Foreign workers denied medical coverage after status expires

Coverage of foreign workers not meant to extend past end of work permits: Court

BY SERGIO KARAS

BACKGROUND

A RECENT decision of an Ontario Divisional Court panel concerning the entitlement of foreign workers to medical coverage under the Ontario Health Insurance Plan has potential far-reaching consequences and may result in the denial of medical benefits for thousands of foreign workers and students in Canada whose status has expired or changed. Immigration lawyer Sergio Karas discusses the case and its potential effects on foreign workers across Canada who may have work-related medical issues.

Two foreign workers from Jamaica injured in an accident on the way to work are not entitled to medical coverage after their work permits expire, the Ontario Divisional Court has ruled.

Denville Clarke and Kenroy Williams arrived in Ontario in 2012 as participants in the Seasonal Agricultural Worker Program (SAWP), operated by the federal government. The workers held work permits valid until Dec. 15, 2012, and worked for a company in Ontario.

As part of their program, the workers signed an employment agreement with the employer, who was required to obtain insurance providing for compensation for the worker for personal injuries received or diseases contracted as a result of the employment — unless prevailing law already did so. In addition, the employer was required to ensure that the workers obtained health coverage according to provincial regulations. The foreign workers were covered by insurance from the Worker's Safety and Insurance Board (WSIB) and health coverage by the Ontario Health Insurance Plan (OHIP).

Accident in employer's vehicle injured foreign workers

A few days after their arrival, the two workers were injured in a serious motor vehicle accident while being transported to work in their employer's van.

The accident resulted in fatalities to other passengers. The workers received compensation benefits and medical care for their work-related injuries funded by the WSIB, but their medical treatment had to be extended beyond the date of expiry of their work permits. Faced with the prospect of being in Canada without status after the expiry of their work permits under the SAWP, the workers applied for and were granted visitor status by Citizenship and Immigration Canada until February 2014. They also applied for an extension of their OHIP coverage but were denied. They appealed to the Health Services Appeal and Review Board, which determined the foreign workers were residents of Ontario and eligible for health insurance coverage, and were entitled to continue to receive medical services. However, the province appealed that decision.

The issue on appeal was whether the foreign workers continued to qualify for OHIP coverage after the expiry of their work permits. The case turned on the interpretation of s. 1.3(2) of Regulation 522 under the Health Insurance Act, which prescribes that people who are present in Ontario because of a work permit under the SAWP are residents of the province, even if they do not meet any other qualifying requirements. The legislative intent was to cover workers with valid work permits issued under the SAWP, so the question was whether the workers whose SAWP permits had expired continued to be covered by that section.

The court discussed the appropriate standard of review and found it was agreed between the parties that such standard was one of reasonableness, as the board was interpreting a statute that is directly related to its core function.

Further, the court relied on previous case law and held that where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is much narrower.

The province argued the foreign workers did not qualify as Ontario residents after the expiry of their work permits and the issue was not properly addressed by the board. Instead, the board had decided that, because the agreements signed by the foreign workers under the SAWP contemplated that, in certain circumstance, persons in Canada under the program might not leave the country by the date stipulated in their work permits, they continued to be residents of Ontario. The board relied on the language in the contract that directed the foreign workers to return to their country of origin at the expiry of their work permits with the exception of extraordinary circumstances, including medical emergencies, and hastily concluded that the foreign workers continued to be residents of Ontario and were entitled to continuing medical coverage.

Coverage ends with work permit expiry

In a unanimous ruling, the court disagreed. The court held the board's conclusion was not reasonable in light of the plain wording in Regulation 522.

The plain and ordinary meanings of the words used in s. 1.3(2) accords the status of residents to the foreign workers "because they have a work permit" under the SAWP. There was no dispute the foreign workers' permits expired on Dec. 15, 2012, and therefore they no longer had work permits. The court also rejected the foreign workers' contention that the work permits did not need to be valid in order to qualify as residents of Ontario.

The court held that such conclusion was neither reasonable nor sensible, based on two main reasons.

First, as a matter of basic statutory interpretation, there was nothing in the plain and ordinary meaning of the words used in the regulation that contemplated its application beyond the situation where a worker is present in Ontario under the terms of the SAWP. The court held it was clear such plain and ordinary meaning of the words meant that coverage was provided for people who were present in Ontario because they have a work permit under the program.

The regulation expressly used the present tense, not the past tense. The court held the simple fact was there was no

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other plausible meaning that could be given to the regulation.

Second, the court ruled the triggering event for residency under the regulation was the possession of a work permit, and therefore it was implicit that such work permit had to be a valid one. The suggestion the province would have passed a regulation that contemplated its application based on an invalid work permit was "irrational."

The court also rejected the foreign workers' contention that OHIP coverage only ceases when there is no longer a causal connection between their physical presence in Ontario and the SAWP. The court held that when a work permit issued pursuant to the SAWP expired, it can no longer be reasonably said there remains a causal connection between the person's physical presence in Ontario and the SAWP, and the person's employment is legally at an end.

If the person continues to remain in Ontario, it is not an outcome connected to the SAWP. The court held that, if the foreign workers' contention was correct, any person whose seasonal worker permit had expired could continue to be entitled to OHIP coverage essentially in perpetuity. That was an outcome the legislature could never have intended, said the court.

The court found the board erred because it did not consider the plain wording of the regulation and whether there was any ambiguity. The board did not engage in any analysis of the scheme of the act or the regulation, did not identify any policy considerations that directed the adoption of any particular interpretation of the regulation.

Instead, the board considered only the SAWP agreement between the foreign workers and the employer and used one provision of that agreement to base its conclusion that section 1.3(2) of the regulation covered the foreign workers' situation. The board also failed to note the province was not a party to the SAWP agreement and it cannot have its interests affected by an agreement to which it is not a party, nor should its legislative or regulatory enactments be interpreted based on such an agreement, especially ones that can create fiscal responsibilities and liabilities.

Eligibility for OHIP ended with permits

In the court's view, the plain wording of the regulation allowed for no other conclusion than the foreign workers ceased to be eligible for OHIP once their work permits expired on Dec. 15, 2012.

The board's conclusion to the contrary was not a decision that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law," as outlined in *Dunsmuir v. New Brunswick*.

Further, the court held that, if there is a gap in the parameters of the SAWP that does not ensure health care coverage for seasonal workers who are required to remain in Ontario for legitimate medical reasons after the expiration of their work permits, then that gap should be filled either by requiring the employers to obtain supplemental health insurance, or through an agreement negotiated between the federal and provincial governments. However, it cannot be filled by a contrived interpretation of an existing regulation.

This decision has potential negative consequences for all foreign workers and students whose permits have expired. Further to the court's decision, all foreign workers and study permit holders who are normally entitled to OHIP can have their coverage terminated if their permits are not extended. The expiry of those permits would mean they would cease to be residents in the province for health insurance purposes as they would no longer be entitled to remain in the province legally.

It is noteworthy that, despite the fact the foreign workers in this case obtained visitor status, that was not sufficient to maintain their OHIP coverage, as visitors are not entitled to it. Employers should also be concerned by the suggestion the gap in coverage should be filled by private health insurance provided by employers, as the province should not assume those liabilities.

For more information see:

- *Ontario (General Manager, Ontario Health Insurance Plan) v. Clarke,* 2014 CarswellOnt 4203 (Ont. Div. Ct.).
- *Mills v. Ontario (Workplace Safety & Insurance Appeals Tribunal)*, 2008 CarswellOnt 184 (Ont. C.A.).
- *Dunsmuir v. New Brunswick*, 2008 CarswellNB 124 (S.C.C.).

About the Author

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