

Hugh Scher – Human rights and disability lawyer in Toronto, Counsel for the National ME/FM Action Network and ME Ontario. Hugh takes cases across Canada and has 25 years experience. <http://www.lostjobs.ca/>

Hugh talked about the relationship between the employment agreement and benefits including drug and medical benefits, short and long term and what is important given the unique nature of ME/CFS and FM.

All disability claims stem from employment relationships and contracts. Employees provide work. In return, employers provide pay and benefits including health and short and long term disability benefits and sometimes life insurance.

What happens when someone becomes ill and is unable to carry out duties of work and can't meet obligations of work contract?

There are many possibilities:

- Request for accommodations at work to allow continued work
- Unpaid leave of absence
- EI sick benefits up to 15 weeks if there are no employer benefits
- Short term disability
- Long term disability
- Employment ends

To figure out which choice is best for an individual, one needs to understand the nature of the employment agreement. What benefits are provided? Are disability benefits included? If so they are generally governed by a “policy” which lays out the terms. Short term benefits are often paid for by the employer and administered by an insurance company. Long term benefits are often paid by an insurance company who administers and pays for the benefits for the employer.

Employers typically have an obligation to accommodate ill and injured workers with modified but still meaningful work if employees are able to continue working. This allows some middle ground between working full time and going on sick leave. There is human rights legislation about the employer's responsibility to accommodate if possible based on the employee's functional limitations.

To go on STD or LTD you must prove that you are unable to perform the duties of your own job or a similar job for which you are qualified by virtue of training, education or experience. After 2 years most policies change to “any occupation”. Private insurance more often stipulates “own occupation”. Private policies are underwritten at the time the policy is purchased rather than group policies which are underwritten at the time of the claim.

Do you receive health benefits while you are on disability? It depends. Those benefits are benefits of employment and not of the disability policy. Therefore, it

depends on the employer whether they will continue the health and dental benefits during disability. Sometimes the employer is willing to cover the claimant if they pay the premiums. Life insurance policies often waive premiums while the insured is on disability.

What if you are terminated from employment before applying for LTD or while on LTD? If you become disabled while working, you are entitled to a disability claim. Usually termination of employment disqualifies a person from disability benefits.

However, if the employer terminates an employee, there is a minimum requirement for notice of termination of at least one week per year of service. Listen to the recording for more details on this because Hugh states later that many higher level and longer serving employees are given notice of up to a month/year worked. Health and wellness benefits are to be maintained for at least 30 days after termination.

If an employee becomes disabled during the notice period for termination, employers or insurers are expected to meet the contractual agreements for disability benefits. This area is very complex and Hugh recommends getting professional advice if you are in this situation to make sure you know what you are entitled to. Furthermore, he recommends finding a lawyer who understands your health condition.

Hugh has been/is involved in cases which have set new precedents

Several years ago, Hugh was involved in a case (Lowe vs Guarantee Insurance) that led to the ability to bring a suit against an IME assessor who makes a biased report.

He is currently involved in a case in Nova Scotia in which they gained access to coverage for medical marijuana as a pain reliever by the insurer. It has been appealed and is going to the NS court of appeal in October 2017.

Other issues

It's important to know how government and private benefits may interact with each other. For example, if someone receiving disability payments is granted CPP-D, the private insurance payments will be offset by the amount of the CPP-D payment so that the overall amount received won't change.

Hugh believes ME and FM have unique challenges. It is a journey just to get a diagnosis and find someone who understands the conditions. However, in the disability context, diagnosis is not key but rather how the condition impairs you from engaging in work.

Issues often not considered for other conditions such as memory, concentration and focus often impact employability. Decreased reliability to show up to work due to fluctuating and unpredictable symptoms is important for patients with ME and FM. The patient and/or lawyer needs to elicit this information from the physician to have a

chance to be successful. Often when claims are denied it is due to inadequate information provided. An occupational health assessment may be helpful. Specialist assessments are useful in Hugh's opinion. It's helpful if all the doctors agree on the extent of limitations.

The critical point is to link limitations and restrictions and the ability to be gainfully employed in a real-world context. Details and specifics are important.

If return to work is likely, it is important to communicate clearly with the employer about your intentions.

This presentation contains so much information and gives a glimpse of the complexity of this area of law. Thank you to Hugh Scher for giving such a detailed and yet accessible summary.

Ellie Stein MD FRCP(C)