WORKPLACE SAFETY AND INSURANCE BOARD

APPEALS RESOLUTION OFFICER DECISION

CLAIM:

OBJECTING PARTY:
REPRESENTED by: Richard Fink, Fink & Bornstein

RESPONDENT:
REPRESENTED by: None

HEARING: June 6, 2017, Toronto, ON
HEARD by: T. Guse, Appeals Resolution Officer

ISSUE

The Worker and his Representative are objecting to the denial of initial entitlement in this claim for a right eye injury, as per the Case Manager's letter of August 17, 2016.

BACKGROUND

On April 20, 2010, this driver with was placing a panel in a trench, when a rope or strap struck him in the back of the head. The Worker sought medical attention on May 20, 2010, and the diagnosis was a possible retinal detachment in the right eye. The claim was initially denied as the adjudicator determined that the right eye condition did not arise out of and in the course of the Worker's employment. Additional information was submitted to the claim and the decision was reconsidered. As per the Case Manager's letter of September 2, 2010, initial entitlement was granted for a right eye injury due to a blunt force trauma to the back of the Worker's head.

In an Appeals Resolution Officer (ARO) decision dated January 9, 2012, the Second Injury and Enhancement Fund (SIEF) cost relief was confirmed at 50 percent. It was determined that the Worker's pre-existing condition with respect to his right eye was moderate in severity, as the Worker would be pre-disposed to a possible retinal detachment. The ARO also concluded that the accident history was moderate in severity, as it would be expected to cause a disabling injury.

The Worker went on to require surgery for his right eye on January 13, 2015. Prior to this, the Worker was granted a 22 percent Non-Economic Loss (NEL) award for his right eye traumatic retinal detachment. The Case Manager reviewed the request for surgery and in a letter dated April 23, 2015, allowed entitlement for the surgery, as it was compatible with the allowed diagnosis and accident history on file.

In a letter dated July 6, 2016, the Case Manager reviewed entitlement to a further surgery on May 2, 2016, and advised that since the evidence on file did not show that the Worker suffered a direct trauma to his eyeball, the Case Manager determined that the accident reported at work

was unlikely to have caused the retinal detachment that was initially accepted. As such, further benefits were denied and the surgery on May 2, 2016, was also denied.

Based on the denial of the surgery and the relationship to the accident, the Case Manager also reconsidered the allowance of initial entitlement and in a letter dated August 17, 2016, the Worker was advised that based on discrepancies in the accident history, and a review of medical reports on file, as well as an opinion from an ophthalmologist, it was determined the most significant risk factors for the Worker's retinal detachment was his prior cataract surgery and YAG posterior capsulotomy. It was determined the Worker's pre-existing eye conditions were far more influential in causing the retinal detachment and therefore, the allowance of initial entitlement was overturned. The Case Manager felt that all of the evidence supported the retinal detachment was probably not caused by the workplace accident on April 20, 2010, and initial entitlement was overturned and the claim was denied.

The Worker and his Representative have objected to this decision and an oral hearing was set up to resolve the issue.

Worker's Position

The Worker's Representative indicated at the start of the hearing that the accident at work was unusual and testimony by the Worker would provide an explanation as to how the accident occurred. The Worker's Representative felt that credibility was an issue in this case and that mostly it was a medical determination that would ultimately be the main issue with respect to the objection. After the Worker provided testimony, the Worker's Representative made a number of arguments with respect to the case. He noted that Dr. Cooper's report of July 5, 2010 indicated the Worker made a sudden head movement and had a retinal detachment. It was also noted that in memo 25, the WSIB medical consultant reviewed the issue of SIEF relief and supported the relationship between the diagnosis and the accident history. The Worker's Representative also noted the ARO decision of January 9, 2012, where the ARO found the accident history was moderate in nature and would be expected to cause a disabling injury. The Worker's Representative questions as to whether the Case Manager has the authority to break from the ARO decision and determine that the accident was minor or insignificant as noted in the decision of August 17, 2016. The reversal of entitlement should have considered the ARO opinion regarding the severity of the accident when considering whether initial entitlement should or should not have been granted.

The Worker's Representative also notes that in Memo 6, the Case Manager accepted the accident history of a blunt force trauma to the back of the Worker's head. In his testimony, the Worker indicates that his hardhat got pulled off of his head and he was struck in the back of the head with a strap. Was the incident significant enough to drag him to his knees? The Worker indicates yes and also notes the straps on his helmet were broken, so there was definitely some sort of force applied when the strap struck his hardhat. The Worker's Representative notes that in Memo 6, the Case Manager took a reasonable view of the accident history at that time, based on the facts that were known.

With respect to the video surveillance, it was noted the Worker was working on a lawn mower and went to the store and it is clear that the Worker has good days and bad days, where he can socialize, but there was no evidence that the Worker was doing any work for money.

With respect to the NEL award, it was noted the Worker received a 22 percent NEL for his eye

injury. The WSIB consultant reviewed the claim on October 7, 2015, and noted the Worker had deteriorated based on decreased vision. The Worker's NEL award got confirmed, as there was no deterioration in his sight. Based on the pre-existing issues, the NEL clinical specialist indicated the original NEL award should have been 15 percent and not 22 percent, so upon re-determination the award was left at 22 percent.

The Worker's Representative indicated that the re-determination of the NEL award was the reason why the Case Manager claims that they could re-determine whether or not the Worker had any entitlement, since he was beyond the 72 month mark. The decision to find that there was no further entitlement in the claim was in August 2016. In Section 44 of the *Workplace Safety and Insurance Act*, it indicates there should be no reviews after the 72-month mark, unless there is a significant deterioration in the Worker's condition. The NEL assessment on October 7, 2015, found no significant deterioration, so the Worker's Representative questions the Case Manager's authority to undertake a review of the Worker's entitlement.

The ARO decision is significant and the Worker's Representative feels that the Case Manager cannot make a decision other than that the accident was moderate in severity, given the decision by the ARO. In addition, the Worker had to have deteriorated in order for the Case Manager to be able to review entitlement and there was no evidence that he had. There are definitely jurisdictional questions with respect to this case.

Dr. Breslin, the WSIB medical consultant, reviewed the claim on June 30, 2016, and indicated that the Worker is vulnerable to retinal detachment after a YAG procedure. It is also noted that the Case Manager presented the accident history as the Worker not having a blunt trauma to the head, but a grazing by the strap, and this is different from the original allowance of the claim, as per Memo 6, when the Case Manager accepted a blunt force trauma to the back of the head.

The WSIB medical consultant indicated that they were not 100 percent sure what had caused the detachment, and that the Worker's prior issues more likely were the cause of the retinal detachment. The WSIB does not generally consider the primary cause of an incident and Dr. Breslin does not discount the significant causation of the accident. But for the incident at work, the Worker would probably have been well longer and would not have experienced his retinal detachment when he did.

The Case Manager indicates in Memo 197 that there must be an actual impact to the eye to have a retinal detachment, but Dr. Breslin's memo does not indicate this.

Of major significance is Dr. Mandlecorn's report of February 8, 2017. He is a significant specialist in Canada with respect to retinal detachment and publishes in medical journals, and the Worker's Representative feels I should put much more weight on the opinion provided in the report of February 8, 2017. He also asks that if I find this report useful in my decision, to ensure that Dr. Mandlecorn gets paid for his report.

AUTHORITY

Operational Policy:

11-01-01 Adjudicative Process
11-02-02 Lost Time Claims

15-02-01 Definition of an Accident
15-02-02 Accident in the Course of Employment

ANALYSIS

Worker's Testimony

During the hearing, the Worker testified that prior to working with the Employer he was self-employed cutting trees and working in the bush. Eventually, the market went south and so he decided to find other employment and began working with the accident Employer in 2009, truck driving and doing light labour.

The Worker testified he had prior eye surgery in 2007, as he had a cataract removed and after the surgery, his full vision was restored. He also indicates he had a prior eye injury in 1986, when a cork from a bottle of champagne he was opening struck him just above his right eye. The Worker also testified that shortly before the accident at work he had YAG surgery to his right eye. He had been experiencing cloudiness in his eye and the surgery takes a few minutes to perform and he missed no work.

On the day of the accident on April 20, 2010, the Worker picked up a panel that had a strap on it that he did not realize was there. As he dropped the panel into a trench, the strap knocked him in the back of the head and he fell forward onto his knees. His hardhat flew off. His neck was sore for a few days after this. The Worker testified under oath that he fell on his hands and knees and although ; who witnessed the incident, said the Worker did not fall to his knees, there is evidence in the statement on file that did tell that the Worker fell on the ground.

Right after the accident, the Worker did not notice any issues with his right eye, but later on in May, around May 12 to the 15th, he noted small flashes in his eye. He originally did not connect this to the accident and thought he had a floater. He also began getting shadows in his vision. He eventually was seen at emergency and also called Dr. Cooper. He went on to have surgeries on his eye the rest of 2010, and in May 2011, he was doing modified work with the accident Employer. He said that his eye would flare up and be painful approximately 15 days per month.

With respect to the surveillance on file, the Worker testified under oath that he did put a belt on a lawn mower for a friend and was there approximately two hours. He also had coffee and he went to a hardware store. The Worker testified that if his eye is painful he is unable to do any activities and that the day he was helping his friend with his lawn mower, his eye was not flared up.

Decision

I have carefully considered all the documents on file, the applicable law and policy, the arguments presented and the Worker's testimony and I am overturning the denial of initial entitlement, as per the Case Manager's letter of August 17, 2016.

Of significant weight in my view is the February 8, 2017, report from Dr. Mandlecorn which discusses the accident history, the mechanism of the Worker's retinal detachment, his analysis of some reports on file and his comments with respect to the WSIB medical consultant's review of the claim. Dr. Mandlecorn indicates that based on the accident history listed in his report, the strap or rope passed over the Worker's helmet and got under the back edge of it and lifted his hardhat off of his head. The strap jerked the Worker to his hands and knees and his hardhat harness broke. Based on Dr. Mandlecorn's review, the Worker's head was suddenly moved forward and downwards, by a mule rope that caught on the back of his hardhat. In Dr. Mandlecorn's opinion the force was strong enough to jerk the Worker's head and cause retinal detachment.

Dr. Mandlecorn goes on to explain the mechanism of retinal detachment. He explains that in the cases of sudden head jerking, the vitreous gel in the eye can suddenly be loosened and it can cause the retina to tear. He goes into a detailed description of how the vitreous gel in the eye moves inside the eyeball when the head is suddenly jerked. When the gel makes contact with the opposite inner wall of the eye, there is a strong pull on the retina. The specialist indicates that having managed thousands of retinal detachments, including many of which were related to trauma, the head injury that the Worker suffered was definitely the cause of his retinal detachment. I have accepted this opinion.

I note that the Case Manager's issues revolve around the fact that there was conflicting details with respect to how the accident occurred. The Worker testified exactly how the accident occurred under oath, which matches his statement in the Case Manager's allowance in Memo 6. I accept the accident description provided by the worker at the hearing and found him to be forthright and credible.

I also note that Dr. Mandlecorn disagrees with Dr. Breslin's conclusion, as although Dr. Breslin is an excellent cornea specialist, he has no personal experience with retinal detachment. He feels that the examples Dr. Breslin provided in his opinion are of general interest, but are not relevant to the Worker's case. Therefore, although the WSIB ophthalmologist felt that the Worker's pre-existing conditions were the main cause of the Worker's retinal detachment, I am satisfied that the incident at work was sufficient to have caused the retinal detachment, and was a significant contributing factor to the worker's retinal detachment.

As such, I am overturning the denial of initial entitlement in this case, and ask that the Worker's benefits be restored. I also ask that Dr. Mandlecorn's report of February 8, 2017 be paid for as per WSIB policies.

CONCLUSION

For the reasons detailed in the body of this decision, I find:

- Initial entitlement for the worker's right eye injury is allowed and all benefits should be restored.

The worker's objection is allowed.

DATED July 6, 2017

T. Guse
Appeals Resolution Officer
Appeals Services Division