



## Tribunal Allows Members Post-Concussion Syndrome Appeal. The Union Rebutted WSIB Rulings The Member Recovered, Was Uncooperative and Did Not Suffer from Depression and Anxiety



By: Gary Majesky, *WSIB Consultant & Executive Board Member*

In September 2020, I got a call from an apprentice who was injured in November 2017 after he hit the back of his head on a gate and suffered a concussion. I represented this same member in 2015 when he was a pre-apprentice after a head injury (Concussion) and was laid-off the next day because the accident employer alleged there were performance issues. I found the timing of the layoff suspicious, and made written submissions to the WSIB.

### Pre-apprentice Roughed Up After 1st Work Head Injury

At that time, the employer wrote WSIB and said Mr. Majesky agreed that he was not proceeding with the re-employment issue. Anybody who has dealt with me knows employers don't speak for me or the union. This same employer in other member claims historically alleged they were substandard performers, and disputed their history of injury. Fortunately, I paper up, and my submissions were on file in the 2015 claim and part of the Case Record materials at the hearing.

When the member hit his head in November 2017, he was a 22 year old apprentice and unable to return to work and suffering from post-concussion syndrome symptoms. The employer provided at-home modified duties which the member performed. The WSIB then halted the work-at-home modified work. The case record also confirmed he cooperated with all health care and medical assessments at the WSIB Trillium Neurology Program who diagnosed post-concussion syndrome.

### Apprentice Had 4 Head Injury by Age-22

The medical record also confirmed this young member suffered four (4) head injuries by age-22. Two were non-work related, the last two were work related (2015 & 2017). The earlier head injuries occurred while playing basketball when he fell backwards and whacked the back of his head on the ground. The other while playing hockey when he got his bell rung.

He was last seen in September 2019 at the WSIB Speciality Clinic who anticipated a full recovery. However, there was no further contact with the WSIB and when the pandemic struck in March 2020, and they kept paying him LOE benefits. In August 2020, a new WSIB case manager popped up and started the push push hurry up routine. I was not representing the member at the time when his case went sideways. The member ultimately reached out for help, but it was too late.

### Failing to Cooperate with WSIB Assessments

The WSIB alleged the member failed to cooperate in a WSIB health assessment, which carries a stiff penalty (LOE benefits terminated). They also concluded he didn't seek health care for 1-year (SEPT 2019 to AUG 2020), which overlapped when the pandemic struck in March 2020.

In September 2020 the WSIB arranged for the member to undergo a Functional Abilities Evaluation, but he was unable to wear a mask. Masks were now mandatory, particularly in health care settings. The member told WSIB that he had an adverse reaction and suffered anxiety attacks when he wore one. The member testified this only became a problem after his last head injury, because when working he wore respirators and N-95 masks at work prior to his injury and this wasn't a problem. WSIB ruled the member was uncooperative and terminated his LOE benefits. The inference, from my perspective, was the member was making a political statement (honk, honk, think Freedom Convoy).

### Law Society Concussion Symposium

The member was also diagnosed with depression and anxiety, which is very common in Mild Traumatic Brain Injury cases according to the Tribunal Medical Discussion Paper, MTBI (Concussion). These findings mirrored a Concussion Symposium the Law Society held in 2022 that I attended for Legal Practitioners, Insurers and Judges, facilitated by Dr. Charles Tator, Neurologist and Director of the Canadian Concussion Centre.

### No Test or Bio Markers Exist to Confirm a Concussion

Several key take-ways from the Symposium. There is nothing 'mild' about brain injuries and that the use of the term "mild traumatic brain injury" should stop. This term is used by the WSIB and Tribunal. The other key finding is there are at this time no biomarkers or tests that prove the diagnosis of concussion e.g., MRI or blood test. The diagnosis of concussion or post-concussion syndrome depends on a knowledgeable doctor or health professional and a compliant patient. In other words, the diagnosis remains the judgment and providence of the treating health professional.

This is where the case went off the rails because WSIB, as they typically do, wanted objective clinical findings i.e., imaging results to confirm the diagnosis, when in fact, that's a straw man argument. According to the medical literature, Persisting Concussion Symptoms (PCS) can also include Depression, Anxiety, and PTSD Behaviour Changes. On this front, the member had a textbook case of Persisting Concussion Symptoms, with Depression and Anxiety. Everything lined up.

### A Young Members Dreams Were Shattered

Ask yourself, how do you think this affected a member who had no income, was a late entrant and denied Canada Life and CPP-Disability benefits, and lived off of \$100,000 he saved to buy a house after working long hours as an apprentice. Two-years later, his home ownership savings dwindled from \$100k down to \$35k. When I prepped the member for the hearing, I discovered other hidden gems about his character. Loving parents raised him. He saw the same Family MD since birth. He was a baseball umpire, played sports (hockey & baseball) and was a



musician whose band played shows locally. Most importantly, this you man's life was turned upside down by a work accident and he was being told by WSIB there was nothing wrong with him and he recovered. No matter my instructions, the kid always complied.

The WSIB Appeals Resolution Officer denied the members appeal concluding:

1. The worker was non-compliant and did not book (or confirm) the WSIB directed medical assessment, as required by WSIB.
2. The worker was non-compliant and did not participate in a WSIB directed medical assessment.
3. The worker was fit for pre-injury duties on February 17, 2020.
4. The work-related injury fully resolved by February 19, 2020, with no evidence of a permanent impairment.
5. There is no ongoing entitlement to a work-related psychological injury.

In *Decision No. 129/23*, the Tribunal found in favour of the member ruling:

As confirmed in a decision dated November 27, 2020, the accepted diagnoses under the claim related to the head injury include: post-traumatic chronic disequilibrium; physiologic tinnitus; post-concussive syndrome; and chronic migraines. For reasons provided below, we are satisfied that the worker has entitlement to a NEL determination for the compensable head injury.

While we acknowledge that the worker missed the specialty neurological assessment in November 2020, which would have clarified the status of his injury, we note there was no attempt to send the worker for further assessment especially closest to the time of the ARO decision. The Board recognized there was no evidence of treatment by Dr. Temis which it accepted as meaning the injury had resolved. In the case materials however there is reporting which documents that the worker continued to be treated by Dr. Temis. The Board did not follow up with Dr. Temis to understand the basis of her reporting. As a result, we relied on the uncontested medical reporting in the case materials which supports the worker had ongoing head/concussive injury beyond the February 2020.

As there is no medical information to contradict Dr. Temis' reporting, and as the worker's testimony about an ongoing injury was reflected in Dr. Temis' reporting, we are satisfied that the worker's post-concussive injury persisted beyond February 2020, resulting in a permanent impairment. Accordingly, we find the worker has entitlement to a NEL determination [permanent impairment].

The ARO concluded that there was no continuity evidence to support the worker's depression had been ongoing since onset occurred after the 2017 workplace accident.

In contrast to the ARO's conclusion, we are satisfied that the evidence in the case materials supports there was no non-compensable intervening event but rather an ongoing continuity of complaint of the worker's psychological condition since the workplace accident. In the report dated December 23, 2020, Dr. Temis wrote that the worker's "anxiety/depression" had "worsened as the time from the concussion passes". We rely on this report as it was provided by a physician who had treated the worker during the relevant period.

Furthermore, in a report dated December 28, 2022, Dr. Borushok (Ph.D., C. Psych) noted the worker had commenced treatment since

January 2021 for "Persistent Depressive Disorder with Persistent Major Depressive Episode with Anxious Distress" resulting from the workplace injury. We rely on the reports of Dr. Temis and Dr. Borushok as they treated the worker during the relevant period under review and there is no contrary medical evidence to support the worker's compensable psychotraumatic disability had resolved by February 2020.

The Board ultimately concluded that the worker was non-compliant because he refused to wear a mask at a scheduled functional capacity evaluation (FAE). In a Trillium Health Partners report dated November 23, 2020, an Occupational Therapist wrote:

Upon attending the assessment, the worker advised that he is not capable of wearing a mask due to reported anxiety and claustrophobia. Due to hospital policy regarding the Covid 19 pandemic and the wearing of masks, we could not proceed with this assessment. A message was left for the Case Manager today advising of the reason this FAE was not completed. This FAE will be placed on hold until further direction is received from WSIB.

In the decision dated November 27, 2020, the Board concluded that there was no evidence to support he could not wear a mask and thus his failure to do so was an act of non-compliance. The Board found that there was no "clinical medical evidence on file that prevents you from wearing a face mask. You do not have entitlement to a work related medical condition that prevented you from wearing a face mask under this claim". Using the report dated August 19, 2019, the Board concluded that he could have returned to modified duties by November 18, 2019, with a full recovery by February 19, 2020. As there was no offer of suitable modified work in November 2019, the Board ceased providing him LOE benefits when he could have returned to his pre-accident job on February 19, 2020.

The worker testified that the inability to use a mask was rather related to his anxiety. In the report dated December 23, 2020, Dr. Temis noted there was a link between the worker's treatment and his anxiety involving face masks. She wrote:

Another roadblock is mask wearing. This is mandatory in order to interact with others, go to appointments or do any outside activities. Wearing a mask causes [the worker] great anxiety. There is no way to determine if this is due to his head injury as masks were never used prior to the spring of 2020. The psychiatrist might be able to reduce [the worker's] anxiety surrounding his mask aversion.

We acknowledge that the Board has addressed several circumstances in which the worker did not appear to co-operate with treatment. In regards to his refusal to wear a mask however, we are satisfied that it was not due to some sort of political statement against wearing masks during the pandemic, but rather, arose out of his anxiety. In this regard, we rely on Dr. Temis' December 2020 report and an Ambulance Report dated May 11, 2022. In the latter, the following was recorded:

PT and staff at the cardiac clinic had a disagreement about PT not being willing to wear a surgical mask while in the clinic. 911 Called. On arrival of EMS PT found sitting outside in front of this office on a rock. PT is having anxiety and is hyperventilating. PT is able to slow his breathing down and calm down when coached to do so.

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