

**MEDICAL MARIJUANA: IMPACT ON MOTOR CARRIERS
JUNE 13, 2014**

Background

As everyone will now be aware, Health Canada is no longer in the business of issuing licenses for individuals to possess or produce marijuana for medical purposes. Because they had concern the former program was too open to abuse (including hazards from home growth), the government is now regulating a commercial market of licensed producers responsible for the production and distribution of marijuana for medical purposes. The producers must meet extensive security and quality control requirements, and are responsible for distribution of the drug. Patients simply need a medical document from a licensed medical practitioner which will allow them to purchase marijuana directly from a licensed producer.

The number of people with Health Canada licenses under the previous program grew from about 500 in 2002 to almost 40,000 currently, and those numbers are expected to increase substantially under the new system. Interestingly enough, when the changes were announced in 2012, Health Canada stated they would treat marijuana like any other narcotic used for medical purposes. However, in a March 31, 2014 release their position changed substantially to say: "Marijuana is not an approved drug or medicine in Canada and has not gone through the necessary rigorous scientific trials for efficacy or safety. Health Canada does not endorse the use of marijuana, but the courts have required reasonable access to a legal source of marijuana for medical purposes". (Government of Canada News Release).

Safety Concerns

In the same release, Dr. Harold Kalant, with Smart Approaches to Marijuana Canada stated:

"As public health advocates, we stress the importance of making clear to the public and to policy makers that marijuana **is not a harmless drug, but an increasingly potent and addictive one that can harm school and work performance**, brain maturation in the fetus and the adolescent, mental health, **driving skills**, and can cause physical harm to the respiratory system and various other organs."

In other words, there are significant side effects associated with use not only with respect to negative health impacts, but certainly with respect to the skills needed to operate any vehicle, and in particular a commercial motor vehicle. Some proponents and unions have suggested "medical marijuana comes from a different part of the plant and is not impairing". In fact, it is the same drug and the only difference would be the level of THC in the crop. Studies have confirmed use contributes to decreased attention, impairs the user's ability to divide attention between two tasks, adversely affects short-term memory, hinders long term memory, reduces learning ability and increases the time needed to make decisions.

Psychomotor performance is highly impaired by marijuana use, which can reduce the ability to do things which require concentration, swift reactions and coordination such as driving or operating machinery; in combination with alcohol, the risk of accidents is greatly increased.

Perspective of the Medical Community

Physicians have expressed concerns with the lack of clinical trials demonstrating the need for, and safety of, medical marijuana. They are also wary of providing it to recreational users masquerading as patients. The Canadian Medical Association has argued doctors should not be asked to authorize a substance that has not been subjected to the same rigorous clinical trials and approvals as pharmaceuticals. However, Health Canada has made the doctors the "gate keeper" under these new regulations.

Note that the drug is not prescribed in the same way other medications are. A physician would 'authorize' use by completing a form that the individual can take to their Health Canada licensed grow op so they can then receive delivery of specific amounts on a regular basis through each month for the duration of their authorization period. Employers should also be aware there is no longer a list of symptoms or conditions that would allow authorization as was found under the previous regulations. There is no need to justify a serious medical condition – it is being authorized for such common medical conditions as arthritis and back pain. A number of occupational health physicians have advised that for none of these conditions is marijuana the drug of choice or the best choice.

As a result, a number of provincial medical associations and licensing bodies are issuing strong cautions and direction on what physicians under their jurisdiction are expected to do to officially authorize use, thereby potentially limiting the number of people with authorization to use. To fill the "void" when individuals can not find a supporting physician, the Medicinal Cannabis Resource Centre Inc. will serve out of town patients via Skype for a fee, and is setting up a slate of doctors willing to authorize from their own offices. So the expectation remains that there will be a dramatic increase in marijuana use.

Human Rights Considerations

As more and more people are authorized to use marijuana for a variety of medical conditions, employers will be faced with determining what their legal obligations are. Human rights legislation directs employers can not discriminate against someone because of a medical condition, and that there is a duty to accommodate the individual "up to undue hardship". The question is whether accommodation obligations extend to accommodating someone's choice of medication, particularly where use can have direct implications for the safe performance of the driver or other employees on a job site, as well as the impacts of their actions on the safety of others including the public.

There has been limited litigation to date which can provide any guidance on the employer's obligations in this area with respect to accommodating medical marijuana use and/or the medical condition that led to the authorization. And even if the worker with the positive result was referred for a Substance Abuse Professional assessment, the likelihood is that most would not be determined to be dependent. So the issue comes back to accommodation of their medical condition, not a dependency.

Two cases may provide some guidance to employers in safety-sensitive industries. When dealing with a medication issue in a safety-sensitive work environment, the BC Court of Appeal ruled that Human Rights legislation fits within the entire legal framework within which enterprises must function...including workers compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the law of negligence impacting clients/public etc. The Court said tribunals can not force non-compliance with some legal obligations in exchange for compliance with the human rights legislation. (Oak Bay Marine, 2002) In another case, the Alberta Court of Appeal ruled that extending human rights protections to situations resulting in placing the lives of others at risk flies in the face of logic. (KBR & Chiasson 2007) This case addressed whether there was a duty to accommodate a casual drug user.

Implications for Employers

In the case of a driver who is subject to the U.S. DOT regulations, whether based in Canada or the U.S., the regulations require any positive test to be reported as a positive. The regulations do not allow medical marijuana to be used as a valid medical explanation for a positive result. Therefore the employer would need to follow the post positive SAP referral and return to duty process to re-qualify for cross-border work. Clearly the follow-up testing requirements set out in the regulations would be impossible for the driver to meet if they were regularly using medical marijuana. And more to the point, would the employer be meeting health and safety obligations by returning the individual to driving duties?

In the case of non-regulated drivers and other workers, some MROs are following the DOT approach and will report a positive test even though the worker has "authorization" from a physician. Others have said they will overturn the lab result because of the medical link, but report a safety caution. Whether the employee advises the company they have authorization for use, or whether it comes to light as a result of a test – even for DOT regulated drivers - employers will still need to determine accommodation obligations under Canadian human rights law.

Clearly the individual is not safe to perform driving duties under any circumstance if they are using marijuana. But can they be assigned to other duties as part of an accommodation? For those in other positions with the company – employers need to determine if the individual is safe to do their job (Mechanical work? Dispatch? Administration?). If not, can they be assigned to alternative duties? In all cases, a decision is needed on what to do if there is no alternative assignment? It is not yet clear what "up to undue hardship" means in this situation. To this end, employers may need independent medical advice on possible work accommodation, hopefully from a doctor with occupational health background and not simply the doctor who authorized use. There are organizations setting up to provide that kind of advice.

Employers should ensure their own alcohol and drug policy is absolutely clear about a prohibition on the use of illicit drugs and alcohol in conjunction with work. They should also set out the requirement for responsible use of medications, and the requirement to use a safe alternative wherever available. Expect employees to consult with their physician or pharmacist regarding the side effects of medication use, and require them to advise the company of any need for modified work. From there, employers must determine if they can allow the employee to safely continue working in their regular job, or whether alternative work can be accommodated and for how long. In the case of medical marijuana use, it may well be that the authorizing physician offers no cautions, even for those operating vehicles and equipment, which is why a second, more knowledgeable medical opinion may be required. In addition, legal advice should be obtained regarding whether accommodation is possible and what that should look like.

Finally, employers should confirm with their benefits provider whether use is actually funded under their medication plan; in other words, does their provider consider authorized use of medical marijuana is covered under their plan.