



# WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

## DECISION NO. 743/09

**BEFORE:** A. Morris: Vice-Chair

**HEARING:** April 15, 2009 at Toronto  
Oral

**DATE OF DECISION:** August 18, 2009

**NEUTRAL CITATION:** 2009 ONWSIAT 1911

**DECISION(S) UNDER APPEAL:** WSIB ARO decision dated March 20, 2008

**APPEARANCES:**

**For the worker:** Steve Sacco, Paralegal

**For the employer:** not participating

## REASONS

### (i) Introduction

[1] These are the reasons for the decision of the Workplace Safety and Insurance Appeals Tribunal with respect to an appeal by the worker from the decision of Appeals Resolution Officer (ARO), Jansi Pereira, dated March 20, 2008. That decision concluded that the worker was not entitled to benefits for depression as related to either a claim for a back injury which occurred on July 18, 2001, or as a result of two robberies at the store where the worker worked. The first robbery occurred on August 9, 1997, and the second robbery occurred on August 19, 1997.

### (ii) Background

#### a) Prior Tribunal Decision

[2] The worker was born in 1976. She was working as a grocery store bookkeeper and clerk on July 18, 2001, when she injured her back. The claim arising out of that accident was the subject of an earlier appeal to the Tribunal in *Decision No. 1781/05*. The background facts are set out in that decision and include as follows:

- On July 18, 2001, the worker fell and landed on her buttocks as she was going down the stairs. Her family physician, Dr. S. Lee, reported that the worker had a painful low back, right hand, and right ankle, on August 8, 2001.
- The Board accepted the worker's claim.
- The worker's condition did not respond to conservative treatment and the Board referred her to a Regional Evaluation Centre for assessment. That assessment took place on November 26, 2001. The assessors noted that the worker appeared to be mildly depressed and recommended evaluation of that condition. They recommended precautions of no prolonged standing or sitting, and no repetitive bending or heavy lifting. These precautions would decrease over four to six weeks. The assessors sent the worker for a bone scan which was normal.
- The employer advised that it could accommodate the worker's restrictions, beginning March 11, 2002.
- The worker began modified work at reduced hours on March 18, 2002. She stopped work after a few days, claiming that she was in too much pain to do so. Her orthopaedic surgeon cleared her to return to work "half-time" on June 11, 2002. The worker did not do so.
- The Board denied further LOE benefits after March 22, 2002, and this decision was upheld by the ARO in a decision dated October 9, 2003. The ARO found, however, that the worker was entitled to a Non Economic Loss (NEL) assessment, for a permanent impairment to her low back. The Board subsequently awarded the worker a 21% NEL benefit for that impairment.

[3] The worker appealed the decision denying further LOE benefits to the Tribunal, and in *Decision No. 1781/05*, the Vice Chair found that the worker was partially, and not totally,

disabled and therefore capable of modified work which she had refused. The worker was therefore not entitled to LOE benefits after March 22, 2002.

**b) 1997 Claims**

- [4] The Vice Chair noted in her reasons that in addition to the claim arising out of the accident of July 18, 2001, the worker had two other claims. One was for psychotraumatic stress disorder as result of an armed robbery on August 9, 1997. The other was for an injured left leg when a safe door fell on it on August 19, 1997.
- [5] As regards the injured left leg, a Form 7, Employer's Report of Injury/ Disease dated August 25, 1997, indicated that on August 19, 1997, the safe door fell on the worker when she was opening it. There had been a store break in and the safe door had been sawn off and put back on. The worker injured her left leg. She returned to work on August 20, 1997. There appears not to have been a claim for benefits as a result of the incident of August 19, 1997. The Form 7 did not mention psychological injury.
- [6] The worker first mentioned the robbery of August 9, 1997, in a letter dated June 28, 2002, in which she wrote to the Board in relation to her claim for benefits arising out of the accident of July, 2002. She referred to a store robbery in August, 1997, during which the robber had pressed a gun to her stomach. She stated that she had been terrified for her life. She indicated that a few days later, the store was robbed again and described the incident in which the safe door had fallen on her leg. She said that she had been in extreme pain and that her leg had been bruised and that she had been limping for a while. She stated that both robberies had affected her life dramatically and that she was afraid to be alone and had nightmares of people trying to kill her.
- [7] In September, 2002, the worker retained the assistance of her union in dealing with her claim. In a letter dated September 17, 2002, the worker's then representative stated that she had recommended that the worker see a psychiatrist "with regards to her excessive pain threshold and how she can best manage her depression which we contend has arisen out of this injury and is now the primary problem."
- [8] The worker saw a psychiatrist, Dr. Lee, on October 10, 2002. In his report of November 21, 2002, Dr. Lee stated that the worker had been traumatized by two robbery attempts at work, leading to posttraumatic stress symptoms. He indicated that her clinical symptoms, history and mental status examination were consistent with DSM IV Axis I criteria of Posttraumatic Stress Disorder – Chronic Type. He did not provide details of the worker's symptoms, history or mental status examination. While he indicated that there were still moderate disturbances of her neurovegetative signs, he did not state what those disturbances were.
- [9] In a brief report dated August 17, 2003, Dr. Lee stated that the worker remained in pain with a secondary reactive type of depression. He stated that the worker was "deemed disabled psychiatrically due to her untreated depression and unremitting bodily pain."
- [10] The Board opened a separate claim with respect to the worker's claim for psychotraumatic disability arising out of the robbery incidents of 1997, and commenced an investigation.

[11] The Claims adjudicator (CA) subsequently denied the worker's claim for traumatic mental stress in a letter dated October 29, 2003. The CA indicated that although the worker's statements with respect to the robbery of August 9, 1997, differed in some details from those set out in the police report, nevertheless it was clear that the worker had experienced a sudden and unexpected traumatic event in the workplace. The CA noted, however, that there had been over a five year delay in seeking medical treatment, and that the worker's co-workers and employer had been unaware of ongoing problems. The details provided by the psychiatrist had been scant and one of the psychiatric reports seemed to indicate that the worker's current psychological problems were related to the July, 2001 injury. The CA therefore denied the claim for traumatic mental stress arising out of the robbery on August 9, 1997.

[12] As regards difference in detail with respect to the robbery, I note that the police report dated August 9, 1997, indicated that the robber had pushed an object into the ribs of a co-worker who was escorting the worker, rather than into the stomach of the worker. The co-worker confirmed this detail in a statement to the Board investigator on February 20, 2003. As noted by the CA, however, it is clear that the worker experienced a sudden and unexpected traumatic event in the workplace on August 9, 1997.

[13] The worker did not immediately appeal the decision of the CA of October 29, 2003, with respect to the claim for traumatic mental stress. The ARO decision with respect to ongoing LOE benefits was heard in September, 2003, prior to the CA decision, and entitlement for traumatic mental stress was not dealt with in the ARO decision. The ARO decision of September, 2003, formed the basis for the appeal to the Tribunal in *Decision No. 1781/05*.

**c) Assessment Requested by Vice Chair in *Decision No. 1781/05***

[14] The Vice Chair in *Decision No. 1781/05*, as part of her jurisdiction to determine whether or not the worker was entitled to LOE benefits after March 22, 2002, considered whether or not the worker was totally disabled by both her physical injury and by her psychiatric condition, rather than by just her physical condition. To that end, she requested that the worker be assessed by a psychiatrist as well as by an orthopaedic specialist.

[15] With respect to the request for a psychiatric assessment, the Vice Chair noted in the request, that the worker's psychiatrist had diagnosed chronic posttraumatic stress disorder and that the worker's claim for benefits for this condition had been denied. The Vice Chair also noted that when the worker testified before her, she had said that her condition was caused by her compensable accident and ongoing pain and not by the hold-ups at work in 1997. The Vice Chair asked the psychiatric assessor to comment on a) whether the worker had posttraumatic stress disorder when examined by the assessor, and b) whether it was usual for posttraumatic stress disorder to be caused by an injury of the type suffered by the worker, and by ongoing pain.

[16] The psychiatric assessment was conducted by Dr. Margulies, as detailed in his report of February 6, 2006. The report is set out in its entirety in *Decision No. 1781/05*. In it, Dr. Margulies discussed the worker's background, accident history and sequelae, her past and psychosocial history, and her mental status. He concluded that the worker suffered from an adjustment disorder with depressed mood rather than from posttraumatic stress disorder. His summation was as follows:

... in terms of her emotional state, [the worker] has likely developed a mild adjustment disorder with depressed mood in reaction to her persisting complaints of pain and associated impairments. There is no compelling evidence of the presence of a posttraumatic stress disorder or that the slip and fall incident of July, 2001, or earlier criminal incidents in which she was involved in 1997 have been thusly significant.

[17] The Vice Chair accepted Dr. Margulies' conclusions. The worker's representative at that hearing argued that Dr. Margulies conclusions supported the worker's argument, in that Dr. Margulies had said that the adjustment disorder was a direct reaction to the worker's ongoing complaints of pain. The Vice Chair stated that she agreed with the worker's representative but that "the issue is whether the adjustment disorder and the organic impairment are sufficiently severe that they would prevent the worker from returning to work. Dr. Margulies said that the adjustment disorder was not. I have ruled that the adjustment disorder and the organic impairment taken together do not render the worker totally disabled."

**d) Request for psychiatric entitlement subsequent to *Decision No. 1781/05***

[18] The worker obtained the services of her current representative in June, 2007. The representative wrote to the CA on June 5, 2007, stating that the worker would like to raise the issue of posttraumatic stress disorder and psychological depression as a direct result of the injury of July 18, 2001. The representative referenced the reports of Dr. Lee of August 17, 2003, and November 21, 2002, and submitted that the worker's trauma had begun with the two robbery attempts in 1996 (sic) and culminated with the July, 2001 accident.

[19] The worker's representative, in a further letter dated September 28, 2007, attached a report from Dr. Lee dated September 20, 2007, and requested that the CA make a ruling on psychological depression as a reaction to "either one or both of her injuries in 1996 (sic) and in 2001". The representative noted that the worker had a NEL organic award but did not have a permanent impairment award for depression.

[20] Dr. Lee's report of September 20, 2007, indicated that he had first seen the worker in October, 2002. He then saw her on December 3, and 11, 2002, January 21, March 18, May 2, July 3, October 22, 2003; July 13, September 25, 2007. Dr. Lee indicated that the worker returned on June 13, 2007, after her last visit on October 22, 2003, with the sole purpose of obtaining a letter for her WSIB appeal. She was 24 weeks pregnant at that time and was not started on any psychotropic medications. Dr. Lee opined that the worker was disabled from a psychiatric viewpoint as her ongoing Posttraumatic Stress Disorder and Major Depressive Disorder was not being treated.

[21] The CA, in response to the worker's request for entitlement to benefits for depression, sought a Board medical opinion and denied the worker's request in a letter dated December 19, 2007. The CA indicated that she did not consider the worker's depression to be the responsibility of either claim, nor that there was evidence that the condition was permanent in nature. The CA also noted that a previous medical report presented at the Tribunal had labelled the depressive symptoms as very mild and with no form of disability.

[22] The worker appealed to the ARO, who, in the decision of March 20, 2008, upheld the December, 2007 decision by the CA to deny entitlement to benefits for depression.

[23] The worker now appeals to the Tribunal.

**(iii) Issue**

[24] The issue as indicated in the hearing ready letter of October 30, 2008, is denial of entitlement to Depression arising from the store robberies in 1997, and from the workplace injury of July 18, 2001.

[25] The Board indicated that Policy Packages: 1;7;9; and 300 apply to these issues. Package #7 deals with Traumatic Mental Stress. Package #9 deals with Psychotraumatic Disability and Chronic Pain Disability.

[26] At the hearing, the worker's representative clarified that Post Traumatic Stress Disorder is not an issue. He stated that the issue is entitlement for Psychotraumatic Disability, specifically Depression, pursuant to Board OPM Document No. 15-04-02, as a sequelae to the back injury sustained in the accident of July 18, 2001.

[27] Since the worker was injured on July 18, 2001, the *Workplace Safety and Insurance Act, 1997* applies.

**(iv) Decision**

[28] I have concluded that the worker is entitled to benefits for a mild adjustment disorder with depressed mood arising from the back injury sustained in the workplace accident of July 18, 2001. I find that the worker recovered from this condition, however, by October 22, 2003, and, given that the Vice Chair in Decision No. 1781/05 considered both the worker's back condition and the worker's adjustment disorder in denying entitlement to ongoing LOE benefits, the worker's entitlement for psychotraumatic disability is limited to health care benefits for the period from July 18, 2001 to October 22, 2003. My reasons follow.

**(v) Analysis**

**a) Board Policy**

[29] Board OPM Document No. 15-04-02 (March 15, 2005) provides in part as follows:

A worker is entitled to benefits when disability/impairment results from a work-related personal injury by accident. Disability/impairment includes both physical and emotional disability/impairment...

**General rule**

If it is evident that a diagnosis of a psychotraumatic disability/impairment is attributable to a work-related injury or a condition resulting from a work-related injury, entitlement is granted providing the psychotraumatic disability/impairment became manifest within 5 years of the injury, or within 5 years of the last surgical procedure.

Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.

Psychotraumatic disability/impairment resulting from organic brain damage is assessed as a permanent disability/impairment.

### Psychotraumatic disability entitlement

Entitlement for psychotraumatic disability may be established when the following circumstances exist or develop

- Organic brain syndrome secondary to
  - traumatic head injury
  - toxic chemicals including gases
  - hypoxic conditions, or
  - conditions related to decompression sickness.
- As an indirect result of a physical injury
  - emotional reaction to the accident or injury
  - severe physical disability/impairment, or
  - reaction to the treatment process.
- The psychotraumatic disability is shown to be related to extended disablement and to non-medical, socioeconomic factors, the majority of which can be directly and clearly related to the work-related injury.

### b) Conclusions

[30] As discussed above, the worker first sought psychiatric treatment on October 10, 2002. Dr. Lee, in his report of November 21, 2002, stated that the worker had been traumatized by two robbery attempts at work, leading to posttraumatic stress symptoms. He indicated that her clinical symptoms, history and mental status examination were consistent with DSM IV Axis I criteria of Posttraumatic Stress Disorder – Chronic Type. He did not provide details of her symptoms, history or mental status examination. He indicated that there were still moderate disturbances of her neurovegetative signs. He did not indicate what those disturbances were.

[31] In a brief report of August 17, 2003, Dr. Lee stated that the worker remained in pain with a secondary reactive type of depression. He stated that the worker was “deemed disabled psychiatrically due to her untreated depression and unremitting bodily pain.”

[32] The issue of the nature and extent of the worker’s psychiatric disability arose in *Decision No. 1781/05* in the context of the worker’s entitlement to ongoing LOE benefits, and the Vice Chair in that decision obtained a psychiatric assessment and made findings. Specifically she accepted the conclusions of the independent assessor, Dr. Margulies, that there was insufficient evidence of posttraumatic stress disorder. In that regard, Dr. Margulies stated as follows:

While it is possible that an event such as the initial armed robbery in which she was involved may have been a sufficient stressor to result in the development of PTSD, the absence of any complaints thereof between the time of the incident and, it would appear, consultation with Dr. F. Lee, strongly speaks against such a likelihood. Furthermore, there is nothing to indicate that her immediate reaction to the armed robbery was one of intense fear, helplessness or horror; she was able to continue working in the same environment in which the robbery occurred. She made no mention of it nor is known to have shown any signs of emotional distress...

[33] The Vice Chair also accepted Dr. Margulies’ conclusion that the worker developed an adjustment disorder with depressed mood as a direct reaction to her persisting complaints of pain. The Vice Chair’s concern, however, was with the severity of the worker’s psychiatric condition, rather than with its existence. She accepted Dr. Margulies’ conclusion that the

adjustment disorder was mild, and that it did not render the worker disabled from working, either on its own or in combination with the worker's physical injury to the back.

[34] I am now asked to rule on entitlement to psychotraumatic disability, namely depression. There is overlap, however, with the findings made by the Vice Chair in *Decision No. 1781/05*. The Vice Chair found that the worker developed an adjustment disorder with depressed mood rather than depression. It is not my function in this appeal to reconsider that finding. I would in any event reach the same conclusion.

[35] While Dr. Lee deemed the worker to be "disabled psychiatrically due to her untreated depression and unremitting bodily pain", in his report of August 17, 2003, and found her to be disabled from ongoing Posttraumatic Stress Disorder and Major Depressive Disorder in his report of September 20, 2007, I prefer the report of Dr. Margulies to those of Dr. Lee.

[36] Dr. Lee in his reports has provided scant detail with respect to the basis for his diagnostic conclusions. Dr. Margulies' report by contrast provides considerable detail as to the basis for his conclusions.

[37] Dr. Lee provided a report dated February 20, 2009. This report was longer than his previous, somewhat brief, reports, but much of the length of the 2009 report was dedicated to setting out completely the diagnostic criteria for Posttraumatic Stress Disorder. The report did not detail at all any aspect of the worker's experience or symptoms which might meet any part of the criteria. For example, he set out Criteria D as follows:

D. Persistent symptoms of increased arousal (not present before the trauma), as indicated by two (or more) of the following:

1. difficulty falling or staying asleep
2. irritability or outbursts of anger
3. difficulty concentrating
4. hypervigilance
5. exaggerated startle response.

He provided no information, however, that the worker actually met any part of the criteria.

[38] Dr. Lee commented on the finding that the worker suffered from an adjustment disorder in the report of February 2009. He stated that making a diagnosis of Adjustment Disorder, was only correct in the absence of major depressive episodes and posttraumatic stress traits. As noted, however, Dr. Lee has provided scant detail as to why the worker meets the diagnostic criteria for posttraumatic stress disorder. He also has provided scant detail as to why the worker, in his opinion, meets the diagnostic criteria for major depressive episodes.

[39] Dr. Margulies stated as follows in concluding that the worker likely suffered from a mild adjustment disorder:

Reported symptoms of sadness, irritability and tearfulness suggest some form of depressive illness which, in view of the absence of any sustained sense of dysphoria or hopelessness and retained optimism is, likely a mild adjustment disorder with depressed



mood, secondary to her persisting painful symptoms. Specifically there is no compelling evidence to support the diagnosis of major depressive disorder or a posttraumatic stress disorder.

[40] Dr. Margulies went on to say that symptoms “of this adjustment disorder with depressed mood have been generally mild and, of themselves, have resulted in very mild symptomatic impairment but without any form of disability”.

[41] Dr. Margulies appears to differentiate between “symptomatic impairment” and “disability”. Board OPM Document No. 15-04-02 uses the word “impairment” and “disability” interchangeably. It may be that Dr. Margulies means to differentiate between symptomatic impairment and functional impairment but that is not clear to me, and he does arrive at the conclusion that the worker developed a mild adjustment disorder with depressive mood as a direct result of the injury of July, 2001. The Vice Chair in *Decision No. 1781/05* accepted this conclusion. I therefore find that the worker has entitlement for that condition.

[42] I find, however, insufficient evidence that the worker has sustained a permanent impairment as a result of her adjustment disorder. Dr. Lee, in his report of September 20, 2007, stated that the worker returned to see him on June 13, 2007, after her last visit on October 22, 2003, with the sole purpose of obtaining a letter for her WSIB appeal. The worker was asked about this gap in treatment and responded that she was pregnant and thought that she would get better. Her first child was born in 2004, and it is understandable that she would not want to take psychiatric medication while pregnant. There is no evidence, however, that she returned to seek treatment after her first child was born. When she did return to see her psychiatrist, it appears to have been for the purpose of pursuing her appeal, rather than for treatment. She was pregnant again when she returned to see Dr. Lee in 2007, and could not take medication.

[43] Board OPM document No. 15-04-02, anticipates that psychotraumatic disability will be temporary and states:

Psychotraumatic disability/impairment is considered to be a temporary condition. Only in exceptional circumstances is this type of disability/impairment accepted as a permanent condition.

[44] The circumstances of the worker’s case are not exceptional. She developed a mild adjustment disorder in reaction to her symptoms of pain, and, as stated by Dr. Margulies in his report of February 6, 2006, this is not an uncommon event. In October, 2003, the worker ceased treatment for this condition, and did not see her psychiatrist again until June, 2007, at which time she attended to obtain a letter to assist in her appeal.

[45] I find for the reasons stated above that there is insufficient evidence of a permanent impairment in relation to the worker’s mild adjustment disorder. The Vice Chair, in *Decision No. 1781/05*, has already concluded that the worker is not entitled to LOE benefits on account of her mild adjustment disorder. The worker’s benefits therefore are limited to health care benefits only for the period from July 18, 2001, to October 22, 2003.

**DISPOSITION**

[46] The appeal is granted in part. The worker is entitled to benefits for a mild adjustment disorder with depressed mood arising from the back injury sustained in the workplace accident of July 18, 2001. The worker recovered from this condition, however, by October 22, 2003, and, given that the Vice Chair in *Decision No. 1781/05* considered both the worker's back condition and the worker's adjustment disorder in denying entitlement to ongoing LOE benefits, the worker's entitlement for psychotraumatic disability is limited to health care benefits for the period from July 18, 2001 to October 22, 2003..

DATED: August 18, 2009

SIGNED: A. Morris