FIGHTING THE TIDE:
OVERCOMING THE REBUTTABLE PRESUMPTION OF INTOXICATION IN THE AGE OF MARIJUANA

I. INTRODUCTION

Currently, the vast majority of states in the nation have enacted laws that legalize medical marijuana or recreational marijuana.[1] Among the purposes behind the laws permitting physicians to prescribe marijuana is the need for a less addictive alternative to opioids.[2] Because these laws have emerged in recent years, states are still adapting regulations to meet everyday realities presented by legal use and possession of marijuana within their jurisdiction.[3] Among the realities, states face is the ubiquity of marijuana use in workers.[4] Still, current tests used to detect delta-9-tetrahydrocannabinol ("THC")[5] are unable to determine impairment for workers' compensation.[6] Notwithstanding the lack of certainty in determining impairment based on THC

[1] *See* Practical Law Labor & Employment, State and Local Medical and Recreational Marijuana Laws Chart, Westlaw (last updated October 21, 2021) (showing that at least forty-one states have enacted some regulation affecting the ability to use medical marijuana and twenty states have enacted laws permitting recreational use of marijuana).

[2] *See* Amy L. Militich & Brendan Benson, More Acceptance, More Protection: The Legalization of Marijuana in the Workplace, 60 No.1 DRI For Def. 65, 2 (January 2018).

[3] *See* Kerry Cork, Recreational Marijuana, Tobacco, & the Shifting Prerogatives of Use, 45 S. Ill. U. L.J. 45, 46 (2020) (discussing the difficulties jurisdictions face with the legalization of marijuana and the differential treatment between marijuana and tobacco smokers).

[4] *See* David Evans, Recreational Marijuana and Employer Concerns about Driving, Job Performance & Safety, 1 Drug Testing Law, Tech. & Prac. § 1:18.30 (2021) (stating that after the legalization of recreational marijuana use in Washington and Oregon, reported marijuana use in those states rose 41%).

[5] THC is the abbreviated name for delta-9-tetrahydrocannabinol which is believed to be the active ingredient in marijuana.

[6] *See* Linda M. Callahan, Quantifying Drug Impairment - Marijuana, 32 Wash. Prac. Wash. DUI Prac. Manual § 3:5 (2020-2021 ed.).

levels, some states have established that the worker bears the burden of proving they were not impaired at the time of the accident when they test positive for THC.[7]

In contrast, the overarching purpose of enacting workers' compensation statutes was to provide injured workers with economic security when they sustained injuries arising out of and in the course of employment.[8] Put differently, legislatures across the country forced employers to internalize costs associated with working environments.[9] As a compromise, industry groups proposed workers' compensation statutes that limited liability for employers and lowered the threshold for access to compensability for workplace injuries.[10] When examining the public policy underlying workers' compensation statutes and the legal tests used to determine compensability once an injured worker tests positive for THC, states that require the injured worker to rebut the presumption of impairment forsake the purpose of workers' compensation statutes.

This paper first begins with the overarching public policy supporting workers' compensation statutes and marijuana legalization policies. Second, this paper critiques the standards used in states to preclude workers from compensability for their injuries when they test positive for marijuana. Finally, this paper recommends that states legalizing marijuana for

[7] *See Joseph v. Georgia Pacific L.L.C.*, 182 So.3d 163, 166-67 (La. App. 1st Cir. 2015) (reasoning that even though the decedent injured worker tested positive for THC thereby establishing the rebuttable presumption of intoxication, genuine issues of material fact precluded summary judgment below); *but see Tlumac v. High Bridge Stone*, 187 N.J. 567, 568-69 (2006) (holding that a valid intoxication defense against a claimant requires the employer to prove that intoxication is the sole cause of the injury-causing accident).

[8] *See Lyons v. Chittenden Central Supervisory Union*, 185 A.3d. 551, 555 (Vt. 2018) (stating that "[i]n exchange for no-fault liability, employers guarantee workers accidentally injured during the normal course of employment insurer-provided wage replacement and medical and other benefits.").

[9] *See Ward & Gow v. Krinsky*, 259 U.S. 503, 512-13 (1922).

[10] *See* Michael Duff, How the U.S. Supreme Court Deemed the Workers' Compensation System "Adequate" Without Defining Adequacy, 54 Tulsa L. Rev. 375, 404 (2019).

medicinal or recreational purposes amend their rebuttable presumption of intoxication laws to harmonize the purpose of workers' compensation and marijuana legalization statutes.

II. ENDING PROHIBITION OF CANNABIS AND THE INTERPLAY OF WORKERS' COMPENSATION.

A. The competing policies of workers' compensation and marijuana legalization laws.

When Congress enacted the Controlled Substances Act ("CSA") in 1970, congress proscribed the use of marijuana as a schedule one controlled substance.[11] Under the CSA, marijuana or its derivatives have no currently accepted medical use and remain federally proscribed.[12] Yet, twenty-six years later, California became the first state to legalize the medicinal use of marijuana by referendum.[13] Under California's Compassionate Use Act of 1996:

> [S]eriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.[14]

Since California's referendum in 1996, thirty-six states have legalized the medical use of marijuana, and seventeen states and the District of Columbia have legalized the recreational use

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[11] *See* 21 U.S.C. § 812(c)(10).

[12] *Compare* 21 U.S.C. § 812(c)(10) (placing "marihuana" on a schedule one list of controlled substances) *with* 21 U.S.C. § 812(b)(1)(B) (stating that items placed on the schedule one list of controlled substances have "no currently accepted medical use in treatment in the United States.").

[13] *See* Amy L. Militich & Brendan Benson, More Acceptance, More Protection: The Legalization of Marijuana in the Workplace, 60 No.1 DRI For Def. at 1.

[14] Cal. Health & Safety Code Ann. § 11362.5(b)(1)(A).

of marijuana.[15] According to Pew Research polling in 2021, over ninety percent of adults in the United States believe that medicinal and recreational marijuana should be legalized.[16] Among the reasons for people's support of medical and recreational marijuana are marijuana's medical utility and the ability for law enforcement to concentrate on other violations of the law.[17] Matching the flow of popular opinion, the enacted purpose of many of these laws and constitutional amendments was to provide access to the medical benefits associated with marijuana to those affected by serious medical issues.[18] Indeed, many states have labeled laws permitting the medical use of marijuana as "Compassionate Use Act[s]."[19]

B. Unlike Alcohol, detection of THC is distinct from detecting impairment.

Even though the tide of states moving towards the legalization of medical marijuana continues to rise, some states still treat marijuana use no different from illegal drugs and recently ingested alcohol for workers' compensation claims, despite their chemical and legal distinctions.

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[15] *See* Practical Law Commercial Transactions, Marijuana State Legal Status Charts: Overview, Westlaw (database updated October 1, 2021).

[16] *See* Katherine Schaeffer, 6 Facts about Americans and Marijuana, Pew Research Center (April 26, 2021), https://www.pewresearch.org/fact-tank/2021/04/26/facts-about-marijuana/ (last visited December 11, 2021).

[17] *See* Jefferey M. Jones, In U.S., Medical Aid Top Reason Why Legal Marijuana Favored, Gallup (June 12, 2019), https://news.gallup.com/poll/258149/medical-aid-top-reason-why-legal-marijuana-favored.aspx (last visited December 11, 2021) (reporting that eighty-six percent of respondents say they favor the legalization of marijuana because of its medical benefits).

[18] *See* N.M.S.A. § 26-2B-2 (declaring the purpose of New Mexico's medical marijuana law is "to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments."); F.S.A. Const. Art. X § 29(a)(1) (amending the Florida Constitution to permit the medical use of marijuana free from "criminal or civil liability or sanctions under Florida law.").

[19] *E.g.* Cal. Health & Safety Code Ann. § 11362.5(b)(1) (declaring the act permitting medical marijuana use the "Compassionate Use Act"); N.M.S.A. § 26-2B-2 (calling the law permitting the use of medical marijuana the "Lynn & Erin Compassionate Use Act"); ."); Fla. Stat. Ann. Const. Art. X § 29(4)(h) (West) (calling the centralized registration for lawful medical marijuana users the "compassionate use registry . . . ").

In marijuana, the active molecule in the plant is called delta-9 tetrahydrocannabinol ("THC"). Currently, urinalysis constitutes the most widely used method for detecting illicit drugs and THC in an employee's body.[20] These widely used urinalysis tests may detect THC in an individual's system from weeks and even months since the person last used marijuana.[21] Still, the longevity of detectable amounts of THC remaining in a person's system does not provide indicia of impairment.[22] In contrast, alcohol can be detected in a person's system only thirty minutes after being consumed.[23] This means that a person who ingested enough alcohol to register .08 in their blood-alcohol-content ("BAC") level, could only retain a detectable amount of alcohol in their system for the next eight hours after their urinalysis test.[24]

While detection of alcohol using current technology may provide more reliable evidence of recent alcohol use and impairment, there is currently no reliable analog for detecting marijuana impairment.[25] Even though many states have legalized marijuana for medicinal use, a sub-set of those states still treat the detection of THC in an injured worker's body identically to an individual who tested positive for alcohol or illegal drugs.[26]

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[20] *See* Ken Kulig, Interpretation of Workplace Tests for Cannabinoids, 13 J. Med. Toxicol. 106, 106-07 (September 2019).

[21] *See id.* at 108-09.

[22] *See id.* at 106.

[23] *See* Implementation Guidelines for Alcohol and Drug Regulations in Highway Transportation, U.S. Dept. of Transportation, Fed. Motor Carrier Safety Admin., Alcohol Fact-Sheet 4-11 (last accessed December 11, 2021).

[24] *See id.* at 4-12.

[25] *See* Stacy A. Hickox, Drug Testing of Medical Marijuana Users in the Workplace: An Inaccurate Test of Impairment, 29 Hofstra Lab. & Emp. L.J. 273, 276-77 (2012).

[26] *See e.g.* Fla. Stat. Ann. § 440.09(d)(3) (West 2003); 820 Ill. Comp. Stat. Ann. 305/11 § 11 (West 2019).

C. Critique of standards for determining whether an injured worker is intoxicated or impaired.

To that end, many jurisdictions preclude or diminish workers' compensation awards once the injured worker tests positive for THC and is subsequently deemed intoxicated.[27] For example, Florida's workers' compensation statute states:

> If the employee has, at the time of the injury, . . . ha[d] a positive confirmation of a drug as defined in this act, it is presumed that the injury was occasioned primarily by the intoxication of, or by the influence of the drug upon, the employee. If the employer has implemented a drug-free workplace, this presumption may be rebutted only by evidence that there is no reasonable hypothesis that the intoxication or drug influence contributed to the injury. In the absence of a drug-free workplace program, this presumption may be rebutted by clear and convincing evidence that the intoxication or influence of the drug did not contribute to the injury.[28]

For the presumption to apply, Florida's Health Care Administration promulgated chain of custody rules for the collected specimen.[29] If the employer does not follow Florida's chain of custody rules, then the employer may defend against the employee's claim by demonstrating that the "injury was occasioned primarily by the intoxication of the employee; by the influence of any drugs, barbiturates, or other stimulants not prescribed by a physician . . . ."[30]

Notwithstanding that Florida's chain of custody rules can provide insulation for the employer to defend against workers' compensation claims, the additional step of compliance through administrative rules provides little in the way for an injured worker's claim. For example, in *Brinson v. Hospital Housekeeping Services*, while the appellant was working, she

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[27] *See id.*

[28] Fla. Stat. Ann. § 440.09(7)(b).

[29] *See* Fla. Admin. Code § 59A-24.005.

[30] *See* Fla. Stat. Ann. § 440.09(3).

slipped and dislocated her shoulder.[31] She was transported from a hospital emergency waiting room by her supervisor to a medical clinic to provide urine for a urinalysis test.[32] Even though her supervisor testified that she showed no signs of impairment,[33] the workers' compensation commission of Florida determined that her positive drug test triggered the state's rebuttable presumption statute.[34] To rebut the presumption, the appellant presented two expert witnesses that testified that the appellant's positive drug tests were unrelated to her alleged impairment[35] and that it was "highly unlikely" that her previous drug use contributed to her injury.[36] Nevertheless, the court affirmed the workers' compensation commission's decision to deny benefits even though the appellant's witnesses severed the correlation between her positive urinalysis test and her alleged impairment.[37] The court reasoned that because the expert witnesses could not *conclusively* state that marijuana did not contribute to the appellant's injury, the appellant failed to rebut the statutory presumption.[38]

In Florida, even when an injured worker demonstrates that they did not show signs of impairment from eye-witnesses and sever the correlation between a positive drug test and contemporaneous impairment, injured workers may not overcome Florida's statutory

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[31] *See Brinson v. Hospital Housekeeping Services*, 263 So.3d 106, 108 (Fla. Dist. Ct. App. 2021).

[32] *See id.* at 108, 111, n.1.

[33] *See id.* at 110-11 (Makar, J. dissenting)

[34] *See id.* at 108.

[35] *See id.* at 108-09.

[36] *See id.* at 114, n.9 (Makar, J. dissenting).

[37] *See id.* at 109.

[38] *See id.* at 114, n.9 (Makar, J. dissenting) (emphasis added).

presumption of intoxication once they test positive for THC.[39] Based on the court's decision in *Brinson*, the statutory presumption in Florida creates a virtually irrebuttable presumption once the injured worker tests positive for THC.[40] Despite Floridians efforts to amend their state constitution to include the permissible use of medicinal marijuana,[41] Florida provides an example of embedding an asymmetric power relationship into a statute that disadvantages injured claimants.

Another example of the asymmetric power imbalance tipped against injured claimants can be found in *Allen v. Employbridge Holding Co.*, where an employee was working as a temporary worker at an industrial worksite.[42] While on an assignment from the temporary staffing agency that employed him, he was responsible for balancing one-ton conveyor belt parts with a strap while he operated a remote control crane to lift the part.[43] On the day of his accident, the employee was unable to keep the part from wobbling to his satisfaction so he tried to balance the part with his body as a counterweight.[44] After unsuccessfully balancing the part, he decided to lower the part but the heavy conveyor belt part fell quickly and landed on his hand, crushing his right thumb and index finger.[45] To lift the conveyor belt part from the employee's hand, a

[39] *See id.* at 109.

[40] *See id.* at 114, n.9 (Makar, J. dissenting).

[41] *See* Fla. Stat. Ann. § 440.09(7)(b).

[42] *See* Allen v. Employbridge Holding Co., 594 S.W.3d. 165, 166 (Ark. Ct. App. 2020).

[43] *See id.* at 166-67.

[44] *See id.* at 167.

[45] *See id.*

coworker had to use a forklift to raise the conveyor belt piece.[46] The coworker then drove the employee to the hospital where he was given morphine and other opiate pain killers.[47]

While receiving treatment for his hand, medical personnel administered a drug test.[48] The employee subsequently tested positive for marijuana.[49] After being discharged from employment due to his positive drug test, the injured employee filed for workers' compensation.[50] To rebut the presumption established by his positive drug test, the employee presented eye-witness testimony from his worksite team leader who saw the employee earlier in his shift and did not believe that the injured employee was intoxicated.[51] The injured employee's immediate supervisor also testified in the proceedings that he witnessed the employee throughout the injured employee's shift and stated that the employee "did not seem intoxicated at the time of the accident."[52]

To nullify the employee's rebuttal, the employer presented a different co-worker who testified that the injured employee's eyes were bloodshot but did not smell marijuana on the injured employee.[53] Even though this same co-worker admitted to using marijuana and not witnessing the accident, the co-worker attributed the accident to the injured employee's

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[46] *See id.*

[47] *See id.*

[48] *See id.*

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See id.* at 168.

[53] *See id.* at 168, n.1.

inattention.[54] The employer also included the work-site company human resources manager as a witness.[55] The work-site company human resources manager testified that the injured employee must have misjudged the momentum of the one-ton part as it was lifted in the air and that she had never seen another worker wobble the industrial conveyor belt part the way the injured employee did.[56] The human resources manager based her conclusion on the incident report that was submitted following the accident because she did not witness the accident.[57] Perhaps most consequential to the injured employee was that he asked twice not to have his blood drawn for his drug test while receiving treatment for his crushed hand.[58]

Despite winning his claim before the administrative law judge, a divided Workers' Compensation Commission of Arkansas overturned the administrative law judge's decision and the Arkansas Court of Appeals affirmed the Commission's judgment.[59] On appeal, the court held that there was substantial evidence for the Worker's Compensation Commission to overturn the administrative law judge's finding of fact and for the Commission to make their credibility determination of witnesses on the record.[60] The court reasoned that when there is conflicting

[54] *See id.*

[55] *See id.* at 168.

[56] *See id.*

[57] *See id.*

[58] *See id.*

[59] *See id.* at 167, 69.

[60] *See id.* at 169.

evidence presented before the finder of fact, the Commission has the prerogative to make credibility findings of witnesses as long as the decision is supported by substantial evidence.[61]

Similar to Florida, the Arkansas workers' compensation statute included a presumption of intoxication once an employee tests positive on a urinalysis test despite amending Arkansas's Constitution to include broad protections for medical marijuana users.[62] Here, the temporary staffing agency went on to use the affirmative defense of intoxication against the injured employee's claim.[63] Specifically, the Arkansas workers' compensation statute states that "[t]he presence of alcohol, illegal drugs, or prescription drugs used in contravention of a physician's orders shall create a rebuttable presumption that the injury or accident was substantially occasioned by the use of alcohol, illegal drugs, or prescription drugs used in contravention of physician's orders."[64] Dissimilar from Florida however, the Arkansas statute presumptively declares that "[e]very employee is deemed by his or her performance of services to have impliedly consented to reasonable and responsible testing by properly trained medical or law enforcement personnel for the presence of any of the aforementioned substances in the employee's body."[65] To overcome the presumption of intoxication in Arkansas, a claimant need

[61] *See id.* (citing *Lowe's Home Ctrs., Inc. v. Robertson*, 567 S.W.3d 899, 904-05 (Ark. Ct. App. 2019) which defined substantial evidence as "evidence that a reasonable mind might accept as adequate to support a conclusion.").

[62] *Compare* Fla. Stat. Ann. § 440.09(7)(b) *with* Ark. Code Ann. § 11-9-102(4)(B)(iv)(d) (West 2021) *and* Ark. Const. Amend. § 3(a) (2016).

[63] *See* Ark. Code Ann. § 11-9-102(4)(B)(iv)(d).

[64] *Id.*

[65] Ark. Code Ann. § 11-9-102(4)(B)(iv)(c); *but see Brinson v. Hospital Housekeeping Services*, 263 So.3d 106, 108 (Fla. Dist. Ct. App. 2021) (Makar, J. dissenting) (stating that "An employer without a [state prescribed drug-free workplace] program, of course, may conduct drug testing under state law . . . but it must comply with standards, such as the 'reason to suspect' requirement for drug-testing after a workplace injury.").

only prove by a preponderance of the evidence that the accident was not "substantially occasioned" by the use of illegal drugs.[66]

Illustrative of the power imbalance inherent in presumptions of intoxication, the Arkansas Workers' Compensation Commission overrode credibility determinations made by an administrative law judge concerning conflicting testimony.[67] The conflicting testimony included two individuals who did not witness the accident and could not testify to the injured employee's allegedly intoxicated demeanor before the accident against the injured employee's immediate supervisor who witnessed the accident and the injured employee's team leader who witnessed the injured employee's demeanor preceding the accident.[68]

Notwithstanding Arkansas's statutory command requiring only a preponderance of the evidence to rebut a presumption of intoxication at the time of a claimant's injury, the Arkansas Court of Appeals affirmed a decision that required a greater quantum of evidence.[69] In *Allen*, the comparative advantage of the witnesses presented by the claimant was still not enough to rebut the presumption of intoxication. There, the court affirmed the decision of a split Workers' Compensation Commission after a trier of fact determined otherwise.

In *Allen*, the employer maintained a strategic advantage over the claimant despite the questionable quality of their witnesses through the statutory presumption of intoxication. Assuming the claimant made a dubious request not to have blood withdrawn from his body while

[66] *See* Ark. Code Ann. § 11-9-102(4)(B)(iv)(d).

[67] *See Allen*, 594 S.W.3d. at 167.

[68] *See id.* at 167, 68.

[69] *See* Ark. Code Ann. § 11-9-102(4)(B)(iv)(d).

undergoing treatment for his crushed hand, the Commission and the Arkansas Court of Appeals imputed the claimant's credibility onto their eye-witnesses.

In comparison to the claimant in *Allen*, the claimant in *Manor v. Brimmage* tested positive for morphine and codeine after taking Tylenol #3, but, the presumption was not applied.[70] There, the claimant injured her back while picking up linens from the ground and reported the injury to her supervisor.[71] Immediately following the reported injury, the claimant took a urinalysis test.[72] After two days passed, the claimant went back to work to pick up her paycheck where she was informed that her urine was collected in an inappropriate container and she submitted to another urinalysis test.[73] Before submitting to the urinalysis test, the claimant told the administering nurse that her father gave her his Tylenol containing codeine the night of the accident to manage the pain in her back.[74] The subsequent urinalysis test came back positive for opiates and the administrative law judge held in favor of the claimant.[75] On appeal, the Arkansas Workers' Compensation Commission affirmed the administrative law judge and disregarded the positive drug result because of the two-day lapse and explanation for the existence of opiates in her urinalysis test.[76] The employer appealed the decision to the Arkansas

[70] *See* Manor v. Brimmage, 952 S.W.2d 170, 171 (Ark. Ct. App. 1997).

[71] *See id.*

[72] *See id.*

[73] *See id.*

[74] *See id.*

[75] *See id.*

[76] *See id.*

Court of Appeals and the Commission's decision was affirmed.[77] The court reasoned that aside from the positive urinalysis test containing morphine and codeine, the employer did not have any evidence of intoxication at the time of the injury and the claimant gave a credible explanation for the existence of codeine in her urine.[78] The court opined in dicta that "we do not think the presumption arises at all, but if it does, it has been effectively rebutted."[79]

To highlight the disparity, *Allen* and *Manor* illustrate the difference in treatment between a positive drug test for opiates and marijuana. Despite the necessity of a second drug test in *Manor*, opiates or derivatives of the drug can be detected in a person's urine up to three days after use.[80] Even though the claimant's urinalysis test detected that she had an opiate in her system within the time frame that included her injury, she was nevertheless victorious because the drug test did not reveal impairment at the time of the accident.[81] Yet, in *Allen*, the court held that a positive drug test sufficiently triggered the presumption of intoxication despite multiple eye-witnesses testifying that the claimant did not appear intoxicated both before and after the accident.[82] To be sure, the analysis used by the Arkansas Court of Appeals in *Manor* should have guided the Arkansas Workers' Compensation Commission and the claimant's appeal to the court of appeals in *Allen*. The precise issue between *Manor* and *Allen* is that biologically there is little

[77] *See id.* at 173.

[78] *See id.*

[79] *See id.*

[80] *See* John B. Stanbridge, Stephen M. Adams & Alexander P. Zotos, Urine Drug Screening: A Valuable Office Procedure, Amer. Family Phys. Vol.81, No. 5, 635, 638 (March 1, 2010).

[81] *See Manor*, 952 S.W.2d at 173.

[82] *See* Allen v. Employbridge Holding Co., 594 S.W.3d. 165, 168 (Ark. Ct. App. 2020).

difference between a positive urinalysis test when conducted moments after an accident or two days after, as long as the metabolized drug is detectable within proximity of the accident.

D. When a state implements rebuttable presumptions of intoxication in their workers' compensation statutes, they defeat the grand bargain.

Considering the public policy undergirding workers' compensation statutes,[83] the dearth of scientific methods for the detection of impairment for marijuana,[84] as well as the ubiquity of marijuana use and legalization efforts,[85] presumptive intoxication rules for workers' compensation claims deny injured workers otherwise justified benefits.[86] Workers' compensation is premised on the principle that the system is designed to spread risk and limit liability while increasing incentives for improving workplace safety.[87] Yet, nearly one fifth[88] of employees must internalize the risk of unsafe workplaces because of their past use of a legal substance in the states that impose rebuttable presumptions of intoxication upon a positive drug test. By instituting a rebuttable presumption of intoxication as well as compelling drug tests, employers externalize their operating costs and shift the cost onto society writ large.

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[83] *See* Duff, *supra*, note 10 at 404.

[84] *See* Hickox, supra, note 25 at 276-77.

[85] *See* Marijuana & Public Health: Data and Statistics, Centers for Disease Control (June 8, 2021) https://www.cdc.gov/marijuana/data-statistics.htm (last visited December 15, 2021) (stating that approximately eighteen percent of Americans reported using marijuana at least once in 2019); Sabina Morris, John Hudak & Chirstine Stenglein, State Cannabis Reform is Putting Social Justice Front and Center, Brookings Institution (April 16, 2021) https://www.brookings.edu/blog/fixgov/2021/04/16/state-cannabis-reform-is-putting-social-justice-front-and-center/ (last visited December 15, 2021).

[86] *See* Price B. Fishback, Long-term Trends Related to the Grand Bargain of Workers' Compensation, 69 Rutgers U. L. Rev. 1185, 1196 (2017) (discussing the longitudinal trends of workers' compensation statutes and the erosion of the program since its inception).

[87] *See id.* at 1189.

[88] *See* Marijuana & Public Health: Data and Statistics, Centers for Disease Control, *supra*, n.105.

Adding to the imbalance in favor of employers is their ability to further externalize costs through tort immunity granted by workers' compensation statutes.[89] What's more, the employer can also enjoy the benefits of a healthier workforce as a result of less addictive pain management medicine and potentially lower workers' compensation premiums by shifting away from opiate prescriptions.[90]

E. Potential arguments in favor of the rebuttable presumption of intoxication.

On the other hand, employers and their insurance carriers may simply argue that even if they agree with the aforementioned propositions, the cost of an employee's marijuana use is appropriately shifted onto the worker through the rebuttable presumption of intoxication because personal drug use has nothing to do with the employment relationship. After all, employees assume the risk of a positive drug test and the potential to forfeit workers' compensation when they use a proscribed substance. Thus, the grand bargain remains intact.

Here, the argument for the rebuttable presumption of intoxication is only half right. Specifically, the personal use of marijuana has nothing to do with the employment relationship. By imposing a presumption of intoxication on a positive drug test that does not detect impairment, the employer is privately regulating their employees' lives outside of work, time the employer does not pay for. In effect, the presumption of intoxication acts as a one-way ratchet

[89] *See* Emily A. Spieler, (Re)Assessing the Grand Bargain: Compensation for Work & Injuries in the United States, 1900-2017, 69 Rutgers U. L. Rev. 891, 909-10 (2017).

[90] *See* Lewis v. American Gen. Media, 355 P.3d 850, 855 (N.M. Ct. App. 2015) (finding that the claimant was taking Oxycontin, oxycodone, Soma, Norflex, gabapentin, Lyrica, Percocet, fentanyl, and Zantac for pain management and that medical marijuana would reduce claimant's reliance on narcotic medications making the medical marijuana both reasonable and necessary care).

where an employer may penalize an employee for what they do in their personal time without valuable consideration.

Moreover, eliminating the presumption of intoxication does not preclude the employer from denying a claim because the employee was impaired and that the impairment was the proximate cause of the accident that led to the injury. Instead, the elimination of the presumption would put injured employees on a less unequal footing when adjudicating their workers' compensation claims. Eliminating the presumption of intoxication would not eliminate the need for drug tests either. A positive drug test may be a factor that the finder of fact could consider, but should not be dispositive in the disposition of the claim.

F. The employer should prove impairment for a valid denial of workers' compensation.

States like Florida and Arkansas could learn from states such as New Mexico concerning both the utility of medical marijuana in pain management for injured workers and the affirmative defense of impairment. In New Mexico, workers are precluded from workers' compensation benefits "in the event such injury was willfully suffered by the worker or intentionally inflicted by the worker."[91] To invoke the affirmative defense of intoxication, courts in New Mexico require that an employer must prove "(1) that the worker was intoxicated at the time of his or her accident, and (2) that such intoxication was a proximate cause of the resulting injury."[92] Moreover, the employer does not have to use medical expert testimony to prove that intoxication was a proximate cause of the accident.[93]

[91] *See* N.M. Stat. Ann. § 52-1-11(West 2016).

[92] *See* Estate of Mitchum v. Triple S Trucking, 832 P.3d 327, 331-32 (N.M. Ct. App. 1991).

[93] *See id.* at 90.

1. *The utility of providing medical marijuana to injured workers as a reasonable and necessary treatment.*

Under New Mexico's workers' compensation statute, the affirmative defense of intoxication is placed on the employer to prove intoxication as opposed to states imposing a rebuttable presumption that workers must disprove. In New Mexico, the burden of proof is on the party invoking the affirmative defense as opposed to a medical test establishing the rebuttable presumption against the injured employee.

In addition to New Mexico's placement of the burden of proof, New Mexico also permits workers' to use medical marijuana as a reasonable and necessary medical healthcare as contemplated under the workers' compensation statute.[94] In 2014, the New Mexico Court of Appeals became the first state in the nation to permit injured workers under the workers' compensation system to receive treatment through medical marijuana.[95] A year later, the New Mexico Court of Appeals decision in *Vialpando* recognized the utility of marijuana as a pain management tool for injured workers' when it recognized that the claimant was on nine different narcotic pain medications and that medical marijuana could reduce the claimant's reliance on them with the use of medical marijuana.[96]

In contrast to New Mexico's requirement to reimburse injured workers for their medically prescribed marijuana, in *Peters v. Southern Drilling*, Florida's Workers' Compensation Commission Division of Administrative Hearings granted a costly pain pump to a

[94] *See Lewis*, 355 P.3d at 855.

[95] *See* Vialpando v. Ben's Automotive Services, 331 P.3d 975, 976 (N.M. Ct. App. 2014).

[96] *See Lewis*, 355 P.3d at 855-56.

claimant because of their opiate addictions.[97] The claimant was injured while operating heavy machinery and as a result, underwent three separate surgeries to his back including a fusion of his lumbar.[98] The claimant was attempting to recover from his opiate addiction but because of injuries suffered at work, he was unable to responsibly use prescribed opiate medications.[99] At times, he had to give his medication to his mother so that he would refrain from using the medication irresponsibly.[100] However, he admitted to harassing his mother until she would relent and give him his pain medication.[101] Instead of furthering his addiction, he requested that a pain pump be surgically implanted in his lower back.[102] The pain pump would only allow a physician to refill the surgically implanted pump to remediate his pain.[103] After visiting with fifteen different physicians and appealing his claim to an administrative law judge, the claimant was granted the ability to have the pain pump surgically implanted as a reasonable and necessary medical treatment.[104]

After suffering years of addiction from opiates, the claimant had to go through extensive procedures to assist in his efforts to end his addiction responsibly. Had the claimant resided in New Mexico instead of Florida, this claimant could have received treatment to manage his pain

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[97] *See Peters v. Southern Drilling*, 2021 WL 4948983, *22 (FL.Off.Judge Comp.Cl. October 21, 2021).

[98] *See id.* at *2-3.

[99] *See id.* at *3.

[100] *See id.*

[101] *See id.*

[102] *See id.*

[103] *See id.* at *4-15.

[104] *See id.* at *22.

that would have eliminated the need for costly adjudications, and costly medical procedures to eliminate the claimant's addiction to opiates. But alas, Florida does not permit injured workers to receive access to medical marijuana as part of their reasonable and necessary care under Florida's workers' compensation system even though medical marijuana is legal in Florida.[105]

G. Conclusion

When states enact statutes permitting the use of marijuana but do not amend their workers' compensation statutes to account for its compassionate use, they disturb the balance established under the grand bargain of workers' compensation. The principles enshrined in the grand bargain and workers' compensation programs is that workers, unlike machines or tools may not be disposed of after their utility to the employer has expired. Further, current efforts to legalize recreational and medical marijuana recognize the positive social attributes for the compassionate use of marijuana. Both concepts are not in tension with each other so long as states remain consistent in their legislation to promote the health and welfare of their workers.

Indeed, because the majority of states have legalized the use of marijuana in some form, the tide of public opinion in states that currently proscribe the use of marijuana continues to recede. States fighting against the tide of marijuana legalization could learn from the experiences of states with a tradition of permitting the use of marijuana as a substitute for dangerous and addictive opiates. Enacting legislation that accounts for the democratic will of a state's populace to maintain safe workplaces while permitting the responsible use of marijuana when done consistently can play a significant role in promoting safer workplaces and healthier workers.

[105] *See* Jones v. Grace Healthcare, 320 So.3d 191, 191 (Fla. Ct. App. 2021).