



WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1030/09

BEFORE:

S. Netten : Vice-Chair
M. Christie : Member Representative of Employers
D. Broadbent : Member Representative of Workers

HEARING:

May 21, 2009 at Toronto
Oral
Post-hearing activity completed on October 29, 2009

DATE OF DECISION:

December 18, 2009

NEUTRAL CITATION:

2009 ONWSIAT 2943

DECISION(S) UNDER APPEAL: WSIB ARO decision dated January 18, 2007

APPEARANCES:

For the worker:

C.M. Ollier, Lawyer

For the employer:

Not participating

Interpreter:

None

**Workplace Safety and Insurance
Appeals Tribunal**

505 University Avenue 7th Floor
Toronto ON M5G 2P2

**Tribunal d'appel de la sécurité professionnelle
et de l'assurance contre les accidents du travail**

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REASONS

(i) Issues

[1] The issues in this appeal are:

- entitlement for temporomandibular joint (TMJ) difficulties claimed to relate to the compensable accident of November 12, 1999; and
- the quantum of the non-economic loss (NEL) award for chronic pain disability (CPD).

(ii) Overview

[2] The worker sustained compensable aggravation injuries to his back, neck and right shoulder on December 21, 1987 and January 24, 1989. In *Decision No. 863/97*, the Tribunal found that these injuries had significantly contributed to the development of chronic pain disability; however, the permanent disability (PD) pension for CPD was to be reduced by 50% based on a major pre-existing disability resulting from non-compensable accidents and surgery. The Board rated the worker's CPD at 20%, and the worker was granted a pension of 10%.

[3] Also in *Decision No. 863/97*, the Tribunal determined that the worker's TMJ problems likely arose from a 1988 motor vehicle accident and not from either compensable injury.

[4] On November 12, 1999, the worker slipped and fell at the facility where he was participating in labour market re-entry (LMR) training. The worker was granted entitlement for injuries to his back, head and finger. On an ongoing basis, the Board accepted that this accident had worsened the worker's back condition as well as his CPD. The Board denied the worker's request for entitlement for additional TMJ problems arising from this injury.

[5] In May 2001 the Board accepted that the worker was unemployable, and granted full loss of earnings benefits (eventually made retroactive to April 26, 2000). On August 14, 2002, the worker's CPD was rated at 70% permanent impairment, reduced to 25% based on the PD pension and the major pre-existing disability.

[6] The worker's requests for TMJ entitlement and for a lesser reduction of the NEL award were denied by the Appeals Resolution Officer on January 18, 2007. The worker appeals to the Tribunal.

[7] The *Workplace Safety and Insurance Act, 1997* (WSIA) applies to this appeal. Section 126 of the WSIA requires the Tribunal to apply Board policy when making its decisions.

(iii) TMJ entitlement

a) Law and policy

[8] General entitlement to benefits is governed by section 13 of the WSIA:

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.

[9] Board policy on adjudication of initial entitlement (*Operational Policy Manual* (“OPM”) Document No. 11-01-01) states that an allowable claim must have five points: an employer, a worker, personal work-related injury, proof of accident, and compatibility of diagnosis to accident history. A claim may be allowed on an aggravation basis where a relatively minor accident aggravates a pre-existing impairment (OPM Document No. 11-01-15).

[10] In this appeal, the medical evidence establishes that the worker broke a permanent retainer and had some further TMJ problems; the question to be determined is whether these difficulties arose from the compensable accident of November 12, 1999.

b) Testimony

[11] The worker testified as follows:

- The worker had previous TMJ difficulties, for which he received orthodontic treatment from 1990 to 1995. After his braces were removed, orthodontist Dr. N. Gaik attached permanent, metal retainers to the inside of his upper and lower teeth. He did not experience further problems with his jaws prior to his accident in November 1999.
- On November 12, 1999, the worker slipped on water in the bathroom and fell, hitting the back of his head on the ground. He believes that he must have closed his mouth in the fall, as he broke his upper retainer and an upper right tooth. His upper retainer, normally attached by a ceramic-like substance, was partially detached and a wire was jabbing into the side of his cheek. He guessed that his bottom teeth knocked the piece of retainer off his upper teeth when his head hit the ground. The worker felt pain in the jaw right away, but could not remember whether he mentioned this at the hospital that day since the bump on the back of his head was more worrisome.
- Orthodontist Dr. Tocchio removed the permanent retainer and made him a temporary, plastic retainer that fit overtop of the teeth. This didn't work out as it was too tight. He wore the retainer for approximately one month, and has not had an upper retainer since.
- In response to questioning, the worker confirmed that he managed with the broken retainer and loose wire from November 12 until he saw Dr. Tocchio mid-December.
- At some point the worker's dentist, Dr. Morreale, told him that he needed braces again but this would have cost thousands of dollars and he could not afford it. The pain in his jaw got worse as time went on, since his teeth began shifting without the retainer. Today, when he opens his mouth wide, his jaw cracks on both sides.
- The worker stated that his broken upper tooth may have been the broken filling mentioned in Dr. Morreale's records. This has not been fixed to date.
- The worker attributed his ongoing TMJ issues to the missing retainer and resulting shifting of his teeth.

c) Medical evidence

[12] The worker received orthodontic treatment from Dr. Gaik to realign the teeth, from 1990 to 1997. There is no record of any treatment by Dr. Gaik or Dr. Morreale between 1997 and 1999.

[13] The hospital emergency report of November 12, 1999 notes a lump on the back of the head, back pain, a numb finger, some disorientation and no loss of consciousness; a number of investigations were carried out.

[14] The worker saw his family doctor, Dr. B.L. DiPaolo, on November 15, 1999. Dr. DiPaolo's notes describe the accident and the worker's complaints of headaches, pain in the low back, left shoulder, neck and left wrist, and numbness of the right index finger. Dr. DiPaolo diagnosed a head injury, cervical strain and low back strain, and recommended massage therapy.

[15] On November 16, 1999, the worker described similar symptoms to a staff member at the Board. A progress note written by the worker's psychiatrist, Dr. S. Waldenberg on November 18, 1999, also described the accident and outlined symptoms of headaches, vomiting, pain in the neck, back and left shoulder, and finger numbness.

[16] An LMR service completion report (undated) indicates that the worker attended at his training program briefly on November 23, 1999 and "stated he was unable to stay at school due to increased back pain, headaches and jaw pain".

[17] Dr. DiPaolo's notes record a visit on November 29, 1999, stating "no change".

[18] On December 2, 1999 Dr. Waldenberg reported that the worker was still feeling sore, with back and left shoulder problems, twitching in the left thigh, dizziness, headaches and numb fingers.

[19] Dr. DiPaolo's clinical notes for December 14, 1999 include an underlined notation "TMJ", as well as neck, mid-back and left shoulder pain. The TMJ is not attributed to any source or incident.

[20] On December 15, 1999 the worker attended at the hospital with complaints of dizziness since the accident one month previously.

[21] Dr. Morreale's clinical records indicate that the worker saw orthodontist Dr. Tocchio "on Dec 16th 1999 for a new retainer and they never saw him again." Dr. Tocchio's office no longer has copies of his records from this time.

[22] A tomography of the TM joints was performed on December 21, 1999, on Dr. DiPaolo's referral. The report noted anterior displacement of the head of the mandible on both sides, "suggesting displacement of the meniscus posteriorly".

[23] Dr. DiPaolo responded to a Board request regarding the November 12, 1999 accident, on January 27, 2000. Dr. DiPaolo described the fall, the worker's complaints and his medical examination, with the worker having last been seen on January 5, 2000. TMJ problems were not

mentioned in the report. Dr. DiPaolo's notes, continuing to April 2000, contain no further references to TMJ.

[24] The worker saw Dr. Morreale for dental care on January 24 and March 7, 2000. On January 24, the worker reported to Dr. Morreale that he chipped his permanent retainer when he hit his head on the ground in the accident of November 12, 1999. Dr. Morreale recommended treatment after orthodontistry was completed. On March 7, Dr. Morreale noted that "Dr. Tocchio feels ortho completed", the worker had cracked an upper right filling, and the worker was wearing a replacement retainer once a week. Notes from his dental examination that day record crepitation and "click TMJ" with pain on both sides.

[25] The worker was examined at a Regional Evaluation Centre on April 25, 2000. The worker's numerous complaints at the time included "an increase in his TMJ pain bilaterally." The accident history recorded referred to the retainer thus:

He was having some vomiting in the early post-accident period. Sometime later he noticed that his mouth orthosis was damaged.

[26] Dr. Waldenberg first mentions dental problems in his progress note of April 27, 2000:

[The worker] could not understand why WSIB is not showing any interest in the dental problems caused by his fall in the college. Apparently he broke a permanent retainere[r] in this fall.

[27] A hand-written notation on this letter, received by the Board, states "first I have heard of this!" While most of Dr. Waldenberg's subsequent reports up to May 2001 do not mention TMJ, there are references to the retainer having broken in the fall and/or to TMJ pain in June, July, October and November 2000.

[28] In order to consider entitlement for these issues, the Board requested a report from the worker's dentist. On October 10, 2000 Dr. Morreale examined the worker. His Dental Report states that the worker "lost wire on lingual of the anterior teeth", fractured a filling and "there was damage to TMJ because it flared up with pain on both sides when opening & closing".

[29] On November 30, 2000, physiatrist Dr. S.H. Garner included TMJ pain in the worker's current status, noting "He has had chronic TMJ pain with some increase as a result of this fall."

[30] Dr. Gaik confirmed on March 26, 2003 that the worker consulted her on June 12, 2001 about a broken retainer. She wrote:

...as he had left this unattended for some time, there was some shifting of his teeth. He did not wish to pay for re-treatment or repair of his appliances and has not been seen since.

[31] Board consultant and oral and maxillofacial surgeon Dr. H. Chung reviewed the worker's file on April 2, 2003. Dr. Chung questioned the suggestion of a posteriorly displaced meniscus, noting that tomography is not diagnostic for soft tissue concerns and the literature supports anteriorly displaced but not posteriorly displaced menisci. He also noted that TMJ dysfunction

has multiple etiologies, including trauma and pre-existing malocclusion. Dr. Chung supported the denial of TMJ entitlement under the November 1999 claim.

[32] The worker's representative's submissions to the Board of February 6, 2006 refer to a letter from Dr. Morreale dated May 26, 2003 which is not in the case materials. This apparently states:

...with a history of accidents that the patient had undergone and the pain he had for a number of years I could understand that his joint could be easily traumatized by a new accident which involved a fall and head injury such as the one that occurred in November 1999.

d) Discussion

[33] The comments of the Vice-Chair in *Decision No. 319/06* apply equally to this case:

In assessing the credibility of the worker's explanation for her delay in reporting symptoms of jaw pain, I have considered her testimony in the context of the events at the time. There were no other witnesses to her injury. The worker is the sole witness, and she has an interest in the outcome of these proceedings, as she stands to gain benefits from a decision in her favour. In such circumstances, the harmony of her testimony with the contemporaneous documentation, in particular her family doctor's notes, is critical.

[34] The Panel is of the view that the worker's evidence regarding the immediate damage to his retainer and tooth or filling, and the immediate onset of TMJ pain, is not consistent with the contemporaneous evidence, including his own contemporaneous reporting. While the worker may genuinely believe, at this point in time, that the slip and fall caused these problems, the Panel finds that it is more probable than not that these occurred after the accident and coincidentally.

[35] In reaching this conclusion, the Panel notes the following:

- The hospital report and Drs. DiPaolo and Waldenberg detail the worker's complaints and symptoms in November 1999, but there is no mention of mouth, jaw or dental problems. The Panel finds it improbable that an emergency physician examined the worker for a head injury, and the family doctor followed up on this injury, and both failed to notice a broken orthodontic appliance with a loose wire poking the worker's cheek. Given the detail with which Dr. Waldenberg regularly records the worker's complaints, the Panel also finds it improbable that the worker had these problems but didn't mention them in November and early December 1999.
- While it is plausible that the worker may not have mentioned jaw pain at the hospital in light of more serious concerns, the worker also failed to mention any jaw pain to the Board on November 16, 1999 and to his family doctor on November 15 and 29, 1999. TMJ pain was first noted by Dr. DiPaolo on December 15th, and Dr. DiPaolo did not note any relationship between this pain and the slip and fall in his clinical notes. His subsequent detailed report to the Board regarding the injuries resulting from the accident did not include TMJ or dental problems.

- The reference to jaw pain by an LMR service provider on November 23, 1999, is insufficient to establish a link with the fall eleven days previously.
- The Panel considers it unlikely that the worker spent over a month with a partially detached retainer in his mouth and a loose wire jabbing into his cheek, before having it removed on December 16, 1999.
- Despite a lengthy relationship with the Board and ongoing contact, the worker did not report a broken retainer, broken tooth or filling, or jaw pain to the Board at this time.
- The medical documentation indicates that the worker did not attribute the broken retainer to the November accident until he saw Dr. Morreale on January 24, 2000, two and a half months later. There is no record of the broken tooth or filling until the visit in March 2000. The Board was not made aware of the dental aspect of the claim until April 2000.
- All other references to the broken retainer, broken filling and/or jaw pain arising from the accident are not contemporaneous and are based only on the worker's reporting after January 2000. Dr. Morreale's opinion is similarly based on his understanding, from the worker, that the retainer broke in the fall; this opinion supports only the possibility that a fall could traumatize the TMJs.

[36] A causal link between the fall of November 12, 1999 and the broken retainer, broken filling and increased jaw pain has not been established. The worker does not have entitlement for TMJ problems.

(iv) NEL quantum

a) Law and policy

[37] A worker is entitled to compensation for non-economic loss if his or her injury results in permanent impairment (WSIA, section 46). Where the NEL entitlement relates to a body part or condition for which a worker already has a permanent disability, Board policy (OPM Document No. 18-05-05) requires the pre-existing permanent impairment to be factored out.

[38] For a pre-existing non-work-related impairment, the total impairment is reduced by the rating for the pre-existing impairment if measurable, or by a set percentage if not measurable. This percentage is 50% in the case of a major pre-existing impairment.

[39] In the case of a pre-existing compensable impairment for which a permanent disability pension or NEL award has been granted, the total impairment is reduced by the PD or NEL rating.

[40] In these ways, the current NEL award compensates only the increased impairment for that body part or condition.

DISCUSSION

[41] In this appeal, the Board determined that the 1999 accident worsened the worker's CPD, and that he was entitled to a NEL award.

[42] In January 1998, the worker received a provisional PD pension for CPD under his prior claims (retroactive to 1989), rated at 20% but halved to 10% for the major pre-existing disability. In November 1998, following review of updated medical and social work reports, the provisional award was made permanent.

[43] Under this claim, the worker's CPD was evaluated as a "marked impairment" in April 2002, corresponding to a rating of 70% (prior to any reduction).

[44] In the Panel's view, the correct calculation of the worker's NEL award under Board policy requires a reduction from the total impairment of 70% by the pre-existing impairments measured at 20%, resulting in a net NEL award of 50%. In 1998, the major pre-existing disability reduced the PD pension by half, equal to 10% impairment. From that point forward, this pre-existing disability is measurable. At the time of the accident in 1999, the worker had a 10% non-work-related pre-existing impairment, and a 10% pre-existing PD pension, totalling 20% impairment. After the 1999 accident, the worker had a 70% total CPD impairment¹. The worsening of the CPD, accepted as the responsibility of the 1999 claim, is reflected in the additional 50% impairment.

[45] The worker is therefore entitled to a correction of the quantum of his NEL award from 25% to 50%.

¹ The Panel notes that the rating schedule used for PD pensions (the Ontario Rating Schedule) is different from that used for NEL awards (the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 3rd edition (revised)). It is therefore possible that some of the increased percentage rating between 1998 and 2002 relates to the different rating schemes applied. However, Board policy does not allow for adjustments to be made on this basis; the actual PD rating is to be deducted.

DISPOSITION

[46] The appeal is allowed in part.

[47] There is no entitlement to TMJ or related difficulties under the 1999 claim.

[48] The correct quantum for the NEL award for CPD under the 1999 claim, rated in 2002, is 50% permanent impairment.

DATED: December 18, 2009

SIGNED: S. Netten, M. Christie, D. Broadbent