Canadian Employment Safety and Health Guide

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Amendments Made to the *Workers Compensation Act* Impact BC Businesses 2

Health and Safety from Coast to Coast

British Columbia ... 4

Worth Noting 5

Recent Cases

British Columbia ... 7

New Brunswick 8

Newfoundland and Labrador 10

Ontario 11

BACK TO NORMAL? COVID-19 AND RETURN-TO-WORK ISSUES

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For months now, we have been trying to spread this message: although a lot of things have changed over the last few months, one thing that has not is that attending at work is not optional.

In pre-COVID days, employees did not have the option of simply choosing not to attend at work on a given day, and that is no different now when they are being directed to return to the workplace after a period of layoff/leave or working from home. They can't simply decide that they "prefer" to defer their return.

So what should employers do when an employee indicates their reluctance or refusal to come back to work?

Like many situations, communication is key. The first thing to do is to engage in a conversation with the employee and find out why they do not want to come back at this time. While working is not optional, there are some scenarios in which individuals may have the right to refuse to attend at the workplace. These relate primarily to situations where they have a medical condition that makes them particularly susceptible to the virus or have childcare obligations.

Accommodation: Disability and Childcare Obligations

If an employee has a legitimate need for accommodation or is truly unable to work due to the pandemic, two different exemptions may apply. Most jurisdictions, including Ontario, have provided for job-protected leaves of absence if an employee cannot work due to the virus. It is important to note that this means that they cannot work, as opposed to simply choosing not to.

At the same time, existing human rights legislation already provides for accommodation in many circumstances, such as if an employee has a legitimate need for accommodation or is truly unable to work due to the pandemic. For example, if an individual has a medical condition that makes them particularly vulnerable to the virus and their doctor has said that they should not attend at work, then they may be entitled to accommodation.

Similarly, the protection of family status means that there is a duty to accommodate childcare obligations. As we often discuss with our clients, this does not mean that you must accommodate a choice or preference; if there are other options available to the employee, then they do not have a need for accommodation.

Employees do not have the right to choose the form of accommodation that they receive. Employers can explore other methods of accommodation, including work from home,

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modified hours (for example, if they can arrange childcare at certain times of day), or even by providing childcare options, as some employers have done. Accommodation does not automatically mean a leave of absence.

This issue certainly bears watching as the school year starts. So much is unknown right now, as students prepare to head back to school. Some parents have chosen to have them attend remotely, and even those that will be "back in school" are, in many cases, still going to be working remotely for a significant portion of the time. Furthermore, outbreaks may mean that students end up at home unexpectedly. For all these reasons, accommodation of childcare obligations will be front and centre.

Safety in the Workplace

This is where communication is critical. We have helped many clients provide detailed information to their employees explaining the efforts that are being made to keep them safe in the workplace. This can often be done in conjunction with the direction to return, and can include details of the safety protocols that are being implemented along with the workers' obligations with respect to safety. It should also include information on what to do if the worker feels unsafe in the workplace at any time, including a clear process to report concerns. Workers cannot refuse to work because of a generalized fear or concern; there must be a genuine danger in the workplace to trigger the right to refuse unsafe work.

If There Is No Lawful Exemption

These are scary times and it is understandable that people will be wary of attending at work. However, they have to understand that a general fear of going out in public, travelling to work or even being at work will not be sufficient to allow them to simply decline to attend at work at this time while keeping their job.

Once you have explained to an employee all of the processes and policies that are in place to keep the workplace safe, and confirmed that there is no need for accommodation or a statutory leave of absence, then you can advise them that they are required to attend at work as directed. You should also very clearly advise them that a failure to do so will result in the conclusion that they are resigning from their employment.

It may also be worth noting that if they are counting on receiving government assistance such as the Canada Emergency Response Benefit, they may not be eligible since that is supposed to be for people who cannot work, as opposed to those who choose not to work.

Takeaways

Attending at work is not optional, even if an employee has been on a leave, or layoff, or has been working from home. They cannot insist that they will not return "yet", or that they will only work from home.

It is important to ensure that the employee does not fall within any of the exemptions above, as well as to assure them of the efforts being made to keep the workplace safe. Once you do so, then you can insist that the employee return to work, though we do encourage employers to allow people to work from home if they can do so effectively, as that is the safest approach at this time.

We also encourage employers to be flexible when it comes to things like childcare, particularly as the school year commences. These are not normal times, and some flexibility will be necessary. However, that does not mean that employees can refuse to work or insist that they will only do so remotely.

Stuart Rudner *is an Employment Lawyer and Mediator, and he can be reached at stuart@rudnerlaw.ca. You can also follow Rudner Law's employment law updates on their social media platforms and receive their newsletter in your inbox by subscribing to their newsletter.*

AMENDMENTS MADE TO THE *WORKERS COMPENSATION ACT* IMPACT BC BUSINESSES

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The *Workers Compensation Amendment Act, 2020* ("Bill 23") received Royal Assent on August 14, 2020, bringing its amendments to the *Workers Compensation Act*, RSBC 2019, c. 1 (the "Act") into force.

Bill 23 made 34 changes to the Act. These changes address COVID-19, worker benefits entitlement, regulatory compliance and the collection of unpaid assessments.

Effective immediately, Bill 23 fast-tracks WorkSafeBC's July 22, 2020 resolution of its Board of Directors providing a presumption of workplace causation of infections caused by communicable pathogens, including COVID-19, that are subject to:

a) A notice given under section 52(2) of the *Public Health Act*;

b) A state of emergency declared under section 9(1) of the *Emergency Program Act*;

c) A state of local emergency declared under section 12(1) of the *Emergency Program Act*; or

d) An emergency declared under section 173 of the *Vancouver Charter*.

For the presumption to be applicable, the worker must be working in a process or industry in the geographic area and time subject to the above where there is a risk of exposure to a source or sources of infection significantly greater than that to the public at large.

This change follows a study commissioned by WorkSafeBC to assess the risk of COVID-19 infections in the workplace. In May 2020, WorkSafeBC published *The Risk of COVID-19 Infection Among Workers*, which concluded that based on current epidemiologic research there was no consistent association between work within a specific occupation and a greater risk of COVID-19 infection. This study noted there was some evidence for an increased risk of infection within some cohorts of health care workers; however, the only Canadian evidence to date indicated a decreased risk of infection of health care workers relative to the general population.

Further guidance on what constitutes a source of infection significantly greater than that to the public at large has yet to be provided in WorkSafeBC policy or determined through application of this policy by WorkSafeBC.

Consequently, if a worker contracts COVID-19 while working in an industry identified as posing a risk of infection significantly greater than that to the public at large, the worker is entitled to a presumption that COVID-19 was caused by the worker's employment, "unless the contrary is proved".

Employers should be aware of additional changes made to the Act that are now in place, including:

- Authorizing WorkSafeBC to provide preventative medical treatment on pending claims where there is a significant chance of deterioration in a claimant's health;
- Permitting WorkSafeBC to obtain search and seizure warrants where there are reasonable grounds to believe that an offence under the Act or its regulations has or is being committed;
- Expanding liability for directors of corporations, making them jointly and severally liable for debts owed to WorkSafeBC in certain circumstances; and
- Permitting WorkSafeBC to demand unpaid amounts an employer owes WorkSafeBC from third parties who are indebted to or likely to become indebted to the employer.

Other changes will take effect January 1, 2021. These include changes to worker entitlement to permanent partial disability awards and raising the maximum annual salary amount on which workers' compensation benefits are based.

Previously, WorkSafeBC permanent partial disability awards were granted on the basis of a loss of function calculation unless the worker's loss of earnings was "so exceptional" as to warrant a loss of earnings award. Workers will soon be entitled to the greater of the calculation of their loss of earnings award or loss of function award in all cases.

The maximum annual salary amount on which workers' compensation benefits are set was based on an inflation-adjusted average of $40,000 starting from the year set out in 1984. The Board had calculated this amount as $87,100 for the calendar year 2020. The wage rate was raised to an inflation-adjusted average to be calculated from 2019 of $100,000, and the 2021 wage rate was also set at $100,000.

This increase will impact employers of workers who earn above the prior maximum wage rate. While such workers will be entitled to additional benefits, employers of workers earning more than the previous maximum will be assessed on a higher assessable payroll and will experience an increase in assessments as a result.

Summary

Significant changes have been made to the *Workers Compensation Act*, including the fast-tracking of a workplace presumption for COVID-19 infections for workers in at-risk industries. Further changes increase workers' entitlement to benefits and expand WorkSafeBC's powers to pursue directors or third parties for unpaid assessments or other amounts.

Richard Savage *is an Associate at Fasken's Vancouver office practicing in the areas of labour, employment, and human rights law. Richard can be reached at (604) 631-3246 or rsavage@fasken.com. For more information about his practice and Fasken, please visit https://www.fasken.com/en.*

HEALTH AND SAFETY FROM COAST TO COAST

British Columbia

Bill 23 — *Workers Compensation Amendment Act, 2020*

The *Workers Compensation Amendment Act, 2020*, SBC 2020, c. 20 (formerly Bill 23), received Royal Assent on August 14, 2020. It amended the *Workers Compensation Act*, RSBC 2019, c. 1 ("Act"). The amendments became effective on August 14, 2020, with two amendments coming into effect on January 1, 2021.

Effective August 14, 2020, notable amendments to the Act include:

- WorkSafeBC approval is no longer required before an officer can lay an information in respect of an offence;
- the court is authorized to issue search and seizure warrants if there are reasonable grounds to believe that an offence against the Act or the regulations has been or is being committed and that evidence respecting the commission of the offence will be obtained through the execution of a warrant;
- the court is authorized to direct convicted persons to publish the facts about their offence, at the person's expense;
- the court is authorized to consider victim impact statements when determining the penalty or punishment to be imposed for an offence under the Act or the regulations;
- WorkSafe BC is permitted to reconsider a decision or order after the 75-day time limit, if the decision or order contains an obvious error or omission;
- clarification that compensation is payable for a mental disorder as if the mental disorder were a personal injury arising out of employment;
- the one-year limitation period for filing an application for compensation for a mental disorder commences on the date of mental disorder;
- WorkSafeBC is allowed to pay for health care-related services and supplies before a worker's claim is accepted if the worker is at risk of a significant deterioration in health;
- the maximum annual salary amount on which workers' compensation benefits are based is increased from $87,100 to $100,000 for 2021;
- the minimum 90-day waiting period required for a regulation related to an occupational disease caused by a communicable viral pathogen (such as COVID-19) to take effect has been eliminated;
- WorkSafeBC is authorized to demand unpaid amounts an employer owes WorkSafeBC from third parties who are indebted to or likely to become indebted to the employer; and
- if a corporation fails to pay an amount owed to WorkSafeBC, the corporate directors are jointly and severally liable to pay the amount owed, in certain situations.

Effective January 1, 2021, the method of calculating permanent partial disability awards will change. Currently, WorkSafeBC assesses a worker using the permanent functional impairment method. The worker's level of function is measured and compared to established standards in order to calculate a percentage of total disability. WorkSafeBC will

also consider using the loss of earnings method in "exceptional circumstances" if the worker meets certain criteria and the permanent functional impairment method will not adequately compensate the worker for his or her loss of earning capacity. Effective January 1, 2021, workers will be entitled to the greater of the calculation of their loss of earnings award or permanent functional impairment award in all cases.

In addition, effective January 1, 2021, WorkSafeBC will be authorized to determine a worker's retirement date when the worker is over age 63, and to consider the worker's circumstances at the time of that determination.

Bill 23 was introduced on July 14, 2020. It received second reading on July 20, 2020 and third reading on August 10, 2020.

Revision of Effective Date of Amendments To Schedule 1 of *Workers Compensation Act*

On July 22, 2020, WorkSafeBC approved amendments to Schedule 1 of the *Workers Compensation Act*, RSBC 2019, c. 1 ("Act") to add a presumption for infections caused by communicable viral pathogens, which are the subject of a British Columbia specific emergency declaration or notice. As a result, workers who contract an occupational disease caused by a communicable viral pathogen (such as COVID-19), in certain employment circumstances, will be presumed to have contracted the disease through their employment.

The amendments were scheduled to come into effect on October 26, 2020.

On August 14, 2020, the *Workers Compensation Amendment Act, 2020*, SBC 2020, c. 20 (formerly Bill 23), received Royal Assent, eliminating the minimum 90-day waiting period required for a regulation related to an occupational disease caused by a communicable viral pathogen to take effect.

As a result of Bill 23, the amendments to Schedule 1 regarding infections caused by communicable viral pathogens took effect August 20, 2020.

WORTH NOTING

WorkSafeNB Improves Injury Reporting and Application for Benefits

On August 6, 2020, WorkSafeNB announced a new way for employers to report workplace injuries and illnesses and for workers to apply for workers' compensation benefits.

Rather than a joint form, there is now a separate reporting process for employers and a separate application process for workers. Only information relevant to each group is required and they can each submit their information separately. Workers are required to complete WorkSafeNB's Application for Workers' Compensation Benefits. Employers are required to file an Employer Report of Injury or Illness.

See https://www.worksafenb.ca/workers/your-claim/hurt-at-work-start-the-claim-process/ for information on the application process for workers.

See https://www.worksafenb.ca/employers/claims/employee-hurt-at-work-here-s-what-you-need-to-do/ for information on the reporting process for employers.

See https://www.worksafenb.ca/about-us/news-and-events/news/2020/improvements-to-injury-reporting-and-application-for-benefits-process/ to view WorksSafeNB's news release.

WCB Nova Scotia Releases 2021 Employer Assessment Rates

On September 1, 2020, the Workers' Compensation Board ("WCB") of Nova Scotia released the employer assessment rates for 2021.

In general, employer assessment rates will remain stable in 2021. The average assessment rate has been $2.65 per $100 of payroll for the past 17 years.

According to a news release dated September 1, 2020, the rate for the fishing industry will decline by six per cent in 2021. Rates will also decrease in the logging, roofing, and plumbing and heating industries. Home care and special care homes will see an increase of one per cent. The rate for long-term care homes will remain the same.

See https://www.wcb.ns.ca/Workplace-Injury-Insurance/Rates.aspx to view the 2021 assessment rates.

See https://www.wcb.ns.ca/About-Us/News-Room/News/WCB-Nova-Scotia-releases-2021-employer-assessment-rates-Sept-1-20.aspx to view the WCB's news release.

Protecting Ontario Transit Workers and Passengers

On September 2, 2020, the Ontario government announced that it has distributed comprehensive health and safety guidance documents and will be providing significant funding to cover lost revenue, enhanced cleaning, and other costs incurred because of COVID-19.

Metrolinx, a Crown agency that manages road and public transportation in Ontario, has implemented more than 40 measures to help keep transit workers and passengers safe. These measures include installing seat dividers on GO trains and buses, making face coverings mandatory for staff and passengers, providing hand sanitizer dispensers on every GO bus and at every GO Transit and UP Express station, and installing health kiosks at stations to provide safety information.

The measures implemented by Metrolinx follow the comprehensive safety guidance document for public transit systems and passengers distributed by the Ministry of Transportation. The guidance document titled "Guidance for public transit agencies and passengers in response to COVID-19", was developed in consultation with public health and transit experts. Its purpose is to provide transit systems with the information they need to help protect employees and passengers during the COVID-19 outbreak.

See https://news.ontario.ca/en/release/58213/ontario-protecting-transit-riders-and-workers-as-province-reopens to view the Government of Ontario's news release.

See https://www.ontario.ca/page/guidance-public-transit-agencies-and-passengers-response-covid-19 to view the guidance document.

Workers' Safety and Compensation Commission of Northwest Territories and Nunavut Seeking Feedback on Proposed Changes to Pension Compensation System

The Workers' Safety and Compensation Commission of the Northwest Territories and Nunavut ("WSCC") is seeking public feedback on proposed changes to the pension compensation system. The pension system provides long-term workers' compensation for permanently injured workers.

Currently, the system provides a pension based on the worker's earnings at the time of the injury and the severity of the worker's permanent medical impairment ("PMI"). The WSCC is proposing a dual system that provides compensation for the worker's PMI and "long-term earning loss benefits based on individual circumstances over time."

The public is invited to share their views on the proposed changes in an online survey and through a series of online town hall meetings hosted by the WSCC in September.

See www.wscc.nt.ca or www.wscc.nu.ca for information on how the pension system works, the proposed changes, and to share your feedback by completing the online survey.

See https://www.wscc.nt.ca/news/media-release-public-consultation-begins-workers%E2%80%99-compensation-pension-system to view the WSCC's news release.

"What We Heard" Report Regarding Modernization and Amalgamation of Yukon *Workers' Compensation Act* and *Occupational Health and Safety Act* Released

Beginning in late 2019, the Yukon Workers' Compensation Health and Safety Board ("YWCHSB") performed a public engagement campaign to ask the public and stakeholders for their input about the modernization and amalgamation of the *Workers' Compensation Act*, SY 2008, c. 12, and the *Occupational Health and Safety Act*, RSY 2002, c. 159, into a newly formed *Workplace Safety and Compensation Act*.

In August 2020, the Yukon government released the "What We Heard" report. The report summarizes the information the YWCHSB received during the public engagement. Among other things, the report indicates that the public and stakeholders support the proposed new legislation.

See https://www.wcb.yk.ca/engage/actsreview/Q0321.aspx for more information on the public engagement and to view the report.

RECENT CASES

British Columbia

Worker Not Entitled To Coverage for Medical Cannabis

Workers' Compensation Appeal Tribunal of British Columbia, March 4, 2020

The worker, a propane delivery driver, had been using medical cannabis since 2018. He sought acceptance of medical cannabis as a necessary health care benefit for his compensable conditions under his 2017 claim. The compensable conditions included left and right shoulder conditions and subsequent surgeries to both shoulders. Chronic pain had not been adjudicated on the claim. In May 2019, the Workers' Compensation Board ("WCB") denied coverage for the expense of medical cannabis. In September 2019, the Review Division confirmed the WCB's decision. The worker appealed the Review Division's decision. At issue was whether the worker's medical cannabis should be covered as a health care benefit for the compensable conditions accepted under his 2017 claim. The worker argued that the Review Division decision was narrow in scope when considering the significance of his accepted compensable conditions. He submitted that the WCB denied coverage for medical cannabis at a time when he was still undergoing treatment for his compensable conditions. He argued it was not unreasonable to expect him to be experiencing ongoing pain while still recovering from his compensable conditions. The nonsteroidal anti-inflammatory drugs initially prescribed for him were to assist him in managing his pain and increase his function. Medical cannabis had been prescribed for the same reasons. An attending physician supported his use of medical cannabis to manage his pain. Given the significance of his compensable injuries, it was reasonable that he would require some form of pain medication to manage his symptoms for the foreseeable future. Section 21 of the *Workers Compensation Act* ("Act") provides for health care benefits reasonably necessary to cure, relieve, or alleviate from the effects of the worker's compensable injuries. There is no specific WCB policy on the coverage of medical cannabis. WCB Policy item #C14-101.01, "Changing Previous Decisions", provides that consideration for health care benefits may occur at various points during the claim as the nature and severity of the worker's compensable injury changes and/or there is a determination that additional treatments or services are reasonably necessary to cure, relieve, or alleviate from the effects of the worker's compensable injuries. WCB Policy item #C3-22.20, "Compensable Consequences – Pain and Chronic Pain", states that a worker's pain symptoms may be accepted as compensable where the evidence indicates that the pain results as a consequence of an employment-related injury. Chronic pain is pain that persists six months after an injury and beyond the usual recovery time for that injury. Chronic pain is further distinguished as either specific or non-specific as set out in WCB Policy item #39.02, "Chronic Pain".

The appeal was denied. The Review Division decision was confirmed. The worker was not entitled to the coverage of medical cannabis to cure, relieve, or alleviate from the effects of the compensable conditions and surgeries under his claim. The evidence did not establish that medical cannabis was reasonably necessary to cure, relieve, or alleviate from the effects of the worker's compensable physical injuries and subsequent surgeries accepted under his claim. Although the

issue under appeal was narrow in scope, it did not include whether the worker was entitled to coverage of medical cannabis as a health care benefit to treat the worker's ongoing pain. The appeal was restricted to those conditions currently accepted under the worker's claim and not the acceptance of other conditions (such as osteoarthritis or chronic pain in either the left or right shoulder or both). Pain is a consequence of an injury; it is not the injury. The worker's claim had been accepted for physical injuries and subsequent surgeries. The compensable conditions might have given rise to pain symptoms as a compensable consequence which if persisting for more than six months after the injury might be chronic. However, those matters had not been addressed by the Review Division decision nor the WCB decision. That said, there are past Workers' Compensation Appeal Tribunal decisions which illustrate that coverage for medical cannabis products may be considered, in the circumstances of individual cases, to be a reasonably necessary health care benefit under the Act where a worker has a permanent compensable condition involving non-cancerous chronic pain (variously described as significant, long-term, intractable) which has not responded to other treatment modalities (or where the worker cannot tolerate other treatments) and where there is clear evidence of physician support for a worker's use of medical cannabis. Pre-claim use of cannabis, a lack of physician support for a worker's use of cannabis, or not exhausting other treatment options may be reasons to deny coverage. In the instant case, the evidence concerning the prescribed use of medical cannabis to treat the worker's ongoing pain symptoms was not sufficient evidence to support its use to treat the compensable physical injuries and surgeries already accepted under the claim. In October 2018, an attending physician had prescribed medical cannabis for the worker's arthritis and pain. In May 2019, an attending physician reported that the worker had severe debilitating osteoarthritis in both shoulders. Surgery was pending. In the interim, the worker's pain was well-managed on medical cannabis. Further, an orthopedic specialist indicated that the worker's right shoulder osteoarthritis was severe and in end-stage. That evidence did not support the coverage of medical cannabis for the worker's compensable physical injuries and surgeries but rather it appeared to support its use to treat bilateral shoulder osteoarthritis and pain.

WCAT Decision Number: A1902585, 2020 CSHG ¶96,333

New Brunswick

Workplace Health, Safety and Compensation Commission Ordered To Reimburse Worker for Cost of Medical Cannabis

Court of Appeal of New Brunswick, June 11, 2020

Best had used dried cannabis since 2011 for chronic pain caused by a 2002 compensable back injury. Her application to Health Canada for approval to buy cannabis for a medical purpose was supported by a physician after she unsuccessfully attempted two trials of a prescribed pharmaceutical cannabinoid, Cesamet. While Cesamet provided relief for her symptoms, it also caused adverse side effects, as had the other prescribed medications Best tried over the years to manage her chronic pain. In 2017, Best asked the Workplace Health, Safety and Compensation Commission ("Commission") to pay the cost of her medical cannabis. The Commission denied her request on the basis that its medical advisor indicated medical cannabis was not a requirement in relation to her compensable injury. Best provided further medical information which indicated that her use of medical cannabis was beneficial for the symptoms related to her compensable injury. It helped by decreasing her pain and increasing her ability to function. The Commission subsequently requested a review of Best's claim by Canadian Health Solutions ("CHS"). Following a review, CHS opined that the use of medical cannabis was not warranted. CHS concluded that there was insufficient scientific evidence to support the use of dried cannabis for Best's condition. As such, the Commission confirmed its denial of Best's request. Best appealed the Commission's decision to the Workers' Compensation Appeals Tribunal ("Appeals Tribunal"). The Appeals Tribunal dismissed her appeal. It accepted the conclusions of CHS that there was no medical indication for the use of medical cannabis for Best's compensable injury. Despite having accepted Best's evidence that she derived a therapeutic benefit from the use of medical cannabis, the Appeals Tribunal characterized it as anecdotal evidence which was insufficient to establish its necessity as a medical aid in the absence of strong medical evidence to support any particular use. Best appealed the Appeals Tribunal's decision to the Court of Appeal of New Brunswick. At issue was whether the Appeals Tribunal erred in law by disregarding Best's evidence of her experience using medical cannabis to manage her chronic pain on the basis that it was anecdotal evidence and failed to make its decision based on the real merits and justice of Best's case. Best maintained the evidence of her personal experience, which the Appeals Tribunal accepted, was not anecdotal

and the Appeals Tribunal was wrong to effectively disregard it and/or conclude it was irrelevant in the absence of research to support its use. On appeal, Best also asked that the Commission be ordered to reimburse the cost of her medical cannabis from the time her application to Health Canada was approved in 2011 and continuing thereafter indefinitely into the future. It is important to note that when the Commission denied Best's request in 2017, it did not have a policy that expressly addressed the use of medical cannabis/cannabinoids. At that time, the Commission's response to requests to pay for medical cannabis was governed by a directive, entitled "Schedule of Care – Generally Not Approved Care, Treatment and Tests" ("Directive"). Under the Directive, medical cannabis includes both pharmaceutical cannabis and dried cannabis. It permits the Commission to pay the cost of medical cannabis for those conditions and/or uses that are listed in the Directive, without the necessity of undertaking a further, or case specific, evaluation. For all other conditions, the Directive requires that requests be decided on the merits of the case. In such situations, an evaluation of the claim is undertaken. Since Best's request related to chronic pain, it stood to be determined, according to the Directive, on the merits of the case, and the Commission instigated such an evaluation. The Directive recommends that, to pay for medical cannabis, traditional forms of treatment must have been tried and failed to alleviate the worker's symptoms. The Directive also indicates that medical cannabis will be supported where the merits of the case justify its use. The Directive makes it clear that a lack of objective scientific research regarding the efficacy of medical cannabis in relation to certain types of pain, and risks associated with its use, forms the basis for the Commission generally not supporting its use.

The appeal was allowed. The decision of the Appeals Tribunal was set aside. The Commission was ordered to reimburse Best for the cost of medical cannabis purchased from an approved supplier for use in connection with her compensable injury from March 2017 to December 2018. The issue of whether the Commission should be ordered to reimburse Best for the cost of her medical cannabis prior to March 2017 and after December 2018 was returned to the Appeals Tribunal for determination. The Appeals Tribunal accepted Best's evidence that she derived a therapeutic benefit from the use of medical cannabis for her chronic pain. However, the Appeals Tribunal erred by characterizing and disregarding that evidence as anecdotal evidence and insufficient to establish the necessity of medical cannabis in the absence of strong medical evidence to support any particular use. Best's evidence of pain reduction, assistance with sleeping, and therapeutic benefit generally, was Best's first-hand account of her experience. It was direct evidence. It might be fairly characterized as subjective but it was not anecdotal in the sense that it consisted of an account or observation by or from others. If the Appeals Tribunal's decision did not reflect an error of law because it misapprehended Best's evidence as anecdotal, it reflected an error by failing to decide the case on its merits. A decision based on the merits of the case is not confined to an inquiry into whether there is evidence of research that establishes efficacy of medical cannabis for a particular use. The analysis requires the consideration of the circumstances of the injured worker making the request. In the instant case: the pain medications tried between 2002 and 2011 to manage the chronic pain from her compensable injury failed to provide relief or otherwise had intolerable side effects; she had tried physiotherapy, acupuncture therapy, and chiropractic treatments; two trials of a pharmaceutical cannabinoid provided pain relief but caused adverse side effects; alternative pharmaceutical cannabinoids were recommended and prescribed by her family physician, but they were cost prohibitive; her use of dried cannabis was supported by a specialist and her family physician, who had treated her since she sustained the compensable injury in 2002; there were no contraindications to Best using dried cannabis, as confirmed by all reports, including that of CHS; Best's use of dried cannabis had been generally consistent with the recommendations of the College of Physicians in relation to dosing and not smoking; and she described her six-year use of medical cannabis as reducing her pain throughout and permitting her to resume activities she was previously unable to perform, evidence that was accepted by the Appeals Tribunal. Best established, on a balance of probabilities, that the prescribed use of medical cannabis in connection with her chronic pain was necessary, within the meaning of the *Workers' Compensation Act*. Other, non-cannabinoid, pain relief options might provide more benefit, but their side effects could not be tolerated. Even the pharmaceutical cannabinoid Cesamet, which provided a measurable benefit, could not be tolerated. While it might be that other pharmaceutical cannabinoids could provide benefit, without side effects, they were cost prohibitive at the time. The use of dried cannabis was the last option taken by Best. Importantly, she used it in the manner that was substantially consistent with the recommendations advanced by the Commission in those situations where the Commission pays for the use of dried cannabis. While it might be advisable to explore pharmaceutical cannabinoids (other than Cesamet) in the future, with the involvement of the Commission, such possibilities did not weigh against deciding Best's claim favourably. The other issues arising in the appeal were returned to the Appeals Tribunal for determination.

Best v. New Brunswick (Workplace Health, Safety and Compensation Commission), 2020 CSHG ¶96,334

Newfoundland and Labrador

Applications Judge Erred in Determining Arbitrator's Decision Regarding Employer's Duty To Accommodate Employee Who Used Medical Cannabis Was Reasonable

Court of Appeal of Newfoundland and Labrador, June 4, 2020

The employee, a general labourer, suffered from chronic pain. He was prescribed medical cannabis to treat his pain. He was denied employment in a safety-sensitive position on a construction project after he disclosed that he used medically authorized cannabis to manage his pain. When he attended for his pre-employment screening, he disclosed his cannabis prescription and use and was told that he would probably fail the drug screening. The company refused to hire the employee due to concerns over whether his ability to work safely would be impaired by his cannabis use. The employee's union filed a grievance alleging that the refusal by the company to hire the employee was based on discrimination. At arbitration, the arbitrator denied the grievance on the basis that the employer's inability to measure and manage the risk of harm constituted undue hardship. Specifically, the arbitrator found, "[t]he safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the Employer if it put the Grievor to work. As previously stated, if the Employer cannot measure impairment, it cannot manage risk." An application for judicial review of the arbitrator's decision, brought by the union, was dismissed. The applications judge held that the arbitrator's decision was reasonable (2019 NLSC 48, 2019 CSHG ¶96,250). The union appealed that decision. At issue was whether the applications judge erred in determining that the arbitrator's decision regarding the employer's duty to accommodate the employee was reasonable.

The appeal was allowed. The arbitrator's decision was subject to review on a standard of reasonableness. The applications judge erred in concluding that the arbitrator's decision was reasonable. The arbitrator found that no reliable scientific or medical test or resource was available for determining impairment in the circumstances. The arbitrator's decision regarding that issue was reasonable. However, "the absence of a test or standard does not lead inexorably to the conclusion that there is no means by which to determine whether an employee, by reason of ingesting cannabis, would be incapable of performing a specific job, including a safety-sensitive job. The onus was on the employer to establish on a balance of probabilities that some means of individual testing of the grievor to assess his ability to perform the job was not an alternative." Given the individual nature of the possible accommodation, the analysis required an "assessment regarding what alternatives were investigated by the employer that may have allowed for individual testing of the grievor. Was a scientific or medical standard the only option? If so, why? If alternate options were identified, why were they not implemented? For example, was a functional assessment of the grievor before his shift considered? If rejected, why? What discussions were had with the union to identify and assess alternate options for determining whether the grievor was capable of safely performing the job despite his use of cannabis in the evening? The employer failed to address these questions or provide evidence as necessary to discharge the onus of demonstrating that accommodation of the grievor on an individual basis would result in undue hardship." As such, "the arbitrator's decision was unreasonable insofar as he failed to address the employer's onus to establish that to accommodate the grievor by means of individual assessment of his ability to perform the job safely, regardless of the absence of a scientific or medical standard, would result in undue hardship." The matter was remitted back to the arbitrator for a determination of whether there was another means of individual assessment of the employee's "ability to perform the job safely which would provide an option for accommodation without undue hardship."

A concurring judgement found that the arbitrator and the applications judge also erred by relying upon "potential risk" of impairment as an independent justification for discrimination, which was contrary to well established workplace disability discrimination principles.

A dissenting judgment would have upheld the applications judge's ruling that the arbitrator's decision was reasonable. The dissenting reasons emphasized that the majority reasons would have required the employer to give the employee the chance to work on the construction site to see if he could perform the job safely. The notion that the employer would be required to do so, after having been put on notice that the employee could possibly be impaired, and with the employer having no way to reasonably measure if or to what degree the employee could be impaired, was unacceptable and could give rise to negligence allegations.

International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association. Inc., 2020 CSHG ¶96,335

Ontario

Worker Entitled To Reimbursement for Generator Under WSIB Home Modification Policy

Ontario Workplace Safety and Insurance Appeals Tribunal, May 15, 2020

In 2013, the worker, a labourer, fell approximately seven meters onto a concrete floor. He suffered multiple injuries including a severe traumatic brain injury, psychotraumatic disability, and paraplegia. He was granted a non-economic loss benefit for his permanent injuries, assessed at 90 per cent. In 2018, an Appeals Resolution Officer found that the purchase of a back-up home generator was reasonable for the worker's circumstances regarding his work-related injuries and the geographical location of his home. The Appeals Resolution Officer then found that the generator ought to be covered by the worker's independent living allowance ("ILA"), and therefore the worker was not entitled to a generator specific reimbursement in addition to the funds the worker already received as his ILA entitlement. The worker appealed. At issue was whether the worker was entitled to reimbursement for the purchase of a back-up home generator.

The appeal was allowed. The worker was entitled to reimbursement for the back-up home generator under WSIB Policy No. 17-06-08, "Home Modification". The Appeals Resolution Officer erred in categorizing the generator as an ILA covered expense. WSIB Policy No. 17-06-02, "Independent Living Allowance", provides that the purpose of the allowance is to off-set the cost of services (regardless of cost) and devices and other items (less than $250), in order to improve a worker's ability to live independently and the quality of his or her life. An example of an eligible device is a food processor. WSIB Policy No. 17-06-02 also provides that devices that cost more than $250 should be considered under WSIB Policy No. 17-06-03, "Independent Living Devices". A back-up home generator is a device that must be purchased and installed. It is not a service akin to hiring someone to cut grass. As such, it could not fall under WSIB Policy No. 17-06-02 on the basis of being a service. Furthermore, the purchase and installation cost of the back-up home generator was $9,944. It therefore could not fall under WSIB Policy No. 17-06-02 on the basis of being a device that cost less than $250. WSIB Policy No. 17-06-02 was not applicable to the purchase and installation of the generator. Expenses for devices that cost more than $250 are considered under WSIB Policy No. 17-06-03. WSIB Policy No. 17-06-03 provides that the WSIB will reimburse a severely impaired worker for a device if it, among other things, restores a worker's ability to be mobile, engage in self-care, avoid further injury, prevent future health complications, meets a permanent or long-term need, is appropriate given the worker's impairment and functional limitations, and meets applicable safety standards. Examples of eligible devices include, environmental controls, motorized scooters, remote vehicle starters, hospital beds, and automatic page turners. The purpose of a back-up home generator is emergency preparedness; to ensure the continuous operation of electrical systems of the home. The purpose did not align with assistive devices that help restore a worker's abilities, such as a motorized scooter. As such, WSIB Policy No. 17-06-03 was not applicable to the purchase and installation of the back-up home generator. WSIB Policy No. 17-06-08, "Home Modification", provides that home modifications may be authorized to provide access to an area within the home, and any other areas utilized for ordinary living necessities. In the instant case, an occupational therapist, who was sent by the WSIB to the worker's home to consider home modification requirements identified the back-up home generator as a required home feature. A back-up home generator is a device that is installed in a home to ensure that power continues in the event of a power disruption. It is not a device separate and apart from the home structure. The purpose of the back-up home generator is the functioning of the home and ensuring that assistive devices required as a result of compensable injuries, as well as other powered features of the home, continue to operate thus ensuring the continuity of health and safety measures and access to areas of the home including exterior areas. As such, WSIB Policy No. 17-06-08 was the applicable policy. The enhancement of an injured worker's independence and dignity is an underlying principle when considering health care provisions of the *Workplace Safety and Insurance Act, 1997* ("Act") and WSIB policy. Home modifications fall under health care provisions. The proper application of the Act and WSIB policy is to enhance the worker's independence and dignity. In the instant case, the generator would ensure that the worker could independently exit and access his home in the event of a power failure or emergency as well ensuring his safety in transferring from chair to bed, etc. Denying a provision identified as required by an assessing occupational therapist, on the basis that family members or personal support workers could assist the worker in an emergency instead, was not compatible with enhancing the worker's independence.

Decision No. 532/20, 2020 CSHG ¶96,336

Worker's Request To Extend Time To Appeal Granted

Ontario Workplace Safety and Insurance Appeals Tribunal, May 19, 2020

The worker sustained a compensable left knee injury in December 2002. The worker appealed a decision of an Appeals Resolution Officer ("ARO") dated January 2017, which denied entitlement for a right knee condition as a result of the compensable left knee injury. The worker filed the notice of appeal in October 2019, approximately 14.5 months after the expiry of the six-month statutory time limit for appealing the decision. The worker sought an order to extend the time to appeal. The worker maintained that the reason for the delay was related to mental illness and stress he had suffered since the injury. At issue was whether the worker's request to extend the time to appeal should be granted. The worker had also appealed from an ARO decision dated October 2012, which denied the worker's objection regarding closure of labour market re-entry services, loss of earnings benefits, and the determination of a suitable employment or business. That appeal was filed within the statutory time limit. He had also appealed within the statutory time limit from an ARO decision dated June 2016, which denied him entitlement to medical cannabis as a health care benefit for treatment of a bilateral knee condition related to the compensable left knee injury. The Workplace Safety and Insurance Appeals Tribunal ("WSIAT") placed both in-time appeals to the WSIAT in inactive status pending the outcome of the worker's application for a time extension to appeal from the January 2017 ARO decision.

The application was allowed. The worker was granted an extension of time and the appeal could be heard by the WSIAT. The overarching principle on a motion to extend time to file a notice of appeal is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances but, in answering that question, the decision maker is to take into account all relevant considerations, including: (1) whether the moving party formed a *bona fide* intention to appeal within the relevant time period; (2) the length of, and explanation for, the delay in filing; (3) any prejudice to the responding parties caused, perpetuated, or exacerbated by the delay; and (4) the merits of the proposed appeal. In the instant case, while there was no direct evidence of intent to appeal within the time limit, the worker had appealed closely-related issues resulting from the same injury in a timely manner, and those appeals were ongoing. The issue of entitlement for the right knee was implicitly decided by the ARO decision dated June 2016, which was one of the decisions that the worker had appealed within the statutory time limit, and which had been placed on hold by the WSIAT pending the outcome of the instant time extension application. The worker's entitlement for the right knee condition was fundamentally intertwined with the issues of entitlement for labour market re-entry services, health care benefits, loss of earnings benefits, and the determination of a suitable occupation. That factor weighed strongly in favour of granting a time extension to appeal on the issue of entitlement for the right knee condition. The 14.5-month delay was significant but it was not likely to affect the WSIAT's ability to adjudicate the worker's appeal on the merits and justice of the case. The relevant medical and other documentary evidence was preserved in the Workplace Safety and Insurance Board file. There was no indication that witnesses or other evidence had become unavailable as a result of the delay. A psychiatric consultation report dated April 2019, which diagnosed delayed chronic post-traumatic stress disorder, bipolar 2 disorder, and cannabis use disorder, indicated that the worker suffered from anxiety and mood instability. As such, the worker was suffering from psychological conditions which were likely to have affected his ability to meet the time limit to appeal from the January 2017 ARO decision. Furthermore, the worker was self-represented and appeared not to have had access to professional advice or representation to meet the time limit to file an appeal. The employer was out of business and had not participated in the time extension application nor did it participate in the ARO decision the worker wished to appeal. As such, the employer was not prejudiced by the worker's 14.5-month delay in filing the notice of appeal. It appeared that the worker suffered from a bilateral knee condition. He had submitted in his notice of appeal that the right knee condition resulted from compensating for the left knee condition since the accident. Based on that information, the worker had an arguable case on the merits for secondary entitlement to a right knee condition as a result of the compensable left knee injury. The justice of the case weighed in favour of granting the worker a time extension to appeal from the January 2017 ARO decision.

Decision No. 282/20E, 2020 CSHG ¶96,337

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For LexisNexis Canada Inc.

Edward Noble, BA, LLB
Content Development Associate
905-479-2665
email: edward.noble@lexisnexis.ca

Customer Support
Phone: 1-800-387-0899
Email: service@lexisnexis.ca
Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

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LexisNexis Canada Inc.
111 Gordon Baker Road
Suite 900
Toronto, Ontario
M2H 3R1