



Cannabis in Construction

RESCON Legal Panel

June 12, 2018

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Cannabis in Construction

Agenda

- ◆ Arising out of the employment
 - Injury caused by impairment
- ◆ Medical Marijuana
 - When allowed: WSIB versus WSIAT
- ◆ RTW issues when worker prescribed cannabis
 - Accommodation

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Cannabis in Construction

Legalization Impact: On WSIB issues: Not much Issues have been in play for some time

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Arising out of

The WSIA:

Insured injuries

13 (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan. 1997, c. 16, Sched. A, s. 13 (1).

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Arising out of

The WSIA:

Presumptions

13 (2) If the accident arises out of the worker's employment, *it is presumed* to have occurred in the course of the employment unless the contrary is shown. If it occurs in the course of the worker's employment, *it is presumed* to have arisen out of the employment unless the contrary is shown. 1997, c. 16, Sched. A, s. 13 (2).

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Arising out of

The WSIA:

Serious and wilful misconduct

17. If an injury is attributable *solely* to the serious and wilful misconduct of the worker, no benefits shall be provided under the insurance plan unless the injury results in the worker's death or serious impairment. 1997, c. 16, Sched. A, s. 17.

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Arising out of

- ◆ The analysis: Suspicion that the accident caused by impairment
 - Accident in course of employment?
 - Time, place and activity
 - If yes, presumed to arise out of employment
 - *Unless contrary is shown*

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Arising out of

- ◆ Hundreds of impairment cases
 - Mostly alcohol
- ◆ Cannabis analysis the same

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Arising out of

- ◆ WCAT 763/91 (March 1994)
 - Truck driver
 - Truck hit guard rail
 - Extensive drinking night before
 - Toxicologist: Worker was impaired

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Arising out of

- ◆ WCAT 763/91 (March 1994)

But, the Panel is not required to satisfy itself beyond any reasonable doubt that it was the impairment, and not the employment activity, which was the predominant cause of this worker's injuries. In our view, in order to rebut the presumption contained in section 4(3) of the Act, the Panel must be satisfied that there is clear and convincing evidence that the alcohol impairment caused the accident. It is not necessary for the Panel to be certain, or to be confident to the standard required in a criminal matter, that such was the case.

In the circumstances, the Panel is satisfied that the impairment caused by this worker's alcohol intake was, more probably than not, the predominant cause of the accident, and the cause of his personal injuries.

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Arising out of

- ◆ 1688/05 (October 14, 2005)
 - Installing siding *at 12:20 A.M.*
 - Been drinking heavily until 11:30 P.M.; Smoked marijuana
 - Fell 30 feet from scaffolding
 - Witness: Worker smelled of alcohol (“reeked”)
 - **Decision:** Worker not so intoxicated he could not perform his duties. Allowed.

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Arising out of

- ◆ WSIAT 1722/03 (July 13, 2004)
 - Truck driver – single MVA at 1:30 AM while negotiating a curve
 - Evidence confirmed worker intoxicated
 - **Decision:**
 - Road conditions, darkness and fatigue were work-related factors that contributed to accident.
 - Impairment did not negate the work related factors – allowed.

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Arising out of



Decision No. 665/00 granted entitlement on the basis that there was no evidence that intoxication was the sole cause of the accident (a fatal MVA), that the worker was so intoxicated that he could not perform his work duties, or that the work-related factors made no significant contribution, and that the worker's elevated blood alcohol level did not take him out of the course of employment.

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Arising out of



Decision No. 1075/98 granted entitlement to a trucker in an MVA on the basis that it was not possible to know whether the worker was impaired by alcohol or by diabetes.

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Arising out of



Decision No. 235/98 granted entitlement to a trucker with a blood alcohol almost twice the legal limit. The Panel did not condone the worker's actions but the worker had been driving for the benefit of the employer for a number of hours that night. The Panel stated as follows:

Other factors such as the visibility and road conditions, and inherent problems of driving with a partly-filled liquid tanker trailer, also contributed to the accident. It may be possible for a worker to be removed from the course of employment if the worker was so drunk as to be unable to drive, so that the worker was no longer performing the work he was being paid to perform, but that was not the situation in this case.

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Arising out of



Decision No. 260/96 denied entitlement concluding that the worker was not in the course of his employment. His blood alcohol was 3½ times the legal limit, a level of intoxication at which many people lose consciousness. The Panel also concluded that the accident (the worker fell off a ladder boarding a ship) did not arise out of employment, since the only significant factor contributing to the accident was the worker's intoxication.

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Arising out of

Decision No. 349/95 granted entitlement to the widow of a trucker who died in an MVA. A majority concluded that, although the alcohol (3 times the legal limit) was a significant factor, it did not negate the contribution of other workplace factors (narrow gravel road in icy conditions).

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Arising out of

◆ Bottom line:

- Showing intoxication is tough
- But even that is not enough
- The intoxication must be the sole cause of the accident
- Very difficult to rebut the presumption

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Medical Cannabis & WSIB

WSIB Policy versus Appeals Tribunal

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Medical Cannabis & WSIB

wsib
cspaat

MEMO

TO: Donna Bain, Chief Operating Officer (A)
FROM: # Marijuana Book, MD, Medical Director Clinical Services
DATE: 04 July 2018
SUBJECT: Medical Marijuana Health Care Advice Document Update

Medical marijuana refers to the physician-supported use of the marijuana plant for therapeutic purposes. Medical marijuana is not considered a drug by Health Canada; individuals require documented physician support to legally obtain it. Under current health Canada regulations, once a medical document is obtained, individuals register with a licensed producer.

The evidence for the use of medical marijuana in the treatment of chronic noncancer pain was reviewed by the WSIB in 2008. The resulting Health Care Advice document did not support the finding of medical marijuana in chronic non-cancer pain. Since then, several more studies were published. These were discussed at the Drug Advisory Committee (DAC) on March 17, 2018. The majority of published systematic reviews and clinical trials were not relevant to the WSIB population since they investigated non-comparable stresses such as multiple sclerosis and HIV-associated neuropathic. Only one abnormal randomised-controlled trial of medical marijuana in neuropathic pain was identified as relevant; however, despite a positive result, it had major design limitations. The DAC concluded the additional evidence is insufficient to support a change in position. The DAC further recommended, in the rare circumstance when an injured worker obtains entitlement for medical marijuana, WSIB should adhere to reasonable dosing limitations due to safety issues. Additionally, approvals should be consistent with WSIB's overall approach to generic substitution.

Clinical Services supports the DAC recommendations and in response will update the Health Care Advice document, with your approval of the DAC recommendations, the information will be communicated to staff.

Approved by:
Donna Bain
D Bain, PhD

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Formulary Drug Listing Decisions

CANNABINOIDS (Nabilone and Sativex®)

Indications
Nabilone: management of severe nausea and vomiting associated with cancer chemotherapy
Sativex®: adjuvant treatment for symptomatic relief of spasticity in patients with multiple sclerosis (MS); adjuvant treatment for the symptomatic relief of neuropathic pain in adults with MS (conditionally); adjuvant analgesic treatment in adult with chronic cancer pain who experience moderate to severe pain during the highest licensed dose of chronic opioid therapy for persistent background pain (conditionally).

Formulary Status

The Drug Advisory Committee (DAC) recommended nabilone be listed on the cancer formulary (FFWS) and Sativex® not be listed on any WSIB formulary.

The WSIB has decided to accept the DAC recommendation.

Nabilone (strengths: 0.5 mg and 1 mg capsules) is listed on WSIB formulary FFWS.

Delta-9-tetrahydrocannabinol (THC) and cannabidiol (CBD) are listed on WSIB formulary FFWS.

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Medical Cannabis & WSIB

- ◆ WSIB Policy:
 - Medical marijuana for treatment of chronic non-cancer pain

Not allowed

- ◆ That is the current WSIB policy

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Medical Cannabis & WSIB

- ◆ Appeals Tribunal has a different take
- ◆ Decision 2335/06I (earlier decision)
 - WSIA s. 50 provides that
 - Every worker entitled to
 - “*such health care as may be necessary as a result of the injury*”
 - S. 50 provides discretion; no requirement for severely impaired worker (para. 32)

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Medical Cannabis & WSIB

◆ Decision 2335/06I (earlier decision)

[34] The Panel does not dispute that there may be controversy in the medical community about the effectiveness of marijuana in relieving pain. The same may be said to be true of many types of medication however. Notwithstanding the controversy surrounding the success of marijuana as a treatment for pain, we see nothing in the legislation or policy which prohibits an adjudicator from concluding that the use of marijuana could be an appropriate health care measure to be used in treating intractable pain arising from a compensable injury. While one would expect that the use of marijuana would be the exception rather than the rule in treating pain, we are satisfied that in the appropriate case, the prescription of marijuana is a form of treatment that can authorized for injured workers. In our view, this is one of those cases.

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Medical Cannabis & WSIB

◆ Decision 2335/06I (earlier decision)

- But no *carte blanche*
- WSIB retains the right to monitor its use and effectiveness
- WSIB can make future declaration that no longer in order (para. 42)

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Medical Cannabis & WSIB

- ◆ Analytical template (Appeals Tribunal)
 - The worker experiences constant and debilitating pain;
 - Treating physician has prescribed medical marijuana;
 - Worker has obtained Health Canada authorization;
 - Other methods of pain control have been tried but have proven to be less effective; and
 - There are no circumstances which make it inappropriate for the worker to use medical marijuana to treat ongoing pain

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Medical Cannabis & WSIB

- ◆ WSIAT 385/18 (February 13, 2018)
 - Using marijuana for medicinal purposes “*would be the exception and not the rule*”
- ◆ WSIB while not allowing medical marijuana in the first instance, implements and complies with WSIAT decisions

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Medical Cannabis & RTW

- ◆ Normal accommodation analysis applies
- ◆ Cannabis brings nothing special
- ◆ Same worker and employer duties/obligations apply as with any other Rx

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