



What's New in HR Law

Don't Get Caught up in the "Weeds"

Board of Trustees Ordered to Cover Medical Marijuana Expenses

February 17, 2017

BOTTOM LINE

The Nova Scotia Board of Inquiry found that the Board of Trustees of the Canadian Elevator Welfare Trust Fund discriminated against the Applicant by denying him coverage for medical marijuana.

Facts: Employee denied coverage for medical marijuana

Mr. Gordon "Wayne" Skinner was involved in an accident that caused severe and lasting injuries, which in turn caused constant and ongoing pain. After two years of attempting to treat his pain through prescription narcotics and anti-depressants, Mr. Skinner's physician recommended medical marijuana.

Initially, his employer's insurer covered the costs of the medical marijuana. However, once he exhausted his entitlements under his employer's benefit plan, Mr. Skinner applied to the Respondent Board of Trustees of the Canadian Elevator Industry Welfare Plan (the "Trustees") for coverage.

The Trustees denied coverage because medical marijuana had not been approved by Health Canada, had not been given a drug identification number ("DIN"), and was not an approved drug under the terms of the Welfare Plan. The Welfare Plan provided coverage for "medically

necessary drugs and medicines” which must have been “obtained only by prescription”. In the Trustees’ opinion, medical marijuana did not fit within these parameters.

The Welfare Plan had a provision that allowed the Trustees to exercise discretion in awarding coverage under the Plan. Despite the initial denial, and based on the Trustees’ discretionary power, Mr. Skinner appealed to the Trustees twice, requesting that they exercise their discretion to provide coverage for the medical marijuana. In each appeal, Mr. Skinner provided further documentation about his disability and the effect of medical marijuana on his disability. However, the Trustees declined to exercise their discretion on both occasions.

As a result, Mr. Skinner applied to the Nova Scotia Human Rights Commission for a declaration that the Trustees’ denial of the coverage was discriminatory. The matter was ultimately referred to the Board of Inquiry (the “Board”).

The Board Used a “Purposive” Approach to Determine Whether the Denial was Discriminatory

The question that the Board was asked to answer was whether the Welfare Plan was itself discriminatory, or whether the Trustees’ failure to exercise their discretion was discriminatory.

The starting point was to first establish whether the denial of coverage was *prima facie* discriminatory. To determine this, the Board assessed the true purpose of the Welfare Plan and then compared how the benefits of the Welfare Plan were allocated to its different beneficiaries.

The Board found that the purpose behind the Welfare Plan was to maximize benefits to beneficiaries, but to do so in an efficient, economical and sustainable way. This did not mean that the Welfare Plan had to cover everything, but that it should cover items where sustainability permitted.

The Board then determined that Mr. Skinner faced differential treatment and a disadvantage because, unlike other beneficiaries under the Welfare Plan, he was denied coverage of a “medically-necessary” drug which was “prescribed by his physician”.

In coming to this conclusion, the Board made a number of factual findings. The Board found that it was “medically-necessary” for Mr. Skinner to take medical marijuana, as other medications had severe side effects that the marijuana did not. The Board also found as a fact that Mr. Skinner had a “prescription” for medical marijuana from his doctor.

The Denial of Medical Marijuana was Discriminatory

The Trustees’ denial resulted in differential treatment, which the Board found was, at least in part, caused by Mr. Skinner’s disability. The Board focused on the fact that Mr. Skinner provided the Trustees with documentation about his disability, and documentation surrounding how medical marijuana helped his disability.

The Board decided that Mr. Skinner’s disability was a factor in or connected to the Trustees’ denial, and that Mr. Skinner’s chronic pain was one of the central issues being addressed by the Trustees. Despite the fact that the Trustees argued that it denied coverage as a result of sound,

non-arbitrary policy choices, the Board still reasoned that Mr. Skinner’s disability was a factor in the denial.

After the Board found that the Mr. Skinner faced a *prima facie* case of discrimination, it fell upon the Trustees to justify their decision to deny coverage. However, during the hearing, the Trustees failed to lead any evidence that would justify its actions, other than the initial explanation. The Trustees failed to provide evidence that would suggest that covering medical marijuana would upset the reasonable accommodation balance struck by the Welfare Plan, or that covering the medical marijuana would cause undue hardship.

The Board ultimately found that the Trustees’ denial was discriminatory, stating that the Trustees’ justification was “wholly inadequate”.

Remedy: Trustees Ordered to Provide Full Coverage

The Board ordered the Trustees to provide coverage for the full amount of Mr. Skinner’s medical marijuana expenses.

Commentary: Can Medical Marijuana be “prescribed”?

In this decision, the Board emphasized that Mr. Skinner had obtained a “prescription” for his medical marijuana, and particularly emphasized this fact when finding that the denial of coverage was *prima facie* discriminatory. Despite the fact that the Board in this case jumped to the factual conclusion that the medical marijuana was “prescribed”, this finding may be subject to further review.

Under the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230, which is the Regulation allowing access to medical marijuana, users are only required to obtain a “medical document” to support medical marijuana use. Users do not necessarily require a “prescription”. Although subtle, there is a distinction between a “medical document” and a “prescription”.

One arbitrator in Ontario decided that a marijuana “medical document” is not necessarily a “prescription,” despite how closely they mirror each other. Arbitrator Sheehan decided in *Hamilton (City) v Hamilton Professional Fire Fighters’ Association*, [2016] O.L.A.A. No. 129 that a “medical document” was “clearly not a prescription”, and found that the employer was correct in not covering medical marijuana expenses, as that specific benefit plan required that eligible drugs be obtained through a prescription.

Check the Box

- When assessing medical marijuana coverage requests under a benefit plan, you need to be cautious, and you should assess each request on a case-by-case basis in light of the specific wording of your benefit plan.
- If coverage is denied, be prepared to justify the denial with facts and evidence of undue hardship or accommodation efforts as opposed to bald assertions.
- Given the opposing views in the case law about medical marijuana and the supporting “medical documents”, continue to monitor developments in this area to determine whether medical marijuana can be “prescribed”.

Citation: *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240.

For further information, please contact Danny Parker at 519-435-6007 or your regular lawyer at the firm.



Toronto

Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London

620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton

1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca