

Disabled Worker Wins Discrimination Claim After He Was Denied Coverage for Medical Marijuana

Wednesday, March 1, 2017

In a decision issued on January 30, 2017, a Board of Inquiry of the Nova Scotia Human Rights Commission concluded that a union insurance fund had discriminated against a disabled claimant when it denied his claim for medical marijuana.

Background Facts

Gordon "Wayne" Skinner was injured in a motor vehicle collision while working as an elevator mechanic. He was unable to return to work. The physical and mental injuries he suffered were treated with conventional drugs for several years, but this ultimately was not effective and caused unpleasant side effects. For the following two years, Mr. Skinner lawfully obtained a prescription for medical marijuana and received coverage under his employer's motor vehicle insurance. When he reached the maximum under such insurance plan, he sought coverage under the insurance plan provided to unionized employees in the elevator sector (the "Welfare Plan").

The Trustees of the Welfare Plan denied his medical marijuana claim under the terms of plan documents, and declined to exercise discretion to approve the claim. Mr. Skinner appealed to the Trustees several times and provided extensive medical documentation relating to his claim. He then filed a complaint with the Nova Scotia Human Rights Commission alleging discrimination on the basis of physical and mental disability. The Commission then referred the complaint to a hearing.

Human Rights Hearing

The Commission's Board of Inquiry had to decide whether the Trustees' denial of medical marijuana coverage amounted to unlawful discrimination under the Nova Scotia *Human Rights Act* and, if so, whether the Trustees had a non-discriminatory justification and could demonstrate accommodation to the point of undue hardship.

At the hearing, the Trustees argued the denial of coverage was not discriminatory for the following reasons:

- medical marijuana is not a Health Canada-approved drug under the *Food and Drugs Act*;
- medical marijuana does not have a drug identification number ("DIN");
- medical marijuana is not an approved drug under the terms of the Welfare Plan; and
- Mr. Skinner should, in any event, seek coverage from provincial medicare because his injuries resulted from a workplace accident.

The Board of Inquiry carefully considered the language in the Welfare Plan. It specifically covers "medically necessary drugs and medicines" which were "obtained only by prescription". It was irrelevant to the Board of Inquiry's decision whether medical marijuana was approved by Health Canada or had a DIN because these were not requirements for coverage under the Welfare Plan. Further, whether Mr. Skinner could have obtained

coverage from provincial medicare was not a proper defence to an allegation of discrimination, although it could potentially be relevant to an assessment of damages resulting from non-coverage. In any event, Mr. Skinner had been denied provincial medicare coverage and was appealing such decision.

On the issue of medical necessity, Mr. Skinner's evidence, and that of the doctors who gave evidence, was that the medical marijuana was necessary to control his pain and avoid side effects from conventional narcotics. The only contrary medical opinion presented to the Board of Inquiry came from a medical advisor at the workers' compensation board, who recommended Mr. Skinner see a chronic pain physician. Mr. Skinner saw that physician, who then supported Mr. Skinner's use of medical marijuana.

On the point of the prescription, Mr. Skinner lawfully obtained a prescription for medical marijuana and purchased marijuana from approved producers. There was no evidence to counter these facts.

The Board of Inquiry therefore concluded that the denial of benefit coverage amounted to indirect discrimination. The focus of the analysis then shifted to whether the Trustees could justify the discrimination or show evidence of undue hardship.

No Evidence of Undue Hardship

Interestingly, the Trustees did not provide any evidence of undue hardship of providing coverage to Mr. Skinner for medical marijuana. The Trustees estimated the cost of extending coverage for medical marijuana to Mr. Skinner at \$60 per day, but there was no evidence to place that cost in context. It is therefore not known whether medical marijuana would be more, or less, costly than the conventional narcotics Mr. Skinner had previously been prescribed.

It is also not known whether the Trustees had any basis to believe that coverage for medical marijuana would place the Welfare Plan in financial jeopardy. Calling such evidence, and making an undue hardship argument, remains open to defendants in future cases involving disputes over coverage of particular drugs.

Interim Remedy Ordered

The Board of Inquiry ordered the Trustees to begin providing coverage to Mr. Skinner on an interim basis, as well as reimburse him for the cost of any lawfully obtained medical marijuana. Other remedies (e.g. damages) will be decided in a future hearing. It is not known at this time whether the decision will be appealed.

Future Cases

This decision does not require all benefit plans to cover medical marijuana. In fact, the Board of Inquiry specifically stated: "[the decision]...does not mean that all private or public employee benefits plans are required to cover medical marijuana or any other drug for that matter." [paragraph 200]. Further, the Board of Inquiry stated that "...no benefits plan can cover the sun, moon and the stars and expect to also be financially sustainable." [paragraph 20].

The Board of Inquiry specifically noted that it was not provided with any relevant cases that applied human rights law to an allegation of a discriminatory benefits plan. However, any future case alleging discrimination would certainly require interpretation of the particular benefit plan. Plan administrators must have a non-discriminatory justification and evidence of undue hardship when denying claims for medical marijuana. On the other hand, claimants must provide sufficient evidence to support a claim. In Mr. Skinner's case, he had ample evidence of medical necessity and compliance with the current medical marijuana regulations.

Benefit coverage for medical marijuana from public providers has been considered in Ontario, with results that vary greatly depending on the applicable legislation and individual circumstances. For example, the Human Rights Tribunal of Ontario has dismissed claims of discrimination against the Ontario Drug Benefit Program on the basis that there was no *Code*-related reason for denying coverage, but rather a dispute over its efficacy and safety as a medical treatment (e.g. *Kueber v. Ontario (Attorney General)*, 2014 HRTO 769). In contrast, the Workplace Safety and Insurance Appeals Tribunal in Ontario has in several cases reimbursed injured workers for the cost of medical marijuana (e.g. Decision No. 1864/16, 2016 ONWSIAT 2674).

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