

Member's Quarterly

Summer 2017 Edition

Feature

Footing the Bill: Employee Benefits Plans and Medical Marijuana

Denied coverage for medical marijuana deemed discriminatory

Employee benefit plans provide employees with health coverage including prescription drugs. When we think of prescription drugs, the first thing that comes to mind generally isn't medical marijuana. Very recently, a Nova Scotia Human Rights Commission Board of Inquiry found that an employee's health plan that denied coverage for medical marijuana was discriminatory.

In *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240 (NS HRC), the complainant, Gordon "Wayne" Skinner was employed by ThyssenKrupp Elevator Canada as an elevator mechanic when he was involved in an on-the-job motor vehicle accident. Mr. Skinner suffered both physical and mental disabilities including chronic pain, anxiety and depression as a result of the accident. Following the accident, Mr. Skinner was treating his pain with narcotics and other conventional drugs with little success and adverse impact on his quality of life. Shortly thereafter, Mr. Skinner began using medical marijuana prescribed by his physician with significant improvement. Mr. Skinner's medical marijuana was covered by his employer's motor vehicle insurer until it reached the maximum coverage amount, at which time he applied for coverage under his employee benefits plan. The Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund ("Trustees") were responsible for the management of the plan. Mr. Skinner sought coverage from the Trustees on three occasions, providing them with extensive medical documentation in support of his claim. The Trustees considered Mr. Skinner's claim but ultimately denied coverage on the basis that medical marijuana was not an approved drug under the terms of the plan. Further, the Trustees determined that since Mr. Skinner's disabilities were the result of a compensable workplace accident, any related medical expenses should be covered by the provincial medicare plan and thereby excluded under the employee plan.

Mr. Skinner filed a complaint with the Nova Scotia Human Rights Commission alleging discrimination in the provision of services on the basis of physical and mental disabilities pursuant to the *Human Rights Act* (the "Act").

First, the Board examined the impact of the medical marijuana on Mr. Skinner, concluding that medical marijuana was medically necessary and was the most effective medication for treating Mr. Skinner's chronic pain.

The Board then went on to review the test for discrimination, noting that the complainant must first establish prima facie discrimination on a balance of probabilities, and then the onus shifts to the respondent to prove on a balance of probabilities that either an exemption applies under the Act or that a non-discriminatory justification for its policy exists, and that it took reasonable steps to accommodate the complainant to the point of undue hardship.

The Board concluded that the plan's exclusion of medical marijuana was not designed to intentionally treat certain beneficiaries differently than others, however the exclusion had the substantive effect of



Kyle MacIsaac
LL.B.
Associate,
McInnes Cooper



Caroline Spindler
J.D.
Associate,
McInnes Cooper

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treating the complainant differently. The Board determined that because the plan allowed for some beneficiaries to receive coverage for medically-necessary, prescription drugs by special request, and that Mr. Skinner's special request was excluded because medical marijuana was not formally approved by Health Canada (despite the fact that it can be legally prescribed) resulted in a distinction under the *Act*.

The Board then found that the exclusion of coverage resulted in a disadvantage to Mr. Skinner because he was denied coverage for something that the Board found as medically necessary. Finally, the Board concluded that the disadvantage was related to a protected ground, as the Trustees had received documentation regarding Mr. Skinner's disabilities and the effect of the medical marijuana.

Ultimately, the Board determined that *prima facie* discrimination had been established and moved onto consider whether any exemptions under the *Act* applied. After concluding that the exemptions were inapplicable, the Board considered whether the Trustee's had provided non-discrimination justification for the exclusion. The Trustee's argued that undue hardship could be presumed from the case law. The Board rejected this argument noting that no information was provided regarding the cost of coverage, impact of the extension of coverage on premiums, or the financial sustainability of the plan.

The Board concluded that the Trustees violated the *Act* when it denied Mr. Skinner coverage for medical marijuana and ordered that coverage be provided.

This decision may have a significant impact on employee benefits plans, but it is important to remember that whether or not coverage is required will always be determined on a case-by-case basis.

Kyle MacIsaac is an Associate with McInnes Cooper in Halifax and can be reached at kyle.macisaac@mcinnescooper.com.

Caroline Spindler is an Associate with McInnes Cooper in Halifax and can be reached at caroline.spindler@mcinnescooper.com.