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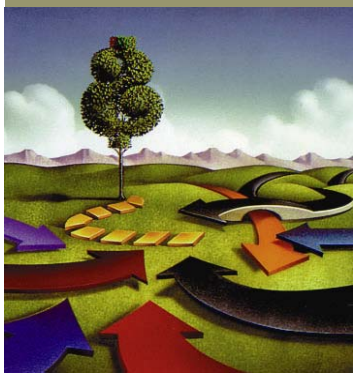
July 2011



Effective Management of Long-Term Disabled Employees

Most employers from time to time experience difficulty in the management of an employee who is absent as a result of disability. Effective management of these employees can reduce costs and legal liability.

It should come as no surprise that employees who are absent as a result of disability have certain Human Rights protections. However, these protections are not without limitations. Not all medical conditions constitute disabilities under the Human Rights Code. In the case of Rogers Sugar, the grievor was absent from work for medical reasons stemming from her reaction to "inhumane" rodent control in the workplace. The employee was held to have chosen to leave the workplace because of this issue. Similarly, in CUPE v. Brampton, "anxiety" over workplace issues did not constitute a disability under the Code. Only disabilities under the Code attract the obligation to accommodate.

An employer can defend any workplace rule provided it is a Bona Fide Occupational Requirement. To be a BFOR, the rule must be:

- Adopted for a purpose rationally connected to the performance of the job;
- Applied in an honest and good-faith belief that it was necessary for work-related purpose;
- Reasonably necessary to the accomplishment of that purpose and it is not possible to accommodate the employee without undue hardship.

Undue hardship is the problematic test. The concept of "undue hardship" presupposes that "due hardship" is to be expected and therefore some dislocation, inconvenience and cost will occur in the course of accommodation. In Ontario, undue hardship is based only on financial and health and safety impacts.

The evidentiary burden associated with undue hardship is considerable. The courts have held that there must be concrete evidence of undue hardship. Impressionistic evidence on the part of the employer is insufficient. Evidence of particular cost or health and safety implications must not only be forthcoming but must have been reviewed during the accommodation process, as opposed to being relied on after the fact. This is because the right to accommodation is not only substantive but procedural. Without this evidentiary basis, the probability is that an employer will be found to have failed to accommodate.

If accommodation short of undue hardship is not possible, an employer can always terminate employment on the provision of reasonable notice at common law, but this is costly. Extensive absence is usually not just cause. However, a third alternative is frustration of contract. When an employee is unable provide services on a permanent basis, the employment contract can be terminated without common law liability (although the ESA applies). The determination must be based on medical evidence, as opposed to the contents of the employee's file or the assertion of the employee. The disability must be total and permanent. Where termination has occurred but the medical evidence was that improvement was to be expected, an employer will not only have failed to accommodate but be liable for common law notice as well.

If the disability is within the own occupation period under an LTD plan (normally 2 years), some courts have held that the disability is not unforeseen and therefore not a frustrating event. It is normally only when an employee moves into any occupation coverage (i.e. has been absent from work for over 2 years) that frustration applies, unless the employee occupies a higher level, unique position. For employees in interchangeable jobs, frustration of contract requires a prolonged period of absence.

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Allison Taylor

Frustration of contract can apply to cases of more sporadic absence. In Desormeaux, the employee was absent from work for 365 days in nine years, most recently due to migraines. The employee was initially found by the Canadian Human Rights Tribunal to have been discriminated against by being terminated, a decision which was overturned on appeal by the Federal Trial Court on the basis that the evidence of a general practitioner was not sufficient to establish migrainesasa disability. The Federal Court of Appeal overturned the Federal Trial Court, requiring, in effect, a very significant period of absence to be tolerated as a matter of accommodation. However, in the Hydro Quebec case, the Supreme Court of Canada held an employee absent 960 days in 7.5 years to be unable to fulfill the basic duties of the position, such that accommodation was impossible and frustration of contract had occurred.

In some circumstances termination on a consensual basis can be a valuable tool, provided that the employee actually opts for termination as opposed to having imposed. This option should not be exercised until other alternatives have been reviewed and any possible accommodation considered.

The Supreme Court of Canada has held that disability benefits paid for by the employer are deductible against pay in-lieu of notice, but where the employee contributes to or pays for the LTD benefits, the employee is entitled to both benefits and pay-in-lieu. Most insurance policies have a claw-back relative to funds paid by the employer so that in practice, the employee does not receive a double payment; instead the insurance company benefits rather than the employer.

If an employee is terminated and subsequently becomes disabled, the courts are increasingly ordering the employer to self-insure during the notice period. In Brito v. Canac Kitchens, the Plaintiff was terminated after 22 years of service at age 55. Although he quickly obtained re-employment, he became disabled16 months later. He sued for wrongful dismissal including loss of LTD benefits. The award was 22 months of notice less his earnings from re-employment, plus short term disability benefits from the onset of disability to the end of the notice period, long-term disability benefits thereafter to trial and a present value award of disability benefits thereafter to age 65. One of the best strategies to avoid this risk is to negotiate a severance package which includes a full and final release. However, if the employer chooses to provide ESA payments only, or has contracted for notice and benefits for a fixed period of time, obtaining a release may not be possible. Another strategy is to utilize an employment contract which limits benefits payable on termination to all benefits during the employment standards period only, as required by law in Ontario, and thereafter health and dental benefits only.

An employee who is terminated because of a disability or a medical condition may be awarded aggravated damages. Although in the Honda v. Keays case, the aggravated and punitive damages awarded to Mr. Keays at trial were eliminated by the Supreme Court of Canada, the Court did rule that where an employee has suffered damages due to uncivil or hurtful treatment at the time of termination, aggravated damages based on medically-supported damages can be awarded.

Workplace related injuries pose special challenges for employers, particularly given the abolition of Labour Market Re-Entry (LMR) in favour of Work Reintegration staffed by WSIB employees rather than expensive and often ineffective consultants. Today WSIB's Return to Work Specialists are embarking on a program of meetings with employers, generally with no prior knowledge of the workplace, seeking to reintegrate employees into work even after long periods of time so as to reduce the Board's significant unfunded liability. The challenge for employers will be to demonstrate why it is that the employee cannot be reintegrated into the workplace in any capacity.

Another WSIB amendment is the probable increase of the experience rating (NEER) window from 3 to 4 years, retroactive to the 2008 accident year, which will result in significant increase in costs to the employer.

Employees who are injured on the job and return to work have re-employment rights if they have been employed for 12 continuous months before the accident, whether or not the accident results in lost time, for up to 2 years after the injury. Relative to terminations within the first six months after the return to work, the employer has the burden of proof that it was not motivated in any way by the injury. The penalty for breach is a year's wages, although the Board will usually allow the employer to re-hire the worker before imposing this penalty.

Finally, the Board is exercising its muscle in applying non-cooperation penalties more stringently than it has historically. The obligation may run as long as six years, when benefits lock in, and can result in significant penalties which rival Occupational Health & Safety fines.

Under the old Labour Market Re-Entry scheme, employers whose employees had gone to LMR could normally count on the Human Rights Tribunal to refuse to hear their cases. Over the last few years, the Tribunal has asserted concurrent jurisdiction over work-related injuries. Because the move to LMR historically has not been the result of investigation by the Board of accommodation options, the Tribunal has increasingly held that such cases can proceed before it. However, provided that an appropriate set of questions relative to the duty to accommodate have been asked in a WSIB hearing, the employee may be unable to relitigate before the Human Rights Tribunal.

As can readily be seen, the issues facing employers seeking to manage their disabled employees are myriad. Employers are well advised, to seek legal advice before taking steps which can result in significant liability.

Source: Stringer Brisbin Humphrey Management Lawyers, *By Allison Taylor, Counsel to Stringer.*

Trends in Paramedical Benefits

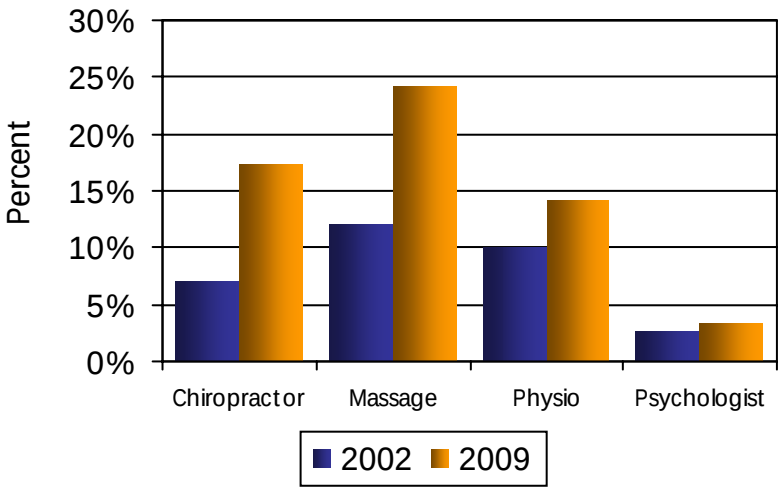
More Employees using Paramedical Services

Many plan members now enjoy coverage of paramedical services as part of their benefit packages. Most commonly available is coverage for massage therapy, chiropractic care, physiotherapy and psychological services. Some plans also feature coverage for services associated with social workers, podiatrists, dietitians, naturopathic treatment, Christian science, acupuncture, athletic therapy, speech therapy, orthopedic therapy and osteopath treatment.

Usage trends

Paramedical services have become more popular with plan members in recent years. The most recent Great-West study examining health and dental benefit trends shows that utilization is growing among plan members. The number of plan members using paramedical services is increasing and the number of services these plan members claim is also on the rise.

Figure 1 - Percentage of Plan Members using Paramedical Services



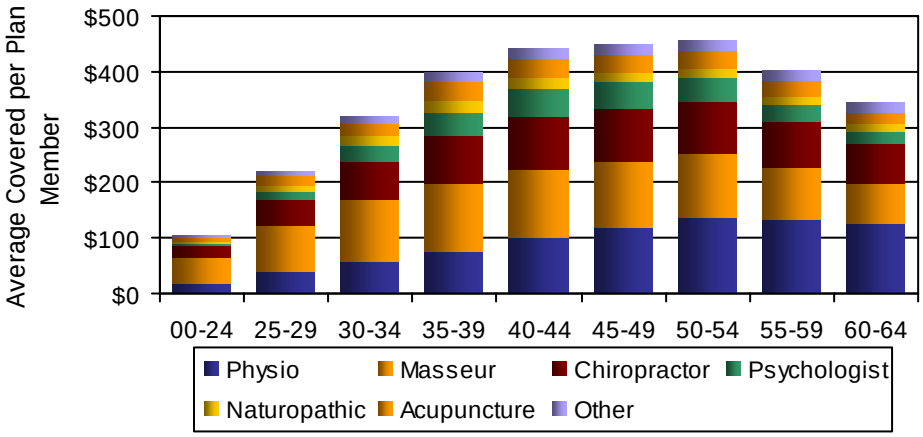
For most paramedical services studied, the annual increase in the number of people submitting claims ranges from five percent to 25 percent, depending on the age of the claimant and the type of practitioner. In most categories, the number of services that plan members use is increasing at a rate of between five percent and 10 percent annually.

Cost trends

Recently, Great-West has seen overall annual increases in per-plan member paramedical costs of seven percent to almost 35 percent, depending on the plan member's age and the type of paramedical practitioner. The largest per-plan member cost increase has been in the area of chiropractic treatment and in the "other" paramedical services category, which includes acupuncture, naturopathic treatment and athletic therapy.

In the Great-West study, per-plan member paramedical costs peaked between the ages of 50 and 54 at just over $450 annually (including dependent claims). Even though paramedical costs peak in this age group, we are seeing the largest cost increases, year over year, in older age categories.

Figure 2 - Paramedical Costs by Age



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Increasing popularity

Paramedical services are becoming more popular among plan members for a few key reasons. Widespread availability of health and wellness information, growing awareness of paramedical options and rising pressures with respect to work and family may be leading plan members to consider alternative treatments.

As well, more people may be using paramedical services as they await medical treatment, and the cost of some services is being shifted from government plans to private insurers. It's also expected that baby boomers, who have become accustomed to using paramedical services, may have increased need for these services as they age, keeping utilization higher in older age groups.

Plan sponsors respond

Some plan sponsors are responding to increases in paramedical utilization by placing limits on how plan members use these services. They may establish a maximum dollar amount that can be spent per-visit or per-practitioner type. Another potential response would be to implement plan member cost-sharing through co-insurance for paramedical benefit expenses.

Meanwhile, other plan sponsors are choosing to expand their paramedical coverage. Recognizing increased interest in these services with plan members, they are opting to cover more types of practitioners (see figure 3).

There is little doubt that plan sponsors will want to consider providing some form of benefits for paramedical services as part of effective benefits plan management. However, appropriate cost management strategies should be considered through effective benefit plan design.

Source: Great West Life, Trends in Health and Dental Benefits, 2010.

Figure 3 - Percentage of plans that cover Paramedical Services