicial appeal, you must both:

*8 a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

*8 b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

*8 The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

0628

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 2880-2018
Social Security: XXX-XX-[redacted]

IN THE MATTER OF THE CLAIM OF

[redacted],

Claimant,

v.

[redacted],

Employer.

ORDER

The employer appeals the hearing officer's decision that granted unemployment benefits. We set aside the hearing officer's decision and remand the case to the hearing officer for further proceedings.

An initial deputy's decision determined that the claimant was disqualified under § 8-73-108(5)(e)(IX.5), C.R.S. That section provides for disqualification, insofar as pertinent here, for:

> The presence in an individual's system, during working hours, of not medically prescribed controlled substances, as defined in section 18-18-102(5), C.R.S., . . . as evidenced by a drug . . . test administered pursuant to a statutory or regulatory requirement or a previously established, written drug . . . policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests.

Stated more simply and for the purposes here, disqualification pursuant to this section requires a showing that 1) the employer has a written drug policy, 2) the claimant was tested as provided by the policy, 3) the test was positive for one of the controlled substances listed in schedules I through V in the Colorado Criminal Code, 4) the substance in the claimant's system was not medically prescribed, 5) the substance was in the claimant's system during working hours, and 6) the laboratory that performed the analysis is licensed or certified to conduct such tests.

At the hearing on the claimant's appeal, the employer's safety coordinator testified that the employer's drug policy provides for random testing. The drug test policy is a safety measure because laborers such as the claimant work around heavy machinery. The claimant was randomly selected for a drug test and provided a saliva sample. The sample was analyzed and the test results were admitted as Exhibit 1. Exhibit 1 shows the analysis was conducted by "Medtox" in St. Paul, Minnesota and was positive for marijuana. The employer's disciplinary policy provides for a 30-day suspension for the first positive test and a clean test before the worker is allowed to return to work. Although this was the claimant's first positive test, the safety coordinator testified the claimant was not allowed the suspension and was discharged instead possibly because the available work was slowing down.

The claimant testified that to treat back pain a doctor recommended that he use "CBD," apparently referring to "cannabidiol." He testified he did not use "marijuana." The claimant also testified that although he had been working 50 hours per week, shortly before his discharge he had been working less than 40 hours per week. He suggested the slow-down in work was the real motive for his discharge because the drug test policy normally results in suspension for a first offense.

The hearing officer found the claimant was discharged because the positive test for marijuana violated the employer's drug policy. The employer's policy states, the hearing officer found, that after a first positive test an employee will be placed on a 30 day leave of absence, randomly tested throughout the thirty days and discharged if any of those tests are positive.

The hearing officer also found that to treat the claimant's back pain a doctor recommended that he try CBD, and the claimant used it twice weekly. The hearing officer believed the claimant's testimony that he did not use marijuana. The hearing officer also found that the claimant's work was slowing down, that he been working 50 hours per week but shortly before his discharge he was working 39 hours per week.

Although the "Findings" section of the hearing officer's decision says the claimant was discharged because of the drug test positive for marijuana, the "Conclusions" section of the hearing officer's decision says the claimant only "allegedly" violated the employer's drug policy. The hearing officer also said the policy does not provide for discharge for the first positive test and was not followed when the claimant's supervisors decided to discharge the claimant. Because the claimant had no prior positive drug tests, the hearing officer found, he is not at fault for the discharge. The hearing officer granted unemployment benefits under § 8-73-108(4), C.R.S.

On appeal, the employer argues that the company has a "zero tolerance" policy for workers who are under the influence of a controlled substance, and the claimant was discharged because he violated the employer's drug test policy. However, although the safety coordinator testified that the claimant tested positive for marijuana, there was no evidence that the claimant was under the influence of any controlled substance, including marijuana. Evidence that the claimant had metabolites of marijuana in his system during working hours does not necessarily mean that he was under the influence of marijuana.

The employer also argues that the claimant testified positive for THC (tetrahydrocannabinol-the psychoactive ingredient in marijuana) and not CBD, as the employer believes the hearing officer found. However, Exhibit 1 says only that the claimant tested positive for marijuana, and does not identify whether the evidence of marijuana was derived from ingestion of THC or CBD. In any event, as we understand the hearing officer's decision, she found the claimant ingested CBD and did not ingest marijuana, but it is not clear if the hearing officer found the test was accurate. The hearing officer's decision suggests that whether the claimant ingested marijuana or CBD is significant, but we disagree. CBD does not appear in the schedules referred to by § 8-73-108(5)(e)(IX.5), but the Federal Drug Enforcement Administration has issued an advisory letter concerning marijuana extracts including "cannabidiols" or CBD. This advisory letter (effective March 9, 2017) identifies CBD as a derivative of marijuana and says CBD is therefore a Schedule I controlled substance. *See* https://www.deadiversion.usdoj.gov/schedules/marijuana/m_extract_7350.html (accessed March 23, 2018); *see also* § 18-18-102(18), C.R.S. ("marijuana" means all parts of the cannabis sativa plant, including derivatives of the plant).

The employer argues that the hearing officer erroneously granted unemployment benefits, but we are unable to adequately address this argument because the findings are insufficient to determine the claimant's entitlement. Additional findings or clarifications are necessary to determine the claimant's entitlement, and we remand the case to the hearing officer for that purpose. *See* § 8-74-104(2), C.R.S. (the Panel may not make factual findings). We identify three issues that require additional findings in order to determine the claimant's entitlement.

The first issue concerns why the claimant was discharged. It is the motivating reason or reasons for a discharge that establish entitlement to unemployment benefits based on wages earned in a particular employment, and it is the hearing officer's responsibility to determine the reason or reasons. *See Eckart v. Industrial Claim Appeals Office*, 775 P.2d 97 (Colo. App. 1989). Here, it is not clear whether the hearing officer

found the claimant was discharged solely because of the positive test or whether the decreasing available work was also a motivating reason for the claimant's discharge. On remand, the hearing officer must specifically determine whether the claimant was discharged solely because of the failed drug test, whether he was discharged solely because of the reduced need for his services, or whether both of these issues motivated his discharge.

The second issue concerns the hearing officer's consideration of the employer's application of its disciplinary policy following a failed drug test. As we understand the hearing officer's decision, she determined that the claimant is not at fault in the circumstances of his discharge because the employer did not follow its own disciplinary policy. However, these circumstances do not support an award unless the failure to follow the disciplinary policy somehow deprived the claimant of the opportunity to act volitionally. *See Keil v. Industrial Claim Appeals Office*, 847 P.2d 235 (Colo. App. 1993). It was error for the hearing officer to base her assessment of the claimant's fault on the employer's failure to follow its own disciplinary policy. The claimant did not claim in the hearing that he used CBD *because* he knew it was permissible to the employer. *See for example Zelingers v. Industrial Commission*, 679 P.2d 608 (Colo. App. 1984) (a claimant's reasonable belief that his action is permitted by the employer may support a conclusion that the claimant did not act volitionally); *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) ("fault" for purposes of determining entitlement to unemployment benefits is defined as a volitional act or exercise of some control or choice in the circumstances leading to a discharge such that claimant can be said to be responsible for his discharge).

The third issue concerns the hearing officer's apparent decision not to apply § 8-73-108(5)(e)(IX.5). Since that statute applies when a test administered pursuant to the employer's policy is positive, the disciplinary system used by the employer following a positive test is irrelevant. In other words, the policy provides for random testing and the claimant was randomly selected for a test. The test was therefore conducted pursuant to the policy. In addition, if the sample was tested by a laboratory licensed or certified to conduct such tests and the test was positive for a not medically prescribed controlled substance in the claimant's system during working hours, disqualification is warranted unless the claimant is not at fault in the circumstances.[1] It is not clear from the hearing officer's findings whether she found the test was accurate or whether, if so, the claimant

[1] In this regard, a physician cannot "prescribe" marijuana or marijuana derivatives. A physician can only "recommend" use of these substances. Consequently, disqualification is warranted when the elements of § 8-73-108(5)(e)(IX.5) are satisfied, even if a claimant has a physician's recommendation to use marijuana or a marijuana derivative. *See Beinor v. Industrial Claim Appeals Office*, 262 P.3d 970, (Colo. App. 2011)

was at fault for the positive test. If, for example, the hearing officer found the claimant ingested nothing that would produce a positive test for marijuana, then he would not be at fault for the positive test (implying that the positive test was erroneous). On the other hand, if, for example, the hearing officer found the test was conducted by a licensed or certified lab and was accurate, then the claimant is properly disqualified unless he was not at fault for the accurate test for some reason. But the hearing officer did not find whether "Medtox" is a licensed or certified lab. On remand, the hearing officer must clarify whether the test results were accurate, whether "Medtox" is a licensed or certified lab, and, if the test is accurate, whether the claimant was at fault for the positive result.[2]

The hearing officer may conduct another hearing in order to permit the parties to present additional evidence.

IT IS THEREFORE ORDERED that the hearing officer's decision dated February 22, 2018, is set aside, and the case is remanded for further proceedings consistent with the views expressed herein. In her discretion, the hearing officer may conduct another hearing.

INDUSTRIAL CLAIM APPEALS PANEL

Kris Sanko

Robert M. Socolofsky

[2] A determination that Medtox is licensed or certified as required by § 8-73-108(5)(e)(IX.5) to impose a disqualification is necessary because the claimant did not concede the test was accurate. *See Sosa v. Industrial Claim Appeals Office*, 259 P.3d 558 (Colo. App. 2011).

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

3/26/2018 by KG.

[redacted]

[redacted]

INDUSTRIAL CLAIM APPEALS OFFICE

Docket Number: 28296-2017
Social Security: XXX-XX-[redacted]

IN THE MATTER OF THE CLAIM OF:

[redacted],

Claimant,

v.

[redacted],

Employer.

FINAL ORDER

The employer has appealed the hearing officer's decision that awarded the claimant unemployment benefits. We reverse.

The claimant, a production chemist, took a random drug test pursuant to the employer's known policy on September 6, 2017. The test results, which were not presented in the hearing, came back showing that the claimant had marijuana in his system. The claimant had not used marijuana since approximately 2007 and the hearing officer was not persuaded by the evidence presented that the claimant had marijuana in his system on September 6, 2017.

The claimant was regularly in contact with industrial hemp. Although industrial hemp does contain THC—at a level of 0.3% or less, industrial hemp is not a controlled substance and is not marijuana. The hearing officer presumed that the reason the lab result was positive for marijuana was because industrial hemp does contain THC. It is unknown if the lab which conducted the test made any effort to distinguish between marijuana and hemp.

The claimant was discharged because the employer believed that he had marijuana, a controlled substance, in his system on September 6, 2017. Since the claimant did not have marijuana, a controlled substance, in his system on September 6, 2017, the hearing officer awarded him benefits.

On appeal, the employer contends the claimant did exercise some control or choice by consuming a substance with THC and argues that the claimant should be disqualified from receiving benefits. We agree.

Initially, we acknowledge that we are bound by the hearing officer's evidentiary findings that are not contrary to the weight of the evidence. *See Clark v. Colorado State University*, 762 P.2d 698 (Colo. App. 1988). However, we may independently assess the evidence to determine whether findings meet this standard. Moreover, we may make our own ultimate findings and conclusions. *Clark v. Colorado State University, supra*. We make a different conclusion here.

Industrial hemp and marijuana are both derived from a plant of the genus cannabis and both contain tetrahydrocannabinols (THC). *See* §§ 18-18-102(18) & (19), 35-61-101, C.R.S. Under Colorado law, the concentration level of THC determines whether a substance is industrial hemp or marijuana: Industrial hemp has a THC concentration of no more than 0.3% on a dry weight basis and is regulated by the Colorado Department of Agriculture while marijuana has a percentage of THC above 0.3% and is regulated by the Colorado Department of Revenue.[1] www.colorado.gov/pacific/agplants/difference-between-hemp-and-marijuana. Tetrahydrocannabinols or THC is a Schedule I controlled substance under Colorado law, § 18-18-203(2)(XXIII), C.R.S., that makes no distinction between THC derived from "industrial hemp" as opposed to "marijuana".

Here, it is undisputed that the claimant was aware of the employer's drug and alcohol policy, admitted into the record as Exhibit 1. The policy refers to "controlled substances", "non-prescribed prohibited drugs", and "all drugs illegal under state or federal law" (the definition of "prohibited drugs"). It explains testing is for six substances and their metabolites including marijuana. The employer testified that the claimant was discharged for testing positive for "marijuana". Tr. at 8-9, 12. The claimant explained that the test actually verifies the existence of THC. Tr. at 19. Although the hearing officer made findings related to the test being positive for "marijuana"—"a controlled substance", he also found the reason why the test was positive for "marijuana" was because the claimant was "regularly in contact with industrial hemp, which contains THC". The claimant conceded that it was "possible" that the drug testing results would have indicated that he had THC in his system because he consumes industrial hemp by smoking it or ingesting liquid extracts (tinctures) of it. Tr. at 19-20.

We note that the hearing officer is not held to a crystalline standard when articulating findings of fact. *See Allmendinger v. Industrial Commission*, 40 Colo. App. 210, 571 P.2d 741 (1977). As we understand the hearing officer's findings, the

[1] We note that industrial hemp is not subject to the provisions of Article XVIII, § 6 of the Colorado Constitution. *See* Art. XVIII, § 6(2)(f).

claimant's drug test was positive for the controlled substance THC—although due to consuming industrial hemp rather than marijuana. However, as noted above, Colorado law has designated THC as a Schedule I controlled substance. Section 18-18-203(2)(XXIII), C.R.S. Colorado law defines "tetrahydrocannabinols" as "synthetic equivalents of the substances contained in the plant, or in the resinous extractives of, cannabis, sp., or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity, such as … [various c]is or trans tetrahydrocannabinol, and their optical isomers." Section 18-18-102(35(a)(I)-(III), C.R.S.

Notwithstanding the qualifying and disqualifying subsections of the statute, an individual is entitled to benefits if he is unemployed through no fault of his own. *See* § 8-73-108(1)(a), C.R.S.; *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). If the claimant was not at fault under the totality of circumstances, a disqualification from receipt of unemployment benefits is not warranted. *See Velo v. Employment Solutions Personnel,* 988 P.2d 1139 (Colo. App. 1998). To be at fault for the separation, the claimant at a minimum must have committed a volitional act, exercising some degree of control over the circumstances leading to the separation. *See Collins v. Industrial Claim Appeals Office,* 813 P.2d 804 (Colo. App. 1991).

The evidence does not show the claimant was unable to control himself in consuming a product containing THC. We conclude that the claimant's consumption of a product that contains THC was a volitional act. *See Clark v. Colorado State University*, 762 P.2d 698 (Colo. App. 1988) (Industrial Claim Appeals Panel may reach its own conclusions).

Section 8-73-108(5)(e)(IX.5), C.R.S. provides for disqualification when a drug test administered pursuant to the employer's previously existing, written drug policy shows the presence of a not-medically prescribed controlled substance in an individual's system during working hours, as evidenced by a test conducted by a licensed or certified facility. The hearing officer found that the employer has a previously existing, written drug policy which provides for random testing. The claimant was aware of this policy. The employer testified that the company that comes to the employer's site to conduct the drug test, Mobile Labs, Inc., is licensed or certified to conduct the tests. Tr. at 10. As we understand the hearing officer's findings, the claimant's drug test showed the presence of THC, a not-medically prescribed controlled substance in his system. Furthermore, the claimant conceded that he smoked or otherwise consumed a product containing THC. Under these circumstances, we conclude that the findings and the evidence support a disqualification pursuant to § 8-73-108(5)(e)(IX.5).

IT IS THEREFORE ORDERED that the hearing officer's decision issued November 9, 2017 is reversed, and the claimant is disqualified from receiving benefits pursuant to § 8-73-108(5)(e)(IX.5).

INDUSTRIAL CLAIM APPEALS PANEL

Lisa A. Klein

David G. Kroll

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the hearing officer and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Industrial Claim Appeals Office Reference Library on our website: www.coloradoui.gov/appeals.

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, contact the Court of Appeals directly at 720-625-5150 or go to** www.colorado.gov/cdle/CTAPPFORM**.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

Industrial Claim Appeals Office
P.O. Box 18291
Denver, CO 80218-0291

[redacted]
Docket Number: 28296-2017
Page 6

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

1/5/2018 by KG.

[redacted]

[redacted]

[redacted]

BR-1 # 10

STATE OF CONNECTICUT
Department of Labor
Employment Security Appeals Division
Board of Review
38 Wolcott Hill Road
Wethersfield, CT 06109
Telephone: (860) 566-3045 Fax: (860) 263-6977

IMPORTANTE - TENGA ESTO TRADUCIDO INMEDIATAMENTE - TIEMPO LIMITADO PARA APELAR

Claimant's Name:

S.S. #: ***********
Employer's Name, Address & Reg. No.

CITY OF NEW HAVEN
c/o Unemployment Ser. Corp.
P.O. Box 346
Wakefield, MA 01880-0746

E.R. #: ***********
Board Case No.: 340-BR-17
Referee Case No.: 75-CC-17

ctarmsGreyscale.jpg

Date mailed to interested parties: May 26, 2017

DECISION OF THE BOARD OF REVIEW

I. CASE HISTORY AND JURISDICTION

The administrator ruled the claimant eligible for unemployment benefits effective November 27, 2016, and notified the employer of its chargeability on January 5, 2017. On January 10, 2017, the employer appealed the administrator's decision to the Waterbury office of the appeals division. The appeals division scheduled a hearing of the appeal for February 14, 017, in which the claimant and employer participated. By a decision issued on February 22, 2017, Associate Appeals Referee Anita M. Weeks reversed the administrator's ruling.

The claimant filed a timely appeal to the board of review on March 15, 2017. Acting under authority contained in General Statutes § 31-249, we have reviewed the record in this appeal, including the recording of the referee's hearing.

II. DECISION ON THE CLAIMANT'S REQUEST FOR A FURTHER EVIDENTIARY HEARING

In support of this appeal from the referee's decision, the claimant requests a further hearing at which his union-appointed attorney can participate to better present his case.

Although any party to an unemployment compensation proceeding has the right to be represented by an agent or an attorney pursuant to General Statutes § 31-272(b)(2), we do not provide a second hearing to a party who fails to obtain legal representation for the original hearing and thereafter alleges that representation is necessary. See Regs., Conn. State Agencies § 31-237g-11(a). Advisements regarding the claimant's right to representation were included in the flyer entitled, "*Essential Information about the Referee's Hearing,*" which was attached to the referee's hearing notice, and in the booklet "*An Employer's Guide to the Appeal Process.*" Therefore, we find that the claimant was adequately notified of his right to legal representation, and we do not find that he is entitled to an additional opportunity to be heard on this basis.

We deny the claimant's request for an evidentiary hearing because he has failed to show, pursuant to Section 31-237g-40 of the Regulations of Connecticut State Agencies, that the ends of justice require that the board receive additional evidence or testimony in order to adjudicate the appeal.

III. ISSUES

The referee ruled that the employer discharged the claimant for wilful misconduct in the course of his employment, and thus the claimant was disqualified from receiving unemployment compensation benefits. In support of its appeal from the referee's decision, the claimant reiterates the contentions that he raised at the referee's hearing. Specifically, he reiterates that he was not disciplined after his second positive drug test, that he was led to believe that the employer was "making an exception" for him, and that he was not required to hold a valid commercial driver's license (CDL), despite his job description. He further contends that he is currently in arbitration to get his job back.

The issues before the board are whether the employer discharged the claimant for wilful misconduct in the course of the employment or because he was disqualified under state or federal law from performing the work for which he was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with law.

IV. PROVISIONS OF LAW

Section 31-236(a)(2)(B) of the General Statutes provides that an individual shall be ineligible for benefits if he or she was discharged or suspended for wilful misconduct in the course of employment. Section 31-236(a)(16) of the General Statutes, as amended, defines wilful misconduct, for purposes of the Connecticut Unemployment Compensation Act, as: deliberate misconduct in wilful disregard of the employer's interests, or a single, knowing violation of a reasonable and uniformly enforced rule or policy of the employer, when reasonably applied, provided such violation is not the result of the employee's incompetence.

Section 31-51x of the General Statutes provides that, unless a random drug test is authorized under federal law, the employee serves in an occupation which has been designated as a high-risk or safety-sensitive occupation by the Labor Commissioner, or the test is conducted as part of an employee assistance program in which the employee voluntarily participates, no employer may require a urinalysis drug test unless the employer has a reasonable suspicion that the employee is under the influence of drugs or alcohol which adversely affects or could adversely affect such employee's job performance.

Section 21a-408p(b)(3) of the General Statutes provides that, u**nless required by federal law or required to obtain federal funding no employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under sections 21a-408 to 21a-408n, inclusive. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.**

Section 31-236(a)(14) of the General Statutes provides that a claimant is disqualified from receiving unemployment compensation benefits if it is found that he or she has been discharged or suspended because he or she has been disqualified under state or federal law from performing the work for which he or she was hired as a result of a drug or alcohol testing program mandated by and conducted in accordance with such law.

V. ANALYSIS AND CONCLUSIONS OF LAW

Preliminarily, the claimant has alleged throughout these proceedings that the employer condoned his decision to downgrade his license from a CDL to a regular driver's license in an effort to avoid submitting to further drug tests. However, the claimant admitted that his job description required him to maintain a valid CDL. Even if the claimant reported the status of his driver's license to his supervisors, we have distinguished between situations where the claimant truly believes that the employer tolerates certain conduct and will not discharge employees for particular conduct, from a situation in which the claimant knows that a supervisor is also engaging in conduct which would be unacceptable to the employer. See, e.g., *Akhtar v. Lens Crafters, Inc.*, Board Case No. 366-BR-02 (4/3/02); see also *Benoit v. Bob's Discount Furniture, LLC.*, Board Case No. 480-BR-08 (5/22/08).

Jeff Pescosolido, the employer's director of public works, testified that he and other members of management had no knowledge that he had downgraded his license. Pescosolido further testified that maintaining a CDL is a requirement of the claimant's position, and he would have charged him with violating his union agreement and pursued a discharge for this violation through the City of New Haven's labor relations department if he had known that the claimant given up his commercial endorsement. Although Pescosolido acknowledged that some employees working as laborers were not required to maintain CDL's, he explained that this exception was limited to a small group of long-standing employees who were grandfathered in under an older version of the claimant's job description that did not require a CDL. There were no other exceptions made for employees working as laborers. Therefore, we do not find that the employer condoned the claimant's decision to downgrade his license.

Under General Statutes § 31-236(a)(4), the employer must prove: (a) that the positive drug test was required to be conducted under state or federal law, (b) that the federal pre-conditions for testing were met, i.e. the testing was done under circumstances meeting the federal conditions for random, reasonable suspicion, return-to-duty follow-up; and post-accident testing and was pursuant to a policy that satisfies the minimum requirements articulated in the federal regulations; and (c) the testing procedures were in accordance with the federal regulations. See *Howell v. City* of Bridgeport, Board Case No. 1396-BR-96 (4/22/97). Where the employer provides the custody and control forms designated in the federal regulations, the test is performed by a certified laboratory, and the medical review officer certifies that he has reviewed the chain of custody and test results in accordance with federal requirements, we have found the test was conducted in accordance with federal law and that the results are accurate. *Id.*

Under federal law, a "driver" subject to drug and alcohol testing is defined as "any person who operates a commercial motor vehicle. This includes, but is not limited to full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent owner operator contractors." 14 C.F.R. § 382.107. Federal law requires that employers randomly drug and alcohol test all persons who operate commercial motor vehicles in their employ. See 49 C.F.R. §§ 382.103 and 382.305 (mandating drug testing of "commercial motor vehicle" drivers); see also General Statutes § 14-261b(b)(1).

Title 49 C.F.R. § 40.137(d) provides that if a medical review officer (MRO) determines that there is a legitimate medical explanation for a positive test result, the MRO must verify the test result as negative. In determining whether a legitimate medical explanation exists, there can be a legitimate medical explanation only with respect to a substance that has a legitimate medical use. See 49 C.F.R. § 40.137(e)(2). Title 49 C.F.R. §40.151(e) specifically states that an MRO is prohibited from verifying a test negative based on information that a physician recommended that the employee use a drug listed in Schedule I of the Controlled Substances Act. (e.g., under a state law that purports to authorize such recommendations, such as the "medical marijuana" laws that some states have adopted). Use of a drug of abuse (e.g., heroin, PCP, marijuana) or any other substance that cannot be viewed as having a legitimate medical use can never be the basis for a legitimate medical explanation, even if the substance is obtained legally in a foreign country. *Id.* The employee has the burden of proof that a legitimate medical explanation exists and must present information meeting this burden at the time of the verification

interview. See 49 C.F.R. § 40.137(c).

Section 21a-408p, *et seq*, of the General Statutes provides for the palliative use of marijuana, prescribed by a physician, for the treatment of a debilitating medical condition by a qualifying patient. Section 21a-408p(b)(3) of the General Statutes provides, in relevant part, that, unless required by federal law or required to obtain federal funding, no employer may discharge an employee *solely* on the basis of such person's or employee's status as a qualifying patient. (Emphasis added.)

In the case before us, the claimant was employed as a refuse laborer and was required to maintain a commercial driver's license (CDL) as part of his job description. As a result, he was subject to random drug testing pursuant to the Title 49 C.F.R §§ 382.103 and 382.305.[1] The claimant acknowledged receiving the employer's drug testing policy upon hire. On November 9, 2016, the claimant was selected at random for a drug test, which was performed, recorded and reported in accordance with the federal regulations. The sample provided by the claimant tested positive for marijuana. On November 14, 2016, the MRO confirmed the positive test result. The claimant did not dispute the manner in which the test was conducted, and admitted that he had consumed marijuana, which led to the positive test result. Despite the fact that the claimant consumed marijuana pursuant to a valid state law, t**he employer discharged him because the positive drug test disqualified the claimant under federal law from performing the job for which he was hired.**

In *Owen v. City of Bridgeport,* Board Case No. 607-R-98 (1/23/98), the board determined that the plain language of General Statutes § 31-236(a)(14)requires a finding of ineligibility in any case where a claimant who is subject to mandated testing is disqualified from performing his work as the result of a positive drug test. In *Owen*, the federal regulations mandated his removal from safety-sensitive duties after he tested positive. See 49 C.F.R. 382.215 (1995); see also *Catalano v. M&J Bus, Inc.*, Board Case No. 1566-BR-12 (10/2/12)(board found claimant disqualified pursuant to General Statutes § 31-236(a)(14)even where claimant did not knowingly ingest cocaine). The board has also specifically held that drug or alcohol addiction is not a defense under General Statutes § 31-236(a)(14). See *Davila v. City of Bridgeport,* Board Case No. 717-BR-97 (5/30/97); See *Kelly v. Sikorsky Aircraft Corp*., Board Case No. 315-BR-99 (3/30/99).

It is undisputed **that the claimant in the case before us has been designated by his physician as a qualifying patient suffering from a debilitating medical condition and that he was prescribed medical marijuana in accordance with General Statutes §** 21a-408p. **The claimant has not alleged that the employer's decision to terminate his employment was based solely on his status as a qualifying patient, and did not dispute that the employer discharged him for failing a third urinalysis drug test.** The relevant federal regulations also specifically prevent the MRO's from **verifying the claimant's drug test as "negative" because his provider prescribed a drug listed in Schedule I of the Controlled Substances Act.**

Because the claimant could not perform the part of his job that included driving a commercial motor vehicle due to a positive drug test, we conclude that he is disqualified under General Statutes § 31-236(a)(14) from performing the work for which he was hired. In so ruling, we adopt the referee's findings of fact as our own.

VI. DISPOSITION AND ORDER

The referee's decision is affirmed, as modified, and the appeal is dismissed. The claimant is disqualified from receiving unemployment compensation benefits effective November 20, 2016, if otherwise eligible.

BOARD OF REVIEW

_____

Lynne M. Knox, Chair,
ES Board of Review

In this decision, Board Member David W. Kiner concurs.

LMK:ECC:dm

IF YOU WISH TO APPEAL THIS DECISION, YOU MUST DO SO BY JUNE 26, 2017. SEE LAST PAGE FOR IMPORTANT INFORMATION REGARDING YOUR APPEAL RIGHTS.

COPIES OF THIS DECISION PROVIDED TO:

BENEFIT PAYMENT CONTROL UNIT
Department of Labor
200 Folly Brook Boulevard
Wethersfield, CT 06109

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[1] **We note that a government employer, including a municipal employer, is technically exempted from the drug-testing provisions of General Statutes §§ 31-51t to 31-51aa, pursuant to General Statutes § 31-51t(2), which defines a covered employer as "any individual, corporation, partnership or unincorporated association, excluding the state or any political subdivision thereof." However, 49 C.F.R. provides that Part 382.109 preempts state law to the extent that compliance with both the state and federal regulations is not possible; or compliance with the state requirement is an obstacle to the accomplishment and execution of any requirement of federal law. Therefore, Federal Highway Administration (FHWA) regulations are clearly controlling in this case. See *Walsh v. Dept. of Trans. - St. of CT.*, Board Case No. 621-BR-98 (9/10/98).**

Quit b/c of legal marijuana use in workplace

CERTIFICATE OF SERVICE
I certify that I mailed a copy of this d sion to the within named interested parties at their c ge addresses, postage prepaid, on May 04, 2018

Representative, Commissioner's Review Office
Employment Security Department

UIO: 770
BYE: 11/24/2018

BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON

Review No. 2018-0810

In re:

Docket No. 033541

MARK A. PRICE
SSA No. 539-76-6558

DECISION OF COMMISSIONER

On April 12, 2018, MARK A. PRICE petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on March 26, 2018. The employer's reply was filed on April 30, 2018. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record (including the audio recording of the hearing) and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we adopt the Office of Administrative Hearings' findings of fact and conclusions of law, and enter the following.

Responding to the Petition for Review, having carefully reviewed the entire record in this matter, we can find no basis for setting aside the administrative law judge's decision. We agree with the administrative law judge that claimant did not have good cause to quit under RCW 50.20.050(2)(b) because he was dissatisfied with how management and a co-worker treated him. However, his petition raises points not addressed in the Initial Order, which we will now address.

Under the Employment Security Act, Title 50 RCW, a claimant who voluntarily quits employment is disqualified from unemployment benefits unless his or her quit is with good cause. See RCW 50.20.050(2)(a). Good cause is defined by statute and is limited to eleven specific circumstances listed at RCW 50.20.050(2)(b). A claimant can establish good cause for quitting only if he or she establishes one of the circumstances set forth in RCW 50. 20.050(2)(b). In re

Campbell v. Dept. of Employment Security, 174 Wn. App 210 (2013). Good cause must be established by a preponderance of evidence. *See* In re Christie, Empl. Sec, Comm'r Dec.2d 262 (1976). "Preponderance of evidence" is that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighted against the evidence in opposition thereto. *See* WAC 192-100-065.

In addition to quitting because of how management and a co-worker treated him, claimant asserts that he quit because of his concern over marijuana use by co-workers and the potential safety issues caused by that use. Claimant reported his concerns to the employer, but the employer did not take any action. Claimant's assertions raise the possible application of these provisions for establishing good cause to quit: RCW 50.20.050(2)(b)(viii) – deterioration of worksite safety and RCW 50.20.050(2)(b)(ix)-illegal activities at the worksite.

Addressing illegal activities, RCW 50.20.050(2)(b)(ix) and WAC 192-150-135 specify the conditions a claimant must meet to establish good cause for voluntarily quitting because of illegal activities in the claimant's worksite. We take official notice that the use of and possession of recreational marijuana is allowed. *See* Washington Uniform Controlled Substances Act (WUSCA), RCW 69.50 *et. seq.* However, the use of and possession of recreational marijuana is unlawful under certain circumstances, including consumption either in view of the general public or in a public place. RCW 69.50.445(1). A "public place' includes places " lobbies, halls and dining rooms of hotels, restaurants" and places "to which the general public has unrestricted right of access, and which are generally used by the public." RCW 66.04.010(36).

The evidence in this case fails to show the employer has a workplace policy prohibiting the use of marijuana at work. Claimant also failed to present any evidence showing his co-worker's were engaged in an illegal use of marijuana under the law (public use, for example). Therefore, he has not established good cause for quitting under RCW 50.20.050(2)(b)(ix).

Next, addressing claimant's safety concerns, under RCW 50.20.050(2)(b)(viii), an individual is not disqualified from benefits for voluntarily quitting work if the individual's worksite safety deteriorated, the individual reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time. See also WAC 192-150-130. More specifically, a claimant must be willing to face the normal risks of his or her occupation, but need not be exposed to unsafe conditions caused by the actions of the employer. A quit in order to avoid working in conditions known to be unsafe and in violation of reasonable

operating practices and regulations may constitute good cause to quit. In re Crawford, Empl. Sec. Comm'r Dec. 2d 777 (1986). Good cause for voluntarily leaving work is established if a reasonably prudent person could conclude that the work presents a risk to safety beyond the basic nature of work.

The preponderance of evidence in this case does not show that claimant faced a deterioration of safety such that a reasonably prudent person would be compelled to quit. Claimant worked as a laborer in the employer's landscape business. Claimant did not present any particular event which caused a deterioration of safety or any specific safety issues other than sometime marijuana use by co-workers. As noted above, non-public marijuana use is not illegal, and the employer appeared not to have a workplace policies prohibiting marijuana use at work. Claimant has not established good cause for quitting due to a deterioration of safety under RCW 50.20.050(2)(b)(viii).

Allegations set forth by claimant in his petition notwithstanding, the preponderance of substantial credible evidence fails to show claimant quit for one of the good cause reasons listed at RCW 50.20.050(2)(b). In so concluding, we do not question claimant's decision or motivation to quit his job, but do hold the evidence does not support a qualification for benefits. The list of good causes to quit at RCW 50.20.050(2)(a) is exhaustive and not subject to expansion. Darkenwald v. ESD, 183 Wash.2d 237, 350 P.3d 647 (2015). The administrative law judge's findings and decision are supported by substantial evidence of record.

Now, therefore,

IT IS HEREBY ORDERED that the March 26, 2018 Initial Order of the Office of Administrative Hearings is **AFFIRMED** on the issue of the job separation. Claimant is disqualified pursuant to RCW 50.20.050(2), beginning November 19, 2017, for seven calendar weeks and until he has obtained bona fide work in employment covered by Title 50 RCW and earned wages in that employment equal to seven times his weekly benefit amount. The Initial Order is **AFFIRMED** on the issue of availability. Claimant is not ineligible pursuant to RCW 50.20.010(1)(c) for the weeks at issue. *Employer*: If you pay taxes on your payroll and are a base year employer for this claimant, or become one in the future, your experience rating account will not be charged for any benefits paid on this claim or future claims based on wages you paid to this individual, unless this decision is set aside on appeal. *See* RCW 50.29.021.

///

Dated at Olympia, Washington, May 04, 2018.*

Rhonda J. Brown
Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a Petition for Reconsideration. No matter will be reconsidered unless it clearly appears from the face of the Petition for Reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty (20) days from the date the Petition for Reconsideration is filed. A Petition for Reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, WA 98507-9555, and to all other parties of record and their representatives. The filing of a Petition for Reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL REVIEW

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the Superior Court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such appeal is filed, the attached decision/order will become final. If you choose to file a judicial appeal, you must both:

Timely file your judicial appeal directly with the Superior Court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the Superior Court of Thurston County. *See* RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

Serve a copy of your judicial appeal by mail or personal service within the thirty (30) day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General, and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park Drive, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be

MARYLAND MEDICAL CANNABIS LAW

Updated as of September 2015. Section titles are not part of the law.
Addendum 1 includes additional provisions enacted in Ch. 403 of 2013, Ch. 256 of 2014, and Ch. 251 of 2015.
Addendum 2 is the text of Criminal Law section § 5-601 relating to the possession of controlled dangerous substances and affirmative defense of medical necessity, and Criminal Law § 5-620 relating to controlled paraphernalia.

Article -- Health – General.
Title 13. Miscellaneous Health Care Programs.

SUBTITLE 33. NATALIE M. LAPRADE MEDICAL CANNABIS COMMISSION.

§ 13-3301. Definitions.

(a) In this subtitle the following words have the meanings indicated.
(b) "Caregiver" means:
(1) A person who has agreed to assist with a qualifying patient's medical use of cannabis; and
(2) For a qualifying patient under the age of 18 years, a parent or legal guardian.
(c) "Certifying physician" means an individual who:
(1) Has an active, unrestricted license to practice medicine that was issued by the State Board of Physicians under Title 14 of the Health Occupations Article;
(2) Is in good standing with the State Board of Physicians;
(3) Has a State controlled dangerous substances registration; and
(4) Is registered with the Commission to make cannabis available to patients for medical use in accordance with regulations adopted by the Commission.
(d) "Commission" means the Natalie M. LaPrade Medical Cannabis Commission established under this subtitle.
(e) "Dispensary" means an entity licensed under this subtitle that acquires, possesses, processes, transfers, transports, sells, distributes, dispenses, or administers cannabis, products containing cannabis, related supplies, related products containing cannabis including food, tinctures, aerosols, oils, or ointments, or educational materials for use by a qualifying patient or caregiver.
(f) "Dispensary agent" means an owner, a member, an employee, a volunteer, an officer, or a director of a dispensary.
(g) "Fund" means the Natalie M. LaPrade Medical Cannabis Commission Fund established under § 13-3303 of this subtitle.
(h) "Grower" means an entity licensed under this subtitle that:
(1) (i) Cultivates, manufactures, processes, packages, or dispenses medical cannabis; or
(ii) Processes medical cannabis products; and
(2) Is authorized by the Commission to provide cannabis to a qualifying patient, caregiver, processor, dispensary, or independent testing laboratory.
(i) "Independent testing laboratory" means a facility, an entity, or a site that offers or performs tests related to the inspection and testing of cannabis and products containing cannabis.
(j) "Medical cannabis grower agent" means an owner, an employee, a volunteer, an

officer, or a director of a grower.
(k) "Processor" means an entity that:
(1) Transforms medical cannabis into another product or extract; and
(2) Packages and labels medical cannabis.
(l) "Processor agent" means an owner, a member, an employee, a volunteer, an officer, or a director of a processor.
(m) "Qualifying patient" means an individual who:
(1) Has been provided with a written certification by a certifying physician in accordance with a bona fide physician-patient relationship; and
(2) If under the age of 18 years, has a caregiver.
(n) "Written certification" means a certification that:
(1) Is issued by a certifying physician to a qualifying patient with whom the physician has a bona fide physician-patient relationship; and
(2) Includes a written statement certifying that, in the physician's professional opinion, after having completed an assessment of the patient's medical history and current medical condition, the patient has a condition:
(i) That meets the inclusion criteria and does not meet the exclusion criteria of the certifying physician's application; and
(ii) For which the potential benefits of the medical use of cannabis would likely outweigh the health risks for the patient; and
(3) May include a written statement certifying that, in the physician's professional opinion, a 30-day supply of medical cannabis would be inadequate to meet the medical needs of the qualifying patient.
HISTORY: 2013, ch. 43, § 5; ch. 403; 2014, chs. 44, 240, 256; 2015, ch. 251.

§ 13-3302. Commission established; purpose and duties, identification cards, Web site.
(a) There is a Natalie M. LaPrade Medical Cannabis Commission.
(b) The Commission is an independent commission that functions within the Department.
(c) The purpose of the Commission is to develop policies, procedures, guidelines, and regulations to implement programs to make medical cannabis available to qualifying patients in a safe and effective manner.
(d) (1) The Commission shall develop identification cards for qualifying patients and caregivers.
(2) (i) The Department shall adopt regulations that establish the requirements for identification cards provided by the Commission.
(ii) The regulations adopted under subparagraph (i) of this paragraph shall include:
1. The information to be included on an identification card;
2. The method through which the Commission will distribute identification cards; and
3. The method through which the Commission will track identification cards.
(e) The Commission shall develop and maintain a Web site that:
(1) Provides information on how an individual can obtain medical cannabis in the State; and

(2) Provides contact information for licensed dispensaries.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3303. Commission membership, staff, fees, fund.

(a) The Commission consists of the following 16 members:

(1) The Secretary of Health and Mental Hygiene, or the Secretary's designee; and

(2) The following 15 members, appointed by the Governor:

(i) Two members of the public who support the use of cannabis for medical purposes and who are or were patients who found relief from the use of medical cannabis;

(ii) One member of the public designated by the Maryland Chapter of the National Council on Alcoholism and Drug Dependence;

(iii) Three physicians licensed in the State;

(iv) One nurse licensed in the State who has experience in hospice care, nominated by a State research institution or trade association;

(v) One pharmacist licensed in the State, nominated by a State research institution or trade association;

(vi) One scientist who has experience in the science of cannabis, nominated by a State research institution;

(vii) One representative of the Maryland State's Attorneys' Association;

(viii) One representative of law enforcement;

(ix) An attorney who is knowledgeable about medical cannabis laws in the United States;

(x) An individual with experience in horticulture, recommended by the Department of Agriculture;

(xi) One representative of the University of Maryland Extension; and

(xii) One representative of the Office of the Comptroller.

(b)(1) The term of a member is 4 years.

(2) The terms of the members are staggered as required by the terms provided for members on October 1, 2013.

(3) At the end of a term, a member continues to serve until a successor is appointed and qualifies.

(4) A member may not serve more than three consecutive full terms.

(5) A member who is appointed after a term has begun serves only for the rest of the term and until a successor is appointed and qualifies.

(c) The Governor shall designate the chair from among the members of the Commission.

(d) A majority of the full authorized membership of the Commission is a quorum.

(e) A member of the Commission:

(1) May not receive compensation as a member of the Commission; but

(2) Is entitled to reimbursement for expenses under the Standard State Travel Regulations, as provided in the State budget.

(f) The Commission may employ a staff, including contractual staff, in accordance with the State budget.

(g) The Commission may set reasonable fees to cover the costs of operating the Commission.

(h) (1) There is a Natalie M. LaPrade Medical Cannabis Commission Fund.

(2) The Commission shall administer the Fund.

(3) The Fund is a special continuing, nonlapsing fund that is not subject to § 7-302 of the State Finance and Procurement Article.

(4) The State Treasurer shall hold the Fund separately, and the Comptroller shall account for the Fund.

(5) The Fund shall be invested and reinvested in the same manner as other State funds, and any investment earnings shall be retained to the credit of the Fund.

(6) The Fund shall be subject to an audit by the Office of Legislative Audits as provided for in § 2-1220 of the State Government Article.

(7) The Comptroller shall pay out money from the Fund as directed by the Commission.

(8) The Fund consists of:

(i) Any money appropriated in the State budget to the Fund;

(ii) Any other money from any other source accepted for the benefit of the Fund, in accordance with any conditions adopted by the Commission for the acceptance of donations or gifts to the Fund; and

(iii) Any fees collected by the Commission under this subtitle.

(9) No part of the Fund may revert or be credited to:

(i) The General Fund of the State; or

(ii) Any other special fund of the State.

(10) Expenditures from the Fund may be made only in accordance with the State budget.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3304. Certifying physician registration, registration requirements, medical conditions, physician compensation, procedures.

(a) The Commission shall register as a certifying physician an individual who:

(1) Meets the requirements of this subtitle; and

(2) Submits application materials that meet the requirements of this subtitle.

(b) To be registered as a certifying physician, a physician shall submit a proposal to the Commission that includes:

(1) The reasons for including a patient under the care of the physician for the purposes of this subtitle, including the patient's qualifying medical conditions;

(2) An attestation that a standard patient evaluation will be completed, including a history, a physical examination, a review of symptoms, and other pertinent medical information; and

(3) The physician's plan for the ongoing assessment and follow-up care of a patient and for collecting and analyzing data.

(c) The Commission may not require an individual to meet requirements in addition to the requirements listed in subsections (a) and (b) of this section to be registered as a certifying physician.

(d) (1) The Commission is encouraged to approve physician applications for the following medical conditions:

(i) A chronic or debilitating disease or medical condition that results in a patient being admitted into hospice or receiving palliative care; or

(ii) A chronic or debilitating disease or medical condition or the treatment of a chronic or debilitating disease or medical condition that produces:

1. Cachexia, anorexia, or wasting syndrome;
2. Severe or chronic pain;
3. Severe nausea;
4. Seizures; or
5. Severe or persistent muscle spasms.

(2) The Commission may not limit treatment of a particular medical condition to one class of physicians.

(e) The Commission may approve applications that include any other condition that is severe and for which other medical treatments have been ineffective if the symptoms reasonably can be expected to be relieved by the medical use of cannabis.

(f) (1) A certifying physician or the spouse of a certifying physician may not receive any gifts from or have an ownership interest in a medical cannabis grower, a processor, or a dispensary.

(2) A certifying physician may receive compensation from a medical cannabis grower, a processor, or dispensary if the certifying physician:

(i) Obtains the approval of the Commission before receiving the compensation; and

(ii) Discloses the amount of compensation received from the medical cannabis grower, processor, or dispensary to the Commission.

(g) (1) A qualifying patient may be a patient of the certifying physician or may be referred to the certifying physician.

(2) A certifying physician shall provide each written certification to the Commission.

(3) On receipt of a written certification provided under paragraph (2) of this subsection, the Commission shall issue an identification card to each qualifying patient or caregiver named in the written certification.

(4) A certifying physician may discuss medical cannabis with a patient.

(5) (i) Except as provided in subparagraph (ii) of this paragraph, a qualifying patient or caregiver may obtain medical cannabis only from a medical cannabis grower licensed by the Commission or a dispensary licensed by the Commission.

(ii) A qualifying patient under the age of 18 years may obtain medical cannabis only through the qualifying patient's caregiver.

(6) (i) A caregiver may serve no more than five qualifying patients at any time.

(ii) A qualifying patient may have no more than two caregivers.

(h) (1) A certifying physician may register biennially.

(2) The Commission shall grant or deny a renewal of a registration for approval based on the physician's performance in complying with regulations adopted by the Commission.

HISTORY: 2014, chs. 240, 256; 2015, chs. 22, 251.

§ 13-3305. Annual report on physicians by Commission.

On or before January 1 each year, the Commission shall report to the Governor and, in accordance with § 2-1246 of the State Government Article, the General Assembly on physicians certified under this subtitle.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3306. Licensing medical cannabis growers, limitations on distribution, requirements, inspection, penalties.

(a)(1) The Commission shall license medical cannabis growers that meet all requirements established by the Commission to operate in the State to provide cannabis to:

(i) Processors licensed by the Commission under this subtitle;

(ii) Dispensaries licensed by the Commission under this subtitle;

(iii) Qualifying patients and caregivers; and

(iv) Independent testing laboratories registered with the Commission under this subtitle.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, the Commission may license no more than 15 medical cannabis growers.

(ii) Beginning June 1, 2018, the Commission may issue the number of licenses necessary to meet the demand for medical cannabis by qualifying patients and caregivers issued identification cards under this subtitle in an affordable, accessible, secure, and efficient manner.

(iii) The Commission shall establish an application review process for granting medical cannabis grower licenses in which applications are reviewed, evaluated, and ranked based on criteria established by the Commission.

(iv) The Commission may not issue more than one medical cannabis grower license to each applicant.

(v) A grower shall pay an application fee in an amount to be determined by the Commission consistent with this subtitle.

(3) The Commission shall set standards for licensure as a medical cannabis grower to ensure public safety and safe access to medical cannabis, which may include a requirement for the posting of security.

(4) Each medical cannabis grower agent shall:

(i) Be registered with the Commission before the agent may volunteer or work for a licensed grower; and

(ii) Obtain a State and national criminal history records check in accordance with § 13-3312 of this subtitle.

(5) (i) A licensed grower shall apply to the Commission for a registration card for each grower agent by submitting the name, address, and date of birth of the agent.

(ii) 1. Within 1 business day after a grower agent ceases to be associated with a grower, the grower shall:

A. Notify the Commission; and

B. Return the grower agent's registration card to the Commission.

2. On receipt of a notice described in subsubparagraph 1A of this subparagraph, the Commission shall:

A. Immediately revoke the registration card of the grower agent; and

B. If the registration card was not returned to the Commission, notify the Department of State Police.

(iii) The Commission may not register a person who has been convicted of a felony drug offense as a grower agent.

(6) (i) A medical cannabis grower license is valid for 4 years on initial licensure.

(ii) A medical cannabis grower license is valid for 2 years on renewal.

(7) An application to operate as a medical cannabis grower may be submitted in paper or electronic form.

(8) (i) The Commission shall encourage licensing medical cannabis growers that grow strains of cannabis, including strains with high cannabidiol content, with demonstrated success in alleviating symptoms of specific diseases or conditions.

(ii) The Commission shall encourage licensing medical cannabis growers that prepare medical cannabis in a range of routes of administration.

(9) (i) The Commission shall:

1. Actively seek to achieve racial, ethnic, and geographic diversity when licensing medical cannabis growers; and

2. Encourage applicants who qualify as a minority business enterprise, as defined in § 14-301 of the State Finance and Procurement Article.

(ii) Beginning June 1, 2016, a grower licensed under this subtitle to operate as a medical cannabis grower shall report annually to the Commission on the minority owners and employees of the grower.

(10) An entity seeking licensure as a medical cannabis grower shall meet local zoning and planning requirements.

(b) An entity licensed to grow medical cannabis under this section may provide cannabis only to:

(1) Processors licensed by the Commission under this subtitle;

(2) Dispensaries licensed by the Commission under this subtitle;

(3) Qualified patients;

(4) Caregivers; and

(5) Independent testing laboratories registered with the Commission under this subtitle.

(c)(1) An entity licensed to grow cannabis under this section may dispense cannabis from a facility of a grower licensed as a dispensary.

(2) A qualifying patient or caregiver may obtain medical cannabis from a facility of a grower licensed as a dispensary.

(3) An entity licensed to grow medical cannabis under this section may grow and process medical cannabis on the same premises.

(d) An entity licensed to grow medical cannabis under this section shall ensure that safety precautions established by the Commission are followed by any facility operated by the grower.

(e) The Commission shall establish requirements for security and the manufacturing process that a grower must meet to obtain a license under this section, including a requirement for a product-tracking system.

(f) The Commission may inspect a grower licensed under this section to ensure compliance with this subtitle.

(g) The Commission may impose penalties or rescind the license of a grower that does not meet the standards for licensure set by the Commission.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3307. Licensing medical cannabis dispensaries, application and review, requirements, reports, inspection, penalties, quarterly reporting to Commission.

(a) A dispensary shall be licensed by the Commission.

(b) To be licensed as a dispensary, an applicant shall submit to the Commission:

(1) An application fee in an amount to be determined by the Commission consistent with this subtitle; and

(2) An application that includes:

(i) The legal name and physical address of the proposed dispensary;

(ii) The name, address, and date of birth of each principal officer and each director, none of whom may have served as a principal officer or director for a dispensary that has had its license revoked; and

(iii) Operating procedures that the dispensary will use, consistent with Commission regulations for oversight, including storage of cannabis and products containing cannabis only in enclosed and locked facilities.

(c) The Commission shall:

(1) Establish an application review process for granting dispensary licenses in which applications are reviewed, evaluated, and ranked based on criteria established by the Commission; and

(2) Actively seek to achieve racial, ethnic, and geographic diversity when licensing dispensaries.

(d) (1) A dispensary license is valid for 4 years on initial licensure.

(2) A dispensary license is valid for 2 years on renewal.

(e) A dispensary licensed under this section or a dispensary agent registered under § 13-3308 of this subtitle may not be penalized or arrested under State law for acquiring, possessing, processing, transferring, transporting, selling, distributing, or dispensing cannabis, products containing cannabis, related supplies, or educational materials for use by a qualifying patient or a caregiver.

(f) The Commission shall establish requirements for security and product handling procedures that a dispensary must meet to obtain a license under this section, including a requirement for a product-tracking system.

(g) The Commission may inspect a dispensary licensed under this section to ensure compliance with this subtitle.

(h) The Commission may impose penalties or rescind the license of a dispensary that does not meet the standards for licensure set by the Commission.

(i)(1) Each dispensary licensed under this section shall submit to the Commission a quarterly report.

(2) The quarterly report shall include:

(i) The number of patients served;

(ii) The county of residence of each patient served;

(iii) The medical condition for which medical cannabis was recommended;

(iv) The type and amount of medical cannabis dispensed; and

(v) If available, a summary of clinical outcomes, including adverse events and any cases of suspected diversion.

(3) The quarterly report may not include any personal information that identifies a patient.

HISTORY: 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3308. Dispensary agent registration, registration card, termination, surrender of card and notice to State Police, disqualification if a felony drug conviction.

(a) A dispensary agent shall:

(1) Be at least 21 years old;

(2) Be registered with the Commission before the agent may volunteer or work for a dispensary; and

(3) Obtain a State and national criminal history records check in accordance with § 13-3312 of this subtitle.

(b) A dispensary shall apply to the Commission for a registration card for each dispensary agent by submitting the name, address, and date of birth of the agent.

(c)(1) Within 1 business day after a dispensary agent ceases to be associated with a dispensary, the dispensary shall:

(i) Notify the Commission; and

(ii) Return the dispensary agent's registration card to the Commission.

(2) On receipt of a notice described in paragraph (1) of this subsection, the Commission shall:

(i) Immediately revoke the registration card of the dispensary agent; and

(ii) If the registration card was not returned to the Commission, notify the Department of State Police.

(d) The Commission may not register an individual who has been convicted of a felony drug offense as a dispensary agent.

HISTORY: 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3309. Licensing Medical Cannabis Processors, requirements, inspection, penalties.

(a) A processor shall be licensed by the Commission.

(b) To be licensed as a processor, an applicant shall submit to the Commission:

(1) An application fee in an amount to be determined by the Commission in accordance with this subtitle; and

(2) An application that includes:

(i) The legal name and physical address of the proposed processor;

(ii) The name, address, and date of birth of each principal officer and director, none of whom may have served as a principal officer or director for a licensee under this subtitle that has had its license revoked; and

(iii) Operating procedures that the processor will use, consistent with Commission regulations for oversight, including storage of cannabis, extracts, and products containing cannabis only in enclosed and locked facilities.

(c) The Commission shall establish an application review process for granting processor licenses in which applications are reviewed, evaluated, and ranked based on criteria established by the Commission.

(d)(1) A processor license is valid for 4 years on initial licensure.

(2) A processor license is valid for 2 years on renewal.

(e) A processor licensed under this section or a processor agent registered under § 13-3310 of this subtitle may not be penalized or arrested under State law for acquiring,

possessing, processing, transferring, transporting, selling, distributing, or dispensing cannabis, products containing cannabis, related supplies, or educational materials for use by a licensee under this subtitle or a qualifying patient or a caregiver.
(f) The Commission shall establish requirements for security and product handling procedures that a processor must meet to obtain a license under this section, including a requirement for a product-tracking system.
(g) The Commission may inspect a processor licensed under this section to ensure compliance with this subtitle.
(h) The Commission may impose penalties or rescind the license of a processor that does not meet the standards for licensure set by the Commission.
HISTORY: 2015, ch. 251.

§ 13-3310. Processor agent registration, registration card, termination, surrender of card and notice to State Police, disqualification if a felony drug conviction.
(a) A processor agent shall:
(1) Be at least 21 years old;
(2) Be registered with the Commission before the agent may volunteer or work for a processor; and
(3) Obtain a State and national criminal history records check in accordance with § 13-3312 of this subtitle.
(b) A processor shall apply to the Commission for a registration card for each processor agent by submitting the name, address, and date of birth of the agent.
(c)(1) Within 1 business day after a processor agent ceases to be associated with a processor, the processor shall:
(i) Notify the Commission; and
(ii) Return the processor agent's registration card to the Commission.
(2) On receipt of a notice described in paragraph (1) of this subsection, the Commission shall:
(i) Immediately revoke the registration card of the processor agent; and
(ii) If the registration card was not returned to the Commission, notify the Department of State Police.
(d) The Commission may not register an individual who has been convicted of a felony drug offense as a processor agent.
HISTORY: 2015, ch. 251.

§ 13-3311. Independent testing laboratory, registration, regulation, inspection.
(a) The Commission shall register at least one private independent testing laboratory to test cannabis and products containing cannabis that are to be sold in the State.
(b) To be registered as an independent testing laboratory, a laboratory shall:
(1) Meet the application requirements established by the Commission;
(2) Pay any applicable fee required by the Commission; and
(3) Meet the standards and requirements for accreditation, inspection, and testing established by the Commission.
(c) The Commission shall adopt regulations that establish:
(1) The standards and requirements to be met by an independent laboratory to obtain a registration;

(2) The standards of care to be followed by an independent testing laboratory;
(3) The initial and renewal terms for an independent laboratory registration and the renewal procedure; and
(4) The bases and processes for denial, revocation, and suspension of a registration of an independent testing laboratory.
(d) The Commission may inspect an independent testing laboratory registered under this section to ensure compliance with this subtitle.
HISTORY: 2015, ch. 251.

§ 13-3312. Criminal history check of applicants.
(a) In this section, "Central Repository" means the Criminal Justice Information System Central Repository of the Department of Public Safety and Correctional Services.
(b) As part of an application to the Central Repository for a State and national criminal history records check, an applicant shall submit to the Central Repository:
(1) Two complete sets of legible fingerprints taken on forms approved by the Director of the Central Repository and the Director of the Federal Bureau of Investigation;
(2) The fee authorized under § 10-221(b)(7) of the Criminal Procedure Article for access to State criminal history records; and
(3) The processing fee required by the Federal Bureau of Investigation for a national criminal history records check.
(c) In accordance with §§ 10-201 through 10-228 of the Criminal Procedure Article, the Central Repository shall forward to the Commission and to the applicant the criminal history record information of the applicant.
(d) If an applicant has made two or more unsuccessful attempts at securing legible fingerprints, the Commission may accept an alternate method of a criminal history records check as permitted by the Director of the Central Repository and the Director of the Federal Bureau of Investigation.
(e) Information obtained from the Central Repository under this section shall be:
(1) Confidential and may not be redisseminated; and
(2) Used only for the registration purpose authorized by this subtitle.
(f) The subject of a criminal history records check under this section may contest the contents of the printed statement issued by the Central Repository, as provided in § 10-223 of the Criminal Procedure Article.
HISTORY: 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3313. Exemption from arrest, prosecution, or penalty; penalty for distributing, possessing, manufacturing, or using diverted cannabis.
(a) Any of the following persons acting in accordance with the provisions of this subtitle may not be subject to arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board, or be denied any right or privilege, for the medical use of cannabis:
(1) A qualifying patient:
(i) In possession of an amount of medical cannabis determined by the Commission to constitute a 30-day supply; or
(ii) In possession of an amount of medical cannabis that is greater than a 30-day

supply if the qualifying patient's certifying physician stated in the written certification that a 30-day supply would be inadequate to meet the medical needs of the qualifying patient;

(2) A grower licensed under § 13-3306 of this subtitle or a grower agent registered under § 13-3306 of this subtitle;

(3) A certifying physician;

(4) A caregiver;

(5) A dispensary licensed under § 13-3307 of this subtitle or a dispensary agent registered under § 13-3308 of this subtitle;

(6) A processor licensed under § 13-3309 of this subtitle or a processor agent registered under § 13-3310 of this subtitle; or

(7) A hospital, medical facility, or hospice program where a qualifying patient is receiving treatment.

(b) (1) A person may not distribute, possess, manufacture, or use cannabis that has been diverted from a qualifying patient, a caregiver, a licensed grower, or a licensed dispensary.

(2) A person who violates this subsection is guilty of a felony and on conviction is subject to imprisonment not exceeding 5 years or a fine not exceeding $ 10,000 or both.

(3) The penalty under this subsection is in addition to any penalties that a person may be subject to for manufacture, possession, or distribution of marijuana under the Criminal Law Article.

HISTORY: 2013, ch. 43, § 5; ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3314. Exclusions from protection of subtitle, vaporizing, discipline reporting not required, multiple licenses.

(a) This subtitle may not be construed to authorize any individual to engage in, and does not prevent the imposition of any civil, criminal, or other penalties for, the following:

(1) Undertaking any task under the influence of marijuana or cannabis, when doing so would constitute negligence or professional malpractice;

(2) Operating, navigating, or being in actual physical control of any motor vehicle, aircraft, or boat while under the influence of marijuana or cannabis;

(3) Smoking marijuana or cannabis in any public place;

(4) Smoking marijuana or cannabis in a motor vehicle; or

(5) Except as provided in subsection (b) of this section, smoking marijuana or cannabis on a private property that:

(i) 1. Is rented from a landlord; and

2. Is subject to a policy that prohibits the smoking of marijuana or cannabis on the property; or

(ii) Is subject to a policy that prohibits the smoking of marijuana or cannabis on the property of an attached dwelling adopted by one of the following entities:

1. The board of directors of the council of unit owners of a condominium regime; or

2. The governing body of a homeowners association.

(b) The provisions of subsection (a)(5) of this section do not apply to vaporizing cannabis.

(c) This subtitle may not be construed to provide immunity to a person who violates the

provisions of this subtitle from criminal prosecution for a violation of any law prohibiting or regulating the use, possession, dispensing, distribution, or promotion of controlled dangerous substances, dangerous drugs, detrimental drugs, or harmful drugs, or any conspiracy or attempt to commit any of those offenses.

(d) This subtitle may not be construed to require a hospital, medical facility, or hospice program to report to the Commission any disciplinary action taken by the hospital, medical facility, or hospice program against a certifying physician, including the revocation of privileges, after the registration of the certifying physician by the Commission.

(e) This subtitle may not be construed to prohibit a person from being concurrently licensed by the Commission as a grower, a dispensary, or a processor.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256; 2015, ch. 251.

§ 13-3315. Federal investigations or prosecutions, counsel fees, suspension of program.

(a) Notwithstanding § 12-315 of the State Government Article, a State employee who incurs counsel fees in connection with a federal criminal investigation or prosecution solely related to the employee's good faith discharge of public responsibilities under this subtitle is eligible for reimbursement of counsel fees as authorized by § 12-314 of the State Government Article.

(b) The Governor may suspend implementation of this subtitle on making a determination that there is a reasonable chance of federal prosecution of State employees for involvement with implementation of this subtitle.

HISTORY: 2013, ch. 403; 2014, chs. 240, 256.

§ 13-3316. Regulations.

On or before September 15, 2014, the Commission shall adopt regulations to implement the provisions of this subtitle.

HISTORY: 2014, chs. 240, 256.

# # #

Additional provisions follow:

ADDENDUM 1.

Additional provisions of Chapter 403 of 2013 (H.B. 1101) applicable to the Commission:

From Section 1:

Article – State Finance and Procurement

§ 6–226. (a) (2) (i) Notwithstanding any other provision of law, and unless inconsistent with a federal law, grant agreement, or other federal requirement or with the terms of a gift or settlement agreement, net interest on all State money allocated by the State Treasurer under this section to special funds or accounts, and otherwise entitled to receive interest earnings, as accounted for by the Comptroller, shall accrue to the General Fund of the State.

(ii) The provisions of subparagraph (i) of this paragraph do not apply to the following funds:

69. the Maryland Legal Services Corporation Fund;
70. Mortgage Loan Servicing Practices Settlement Fund**;** and
71. Natalie M. Laprade Medical Marijuana Commission Fund.

SECTION 2. AND BE IT FURTHER ENACTED, That the terms of the initial members of the Medical Marijuana Commission, established under Section 1 of this Act, shall expire as follows:
(1) four in 2015;
(2) four in 2016; and
(3) four in 2017.

SECTION 3. AND BE IT FURTHER ENACTED, That during fiscal year 2014, the Commission shall develop policies, procedures, regulations, and guidelines for implementation of this Act, including:
(a) the request for proposals;
(b) the application review process;
(c) the application renewal process;
(d) the inspection process;
(e) data requirements for participating programs;
(f) the annual report format; and
(g) the Commission's requirements for licensing, including security and the product–tracking system.

SECTION 4. AND BE IT FURTHER ENACTED, That on or before December 1, 2013, the Commission shall report to the Governor and, in accordance with § 2–1246 of the State Government Article, the General Assembly, on sources of funding for the implementation of the provisions of Section 1 of this Act and suggested fees to support the implementation of this Act beginning July 1, 2014.

SECTION 5. AND BE IT FURTHER ENACTED, That this Act [Chapter 403 of 2013 (H.B. 1101)] shall take effect October 1, 2013.

Approved by the Governor, May 2, 2013.

* * *

Additional provisions of Chapter 256 of 2014 (S.B. 923) applicable to the Commission:

SECTION 2. AND BE IT FURTHER ENACTED, That, on or before December 1 of any year in which the results of the Maryland Youth Behavior Survey are published, the Natalie M. LaPrade Medical Marijuana Commission shall report to the Senate Judicial Proceedings Committee, the Senate Education, Health and Environmental Affairs Committee, the House Judiciary Committee, and the House Health and Government Operations Committee, in accordance with § 2-1246 of the State Government Article, on any change in marijuana use by minors in Maryland.

SECTION 3. AND BE IT FURTHER ENACTED, That the Natalie M. LaPrade Medical Marijuana Commission shall study and report its recommendations, in accordance with § 2-1246 of the State Government Article, to the General Assembly on how to provide access to medical marijuana to veterans who are receiving treatment at a medical facility operating under the auspices of the United States Veterans Health Administration, the United States Department of Veterans Affairs, the Maryland Department of Veterans Affairs, or any other facility in the State certified by the United States Department of Veterans Affairs Medical Center.

SECTION 4. AND BE IT FURTHER ENACTED, That, on or before December 1, 2015, the Natalie M. LaPrade Medical Marijuana Commission shall report to the General Assembly, in accordance with § 2-1246 of the State Government Article, on the level of competition in the market for medical marijuana and:

(1) whether the supply of medical marijuana exceeds the demand, and, if so, whether the oversupply has caused the diversion of medical marijuana to persons not authorized by law to possess it; or

(2) whether the demand exceeds the supply, and, if so, whether additional medical marijuana grower licenses are necessary to meet the demand for medical marijuana by qualifying patients and caregivers issued identification cards under Title 13, Subtitle 33 of Health – General Article in an affordable, accessible, secure, and efficient manner.

SECTION 5. AND BE IT FURTHER ENACTED, That:

(a) The Natalie M. LaPrade Medical Marijuana Commission, in consultation with the Comptroller, shall study the taxation of medical marijuana and the impact that medical marijuana laws have had on banking and financial transactions in other states that have implemented medical marijuana laws.

(b) The study required under subsection (a) of this section shall include an examination of federal laws and policies related to the taxation of medical marijuana and banking and financial transactions affected by medical marijuana laws.

(c) On or before December 1, 2014, the Commission shall report its findings and recommendations to the General Assembly, in accordance with § 2-1246 of the State Government Article, regarding taxation of medical marijuana in this State and the impact of medical marijuana laws on banking and finance transactions.

SECTION 6. AND BE IT FURTHER ENACTED, That this Act [Chapter 256 of 2014 (S.B. 923)] shall take effect June 1, 2014.

Approved by the Governor, April 14, 2014.

* * *

Additional provision of Chapter 251 of 2015 (H.B. 490) applicable to the Commission:

SECTION 2. AND BE IT FURTHER ENACTED, That this Act [Chapter 251 of 2015 (H.B. 490)] is an emergency measure, is necessary for the immediate preservation of the public health and safety, has been passed by a yea and nay vote supported by three-fifths of all members elected to each of the two Houses of the General Assembly, and shall take effect from the date it is enacted.

Approved by the Governor, May 12, 2015.

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ADDENDUM 2.

CRIMINAL LAW
TITLE 5. CONTROLLED DANGEROUS SUBSTANCES, PRESCRIPTIONS, AND OTHER SUBSTANCES
SUBTITLE 6. CRIMES INVOLVING CONTROLLED DANGEROUS SUBSTANCES AND PARAPHERNALIA
PART I. PRIMARY CRIMES

§ 5-601. Possessing or administering controlled dangerous substance.

(a) Except as otherwise provided in this title, a person may not:

(1) possess or administer to another a controlled dangerous substance, unless obtained directly or by prescription or order from an authorized provider acting in the course of professional practice; or

(2) obtain or attempt to obtain a controlled dangerous substance, or procure or attempt

to procure the administration of a controlled dangerous substance by:

(i) fraud, deceit, misrepresentation, or subterfuge;

(ii) the counterfeiting or alteration of a prescription or a written order;

(iii) the concealment of a material fact;

(iv) the use of a false name or address;

(v) falsely assuming the title of or representing to be a manufacturer, distributor, or authorized provider; or

(vi) making, issuing, or presenting a false or counterfeit prescription or written order.

(b) Information that is communicated to a physician in an effort to obtain a controlled dangerous substance in violation of this section is not a privileged communication.

(c) (1) Except as provided in paragraphs (2) and (3) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 4 years or a fine not exceeding $ 25,000 or both.

(2) (i) Except as provided in subparagraph (ii) of this paragraph, a person whose violation of this section involves the use or possession of marijuana is subject to imprisonment not exceeding 1 year or a fine not exceeding $ 1,000 or both.

(ii) 1. A first violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $ 100.

2. A second violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $ 250.

3. A third or subsequent violation of this section involving the use or possession of less than 10 grams of marijuana is a civil offense punishable by a fine not exceeding $ 500.

4. A. In addition to a fine, a court shall order a person under the age of 21 years who commits a violation punishable under subsubparagraph 1, 2, or 3 of this subparagraph to attend a drug education program approved by the Department of Health and Mental Hygiene, refer the person to an assessment for substance abuse disorder, and refer the person to substance abuse treatment, if necessary.

B. In addition to a fine, a court shall order a person at least 21 years old who commits a violation punishable under subsubparagraph 3 of this subparagraph to attend a drug education program approved by the Department of Health and Mental Hygiene, refer the person to an assessment for substance abuse disorder, and refer the person to substance abuse treatment, if necessary.

(3) (i) 1. In this paragraph the following words have the meanings indicated.

2. "Bona fide physician-patient relationship" means a relationship in which the physician has ongoing responsibility for the assessment, care, and treatment of a patient's medical condition.

3. "Caregiver" means an individual designated by a patient with a debilitating

medical condition to provide physical or medical assistance to the patient, including assisting with the medical use of marijuana, who:

A. is a resident of the State;

B. is at least 21 years old;

C. is an immediate family member, a spouse, or a domestic partner of the patient;

D. has not been convicted of a crime of violence as defined in § 14-101 of this article;

E. has not been convicted of a violation of a State or federal controlled dangerous substances law;

F. has not been convicted of a crime of moral turpitude;

G. has been designated as caregiver by the patient in writing that has been placed in the patient's medical record prior to arrest;

H. is the only individual designated by the patient to serve as caregiver; and

I. is not serving as caregiver for any other patient.

4. "Debilitating medical condition" means a chronic or debilitating disease or medical condition or the treatment of a chronic or debilitating disease or medical condition that produces one or more of the following, as documented by a physician with whom the patient has a bona fide physician-patient relationship:

A. cachexia or wasting syndrome;

B. severe or chronic pain;

C. severe nausea;

D. seizures;

E. severe and persistent muscle spasms; or

F. any other condition that is severe and resistant to conventional medicine.

(ii) 1. In a prosecution for the use or possession of marijuana, the defendant may introduce and the court shall consider as a mitigating factor any evidence of medical necessity.

2. Notwithstanding paragraph (2) of this subsection, if the court finds that the person used or possessed marijuana because of medical necessity, the court shall dismiss the charge.

(iii) 1. In a prosecution for the use or possession of marijuana under this section, it is an affirmative defense that the defendant used or possessed marijuana because:

A. the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship;

B. the debilitating medical condition is severe and resistant to conventional medicine; and

C. marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition.

2. A. In a prosecution for the possession of marijuana under this section, it is an affirmative defense that the defendant possessed marijuana because the marijuana was intended for medical use by an individual with a debilitating medical condition for whom the defendant is a caregiver.

B. A defendant may not assert the affirmative defense under this subsubparagraph unless the defendant notifies the State's Attorney of the defendant's intention to assert the affirmative defense and provides the State's Attorney with all documentation in support of the affirmative defense in accordance with the rules of discovery provided in Maryland Rules 4-262 and 4-263.

3. An affirmative defense under this subparagraph may not be used if the defendant was:

A. using marijuana in a public place or assisting the individual for whom the defendant is a caregiver in using the marijuana in a public place; or

B. in possession of more than 1 ounce of marijuana.

(d) The provisions of subsection (c)(2)(ii) of this section making the possession of marijuana a civil offense may not be construed to affect the laws relating to:

(1) operating a vehicle or vessel while under the influence of or while impaired by a controlled dangerous substance; or

(2) seizure and forfeiture.

HISTORY: An. Code 1957, art. 27, § 287(a), (b), (e); 2002, ch. 26, § 2; 2003, ch. 21, § 1; ch. 442; 2011, ch. 215; 2012, chs. 193, 194; 2013, chs. 61, 62; 2014, ch. 158; 2015, ch. 351.

PART III. RELATED AND DERIVATIVE CRIMES

CRIMINAL LAW

§ 5-620. Controlled paraphernalia.

(a) Unless authorized under this title, a person may not:

(1) obtain or attempt to obtain controlled paraphernalia by:

(i) fraud, deceit, misrepresentation, or subterfuge;

(ii) counterfeiting a prescription or a written order;

(iii) concealing a material fact or the use of a false name or address;

(iv) falsely assuming the title of or representing to be a manufacturer, distributor, r authorized provider; or

(v) making or issuing a false or counterfeit prescription or written order; or

(2) possess or distribute controlled paraphernalia under circumstances which reasonably indicate an intention to use the controlled paraphernalia for purposes of illegally administering a controlled dangerous substance.

(b) Evidence of circumstances that reasonably indicate an intent to use controlled paraphernalia to manufacture, administer, distribute, or dispense a controlled dangerous substance unlawfully include the close proximity of the controlled paraphernalia to an adulterant, diluent, or equipment commonly used to illegally manufacture, administer, distribute, or dispense controlled dangerous substances, including:

(1) a scale;

(2) a sieve;
(3) a strainer;
(4) a measuring spoon;
(5) staples;
(6) a stapler;
(7) a glassine envelope;
(8) a gelatin capsule;
(9) procaine hydrochloride;
(10) mannitol;
(11) lactose;
(12) quinine; and
(13) a controlled dangerous substance.

(c) Information that is communicated to a physician to obtain controlled paraphernalia from the physician in violation of this subtitle is not a privileged communication.

(d)(1) Except as provided in paragraph (2) of this subsection, a person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 4 years or a fine not exceeding $ 25,000 or both.

(2) A person who violates this section involving the use or possession of marijuana is subject to imprisonment not exceeding 1 year or a fine not exceeding $ 1,000 or both.

HISTORY: An. Code 1957, art. 27, § 287(b), (d), (e); 2002, ch. 26, § 2.

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