

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

REVIEW AND REGULATION LIST

VCAT REFERENCE NO. Z522/2013

CATCHWORDS

Transport Accident Act 1986; Applicant involved in two separate motorbike accidents; claim for dental treatment arising from first accident and further injuries sustained in second accident pursuant to s 60(2)(a); application for dental treatment refused by TAC; review pursuant so s 77; open offer made by the TAC not accepted; no mention of dental injuries in contemporaneous records; expert evidence equivocal; Applicant's evidence accepted at genuine; application for costs.

APPLICANT	Mr John Ireland
RESPONDENT	Transport Accident Commission
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing
DATE OF HEARING	25 July and 12 August 2014
DATE OF ORDERS	28 August 2014
DATE OF FURTHER ORDERS AND REASONS	22 October 2014
CITATION	Ireland v Transport Accident Commission (Review and Regulation) [2014] VCAT 1328

ORDERS

Orders 1 – 4 made on 28 August 2014:

- 1 The Tribunal finds that, pursuant to s 60(2)(a) of the *Transport Accident Act 1986*, Mr John Ireland is entitled to compensation from the Transport Accident Commission (the 'TAC') for the reasonable cost of medical services for injuries sustained in either or both transport accidents on 20 December 2009 and 19 March 2012, to the following teeth:
 - (a) Upper right central incisor (11);
 - (b) Upper left lateral incisor (22);
 - (c) Upper right lateral incisor (12); and
 - (d) Upper right second molar (15).

- 2 The reference in Order 1(a) and (b) encompasses injuries and damage sustained to the dental bridge which extends across the upper left central incisor 21 (previously extracted).
- 3 The TAC shall urgently arrange for Mr Ireland to attend his treating dentist Dr Andrews, with a view to obtaining a revised treatment plan that will enable him to undergo appropriate dental surgery as soon as possible.
- 4 The TAC shall urgently review any revised treatment plan that it receives in relation to Order 3, with a view to responding within 14 days of receipt. If the TAC determines that the cost of the treatment plan exceeds a reasonable cost, then the question of whether the cost is a reasonable cost shall be referred to the Tribunal for consideration.

Further orders made 22 October 2014:

- 5 Pursuant to para 60(2)(a) of the *Transport Accident Act 1986*, the Respondent shall forthwith reimburse the Applicant \$600 for Panadeine Forte and a further \$381 for three consultations at the Hobsons Bay Dental Clinic.
- 6 Pursuant to sub-s 79(2) of the Act:
 - (a) the Respondent shall forthwith pay the Applicant's filing fee and the fee payable for the second day of hearing, fixed at \$818.20; and
 - (b) upon receipt of an invoice paid to Grace Placencio Davies & Company Lawyers, and confirmation by TAC that the invoice is referable to this proceeding, the TAC shall reimburse the Applicant that invoice.
- 7 The TAC shall pay any further costs claimed by the Applicant on County Court Scale, to be assessed by the Costs Court in default of agreement.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant	Mr John Ireland, in person
For Respondents	Mr P Bourke of Counsel

TABLE OF CONTENTS

ORDERS	1
TABLE OF CONTENTS	3
REASONS	4
NATURE OF APPLICATION.....	4
BACKGROUND.....	4
MATTERS FOR DETERMINATION	6
Was tooth 15 also injured in the Second Accident?.....	6
Can the teeth be treated in isolation, or is a full clearance required?.....	9
What costs can the Applicant claim?	9
Loss of Income	9
Medical costs	10
Legal Costs	11
Further Costs sought by the Applicant (general expenses).....	11

REASONS

NATURE OF APPLICATION

- 1 This is an application by Mr John Ireland (the Applicant) for a review of the decision of the Transport Accident Commission (the TAC) dated 4 January 2014, to deny funding of dental treatment.
- 2 The review is made pursuant to s 77 of the *Transport Accident Act 1986* (the Act), which allows a person whose interests are affected by a decision of the TAC to apply to the Tribunal for review of that decision.

BACKGROUND

- 3 The Applicant was injured in two motorbike accidents. The first accident occurred on 20 December 2009 (the First Accident) and the second accident occurred on 19 March 2012 (the Second Accident).
- 4 The First Accident was a single vehicle incident which occurred on the Westgate Freeway and was caused by the Applicant hitting a pot hole. The Applicant's compensation claim dated 6 December 2010, which did not include dental expenses, was accepted by the TAC.
- 5 The 6 December 2010 compensation claim was accompanied by a letter from the Macedon Dental Group dated 9 February 2010 which stated that:

Patient presented on 4th February 2010 complaining of 'fractured 3 unit bridge 11-22 and associated mobility...reports both of these conditions caused by trauma resulting from motorbike accident on 20 December 2009. The presenting conditions are consistent with such trauma'.
- 6 The Applicant gave evidence that he spoke to his local dentist about the damage to his teeth. He was referred to another dentist who did implants, but that dentist was unable to treat him because of the gum and bone damage. He was further referred to Dr Larry Bengé. That is when he was advised that it would cost \$24,000 to fully repair his top row of teeth.¹
- 7 The TAC provided the Applicant with a Dental Report Form that it required to be completed before considering funding for dental treatment. The Applicant failed to submit that form and, to date, the TAC has not paid any dental services arising from the First Accident.
- 8 The Applicant explained the reasons behind not pursuing his initial claim. He understood from his discussions with Dr Bengé that he may receive \$12,000 back from the TAC, but as he could not afford to pay the balance, he did not pursue his claim and he left his teeth as they were.²

¹ Transcript 1, page 5

² Transcript 1, page 5

- 9 The Second Accident occurred on 19 March 2012. A car performed an illegal u-turn in front of the Applicant causing him to collide into the side of the vehicle.
- 10 The Applicant claims that he suffered further damage to his teeth in the Second Accident. On 24 May 2012, he filed a Claim for Compensation with the TAC. In handwriting at the end of the form he wrote 'Need my teeth fixed, quoted \$24,000. When shall I book in. Regards'.
- 11 In the same form question 17 reads 'Please list all of your injuries from the transport accident'. In the space provided the Applicant wrote '(Injury of knee) (right), (Pain in thumb)'. Apart from the handwritten note, there is no mention of an injury to teeth. The claim form is ambiguous as the reference to \$24,000 may have only been a reference to the dental work required after the First Accident. That is how the TAC interpreted it.
- 12 Dr Bengel provided a report dated 6 December 2012. That report identifies a number of dental problems including missing teeth (13, 15, 24 and 26), a mobile three unit bridge (11-22), periodontal disease (17, 16, 14 and 27) and a tooth fractured beyond repair (12).
- 13 By letter dated 4 January 2013, the TAC advised the Applicant that it was unable to pay for the dental treatment proposed because his need for the treatment was not related to his transport accident injuries. In forming that decision, the TAC considered the following reports:
- (a) Dental report from Dr Bengel dated 28 November 2012³;
 - (b) The Applicant's TAC claim form dated 24 May 2012;
 - (c) Ambulance Case Sheets, Ambulance Victoria dated 19 March 2012; and
 - (d) Clinical Notes, Royal Melbourne Hospital.
- 14 The TAC letter states as follows:
- A dental consultant, who is a member of the TAC's Clinical Panel, has reviewed the treatment request provided by Dr Bengel. The clinical panel consultant notes that in reviewing the above documentation, there is no mentioned injury to your teeth on your claim form, ambulance notes or hospital records. It is also noted that there was no significant soft tissue facial laceration to indicate dental damage or loss of teeth due to the transport accident in any of the above documents.
- Dr Bengel reports tooth numbers 15, 13, 24 and 26 as missing prior to your transport accident. He also notes an 11-22 bridge so tooth 21 was missing and replaced by a bridge prior to your transport accident. He further notes that tooth numbers 17, 16, 14 and 27 have periodontal disease, which again is not related to your transport accident.

³ This should read 6 December 2012.

The clinical panel consultant notes that given the latter teeth are of poor prognosis, this means the following teeth are either missing, have been restored as part of a bridge which is periodontally affected or have active periodontal disease in the upper jaw: 17, 16, 15, 14, 13, 11, 21, 22, 24, 26 and 27. This means that treatment required to all of these teeth is not related to your transport accident.

The consultant states that the plan to remove all teeth and place implants is understandable, but this does not relate to your transport accident, it relates to chronic periodontal disease and multiple pre-existing missing or compromised teeth.

- 15 Since Mr Ireland lodged the application for review at VCAT, the TAC has had the dental request reviewed by Dr Philip Yeung, an independent prosthodontist. Dr Yeung has accepted that there has been further damage to the bridge (11-22) and to an adjacent tooth (12).
- 16 Counsel for TAC explained that one of the reasons for the TAC's 4 January 2013 determination was that the request was made under the second claim and there appeared to be no evidence of damage to Mr Ireland's teeth from the Second Accident. However, the TAC has now adopted Dr Yeung's findings and has made an open offer to the Applicant regarding tooth 12 and the bridge (11-22) accordingly.
- 17 The TAC, in making its open offer, has effectively considered the two claims as a whole and the open offer covers dental claims arising from the first and/or second accidents. As such, the position of TAC was that it accepted liability for treatment and repair of:
 - (a) Upper right central incisor (11);
 - (b) Upper right lateral incisor (22); and
 - (c) Right lateral incisor (12).
- 18 Mr Ireland claims that he is entitled to the dental treatment offered by the TAC, and that he is further entitled to treatment for tooth number 15. He claims tooth 15 was knocked sideways and loosened in the Second Accident, to the point that he had to get it extracted. Tooth 15 was extracted by Dr Andrews from the Macedon Dental Clinic on 17 July 2012.

MATTERS FOR DETERMINATION

Was tooth 15 also injured in the Second Accident?

- 19 The main issue for this Tribunal to determine is whether the extraction of tooth 15 was caused by or is a consequence of the Second Accident, or whether it is more probable that tooth 15 needed extraction because of the Applicant's pre-existing periodontal disease.
- 20 The extraction of tooth 15 was conducted by Dr Andrews of the Macedon Dental Clinic on 17 July 2012, some three months after the Second Accident. Dr Andrews' clinical notes reads 'complained of mobile 15 needs

extraction'. Upon further enquiry by the TAC, Dr Andrews stated in an email dated 18 August 2014 that, regarding tooth 15, 'it is possible either accident may have loosened 15 from subluxation injury or exacerbated the periodontal condition, but it is difficult to determine the ultimate cause'.

- 21 The TAC does not accept liability for tooth 15. They rely on contemporaneous report from the Ambulance Victoria and the Royal Melbourne Hospital. They also rely on statements from Lachlan Ireland (Lachlan), the Applicant's son who was riding behind the Applicant when the Second Accident occurred and accordingly was first on the scene.
- 22 Neither Ambulance Victoria nor the Royal Melbourne Hospital notes have any record of injury to teeth. As TAC points out in the 4 January 2014 letter, there is also no mention of soft tissue facial injuries. Other injuries are listed including cervical tenderness and wrist pain.
- 23 Lachlan provided a statement to TAC on 7 August 2012 in which he states, referring to the Applicant, 'his neck hurt and across the side of his left shoulder. His hands, elbows and knees were tender'. The TAC pointed out that although Lachlan's statement is quite detailed, it says nothing about an injury to teeth.
- 24 The TAC also relies on the absence of any reference to injuries sustained to tooth 15 in the reports of Dr Bengé and Dr Yeung, as further indication of no injury to tooth 15. TAC submit that if tooth 15 was injured and removed because of the Second Accident, the Applicant would have mentioned it and either or both practitioners would have made a note of that fact.
- 25 The Tribunal acknowledges that the TAC's denial of liability for tooth 15 relies upon the lack of evidence corroborating the Applicant's claim that tooth 15 was depressed in the Second Accident. However, the Tribunal also accepts that the expert evidence on tooth 15 is equivocal and there is nothing fatal which makes a lie of the Applicant's claim.
- 26 In his oral evidence, the Applicant dismissed the Ambulance Victoria notes. He says he was in a lot of pain, dazed and shocked at the time. That contention is supported by the Ambulance Victoria notes and Lachlan's account. He was also clearly angry at the driver who performed an illegal U-turn. With multiple injuries and with all that was happening at the time, the Applicant's assertion that he did not yet realise he had dental injuries is credible.
- 27 The Applicant gave evidence that he first noticed injuries to his teeth when he was taken to the Royal Melbourne Hospital. The Emergency Triage notes make no mention of teeth. However, the Applicant says he definitely did make comments about injuries to his teeth, and that it was within two hours of the accident. He says he was told that the Hospital did not do any dental treatment and that he should make arrangements to see his own dentist.

- 28 Similarly, in regards to the account provided by Lachlan, the Applicant says that he did not recall giving his son an account of his injuries. He was dazed, shocked, confused and angry at the time. In essence, he does not recall what he said or did not say at the time to his son.
- 29 While none of the contemporaneous reports support the contention that there were any dental injuries sustained after the First Accident, the TAC has now conceded the fact that damage occurred to the bridge (11-22) and tooth 12. The question remains whether tooth 15 was also injured in the Second Accident.
- 30 In regards to the reports by Dr Yeung and Bengé, the Applicant also says that he definitely would have mentioned having had tooth 15 extracted. However, the Tribunal notes that tooth 15 had already been extracted prior to the consultations with Dr Bengé and Dr Yeung. Neither were asked to specifically investigate tooth 15 and in light of several other teeth also being missing, it is not altogether surprising that tooth 15 was merely noted as missing.
- 31 The Applicant gave evidence about why he did not see a doctor straight away if tooth 15 was depressed and causing so much pain. He explained that he had to attend a race meeting in Sydney and, against his better judgement, checked out of the hospital at 5:00 am the next morning to catch the flight. He also noted that he dislikes having to attend the dentist and so further 'put it off'.
- 32 The Tribunal accepts the Applicant's account. He has demonstrated a capacity to live with advanced gum disease for years. He clearly does not seek out medical or dental treatment or advice until the situation becomes intolerable for him. In this context the time frame of three months after the Second Accident, before tooth 15 was removed by Dr Andrews, is entirely consistent with his behaviour.
- 33 In relation to the Applicant's evidence generally, it is appropriate to make certain observations:
- (a) The Applicant is not an easy customer. He appreciates as much but seems incapable of modifying his behaviour, preferring to issue verbal abuse, where he considers it to be warranted, and revel in his 'rough and ready' nature;
 - (b) Although uncooperative and argumentative at times, I am satisfied that his evidence was consistent and that he gave credible explanations, even in the face of extensive cross examination from Counsel and questions from the Tribunal;
 - (c) I am further satisfied that his behaviour in the witness box reflected a genuine frustration with the legal process and perceived obstinacy of the TAC; and
 - (d) There was no detection that he was maintaining a lie or attempting to obtain a financial benefit beyond his legal entitlements.

- 34 In making these observations, the Tribunal does not in any way reflect adversely upon the TAC. However, there does appear to have been a breakdown in communication between the parties over the years. The Applicant has sought legal advice at different times, but not consistently. He has mostly attempted to personally handle his application to the TAC and proceeding before the Tribunal. He was ill-equipped to do so. Although much of the oral evidence which he attempted to give was not directly relevant or speculative, I am satisfied that he gave an honest and credible account of injuries to his teeth in the Second Accident. I am further satisfied that the expert evidence has not precluded such a finding.
- 35 Accordingly, I have determined, on balance, that tooth 15 was injured in the Second Accident and TAC is liable for the cost of dental treatment associated with that tooth, together with teeth for which the TAC has already accepted liability, namely tooth 12 and the bridge between encompassing teeth 11-22.

Can the teeth be treated in isolation, or is a full clearance required?

- 36 Expert opinions briefly addressed whether the injured teeth could be treated in isolation, or whether it was necessary to have a full replacement of all top teeth, in light of the underlying extensive gum disease. Dr Benge, in his report of 6 December 2012, stated that the Applicant was best suited to an upper clearance with four implants supporting a 12 unit bridge.
- 37 Dr Yeung, in his report of 2 June 2014, stated that it would be possible to treat the affected section in isolation and he developed a treatment plan to put that into effect. He gave oral evidence confirming that opinion. That is not to say that a full clearance would not be preferable in terms of the Applicant's overall dental care. However, the TAC's liability only extends to those teeth injured in a transport accident. The Applicant accepted this evidence.⁴

What costs can the Applicant claim?

- 38 The Applicant filed a submission in relation to his costs prior to the second day of the hearing on 21 August 2014. The Applicant is self-represented and the submission is put as being 'fair and reasonable' without making a distinction between professional legal costs, medical costs, loss of income and general expenses associated with attendance at various compulsory conference and hearing dates. I will address each of these claims.

Loss of Income

- 39 The Applicant claims a partial loss of income for 5 months at \$450 per week plus a further \$2,500 per week for three weeks between 4 August 2014 and 30 August 2014, where he claims he had no capacity to work.

⁴ Transcript 1, page 9

40 It may or may not be the case that the Applicant is entitled under the Act for compensation for loss of income. However, this is an application for review of the TAC's decision dated 4 January 2013 to deny liability for the dental work proposed by Dr Larry Bengé. The TAC decision, under s 60 of the Act, was to deny the treatment plan proposed at that time. Loss of income was not an issue before the Tribunal and was not part of TAC's decision, so it is not a matter which the Tribunal can now consider and determine as part of this application.

Medical costs

- 41 The Applicant seeks reimbursement for Panadeine Forte in the amount of \$600, which he takes regularly to manage pain associated with his teeth. The Applicant also seeks reimbursement for 3 invoices from Hobsons Bay Dental totalling \$381, which he refers to as 'patch ups' to get him through, until the substantive claim was dealt with.
- 42 Having already determined that the TAC is liable for teeth 15, 12 and 11-22, it follows without the need for further findings that the TAC is liable pursuant s 60 of the Act for the medical expenses related to those injuries.
- 43 However, as contemplated in the hearing, I indicated I would consider medical costs in my reasons and make a determination where possible so as to reduce the potential for further disagreement between the Applicant and TAC, in what has been a turbulent relationship.
- 44 There is a letter from Dr Wood to TAC dated 29 April 2014 which can be interpreted as a request for funding of Panadeine Forte. That letter states that the Applicant is suffering significant pain for which he has to take up to 8 Panadeine Forte daily.
- 45 I have considered the Applicant's request for reimbursement and Dr Wood's letter. I have accepted his evidence that he has paid \$600 out-of-pocket for Panadeine Forte and accordingly he should be reimbursed that amount. The Applicant stated:
- I can't really prove that I've had a thousand dollars worth or \$1200 worth, but I can prove I've had \$600 worth. I can give evidence. My evidence is that I've been taking those on a regular basis, 10 a day for two years. And if you multiply that by \$12.40, it comes to way more than 600 bucks.
- 46 Although Dr Wood refers to the Panadeine Forte being required for the Applicant's right knee, it is not controversial that the knee is also attributable to a transport accident. The Applicant's evidence now is that the Panadeine Forte is primarily to manage pain in his mouth, the Tribunal has accepted the Applicant's evidence on that point. The sum sought is not unreasonable and it is consistent with the evidence.
- 47 The three invoices from Hobsons Bay Dental identified cash payments of \$96 on 17 July 2012, \$186.10 on 13 March 2013, and \$49 on 13 September

2013. The invoices appear appropriate for reimbursement as they fall within the appropriate time frame and relate to the removal of tooth 15 and tooth 12. In the case of the \$49 expense on 13 September 2013, the invoice simply says 'oral examination'. I accept at face value the Applicant's claim that it was an examination that related to the transport accident injuries.

- 48 Accordingly I have ordered the TAC to reimburse the Applicant \$600 for Panadeine Forte and \$381 for three dental visits.

Legal Costs

- 49 The Applicant claims legal costs including filing fee (Tribunal records indicate that \$428.90 was paid); the hearing fee payable for the second day of hearing (\$389.30); and legal fees paid to law firm Grace Placencio Davies & Company Lawyers estimated by the Applicant to be \$500.00.
- 50 Pursuant so sub-s 79(2) of the Act, I consider it just to require the Respondent to pay the Applicant's filing fee and the fee payable for the second day of hearing, fixed at \$818.20. The TAC did not contest that these costs were payable.
- 51 Upon receipt of an invoice paid to Grace Placencio Davies & Company Lawyers, and confirmation by TAC that the invoice is referable to this proceeding, I find that it is just that TAC pay the Applicant that invoice. The Applicant is required to provide invoices verifying his claim for this cost before TAC can be required to reimburse him. I have made orders accordingly.

Further Costs sought by the Applicant (general expenses)

- 52 I have considered further costs sought by the Applicant which I have categorised as 'general expenses'.
- 53 These general expenses include:
- (a) The Applicant's costs of attending court $\$300 \times 7 \text{ days} = \$2,100$;
 - (b) Lachlan's costs of attending court $\$300 \times 3 \text{ days} = \900 ;
 - (c) Parking and travel, $\$118 \text{ per day} \times 7 \text{ days} = \826 ; and
 - (d) Work transit van registration = \$640.
- 54 I do not make any order fixing the costs in relation to the additional amounts sought by the Applicant. They may have been costs reasonably incurred. However, there are a number of authorities dealing with applications for costs by litigants in person and the meaning of the word 'costs' in that context. It is generally the case that such expenses are not recognised as costs payable by the unsuccessful party.
- 55 The leading authority comes from the High Court case of *Cachia v Hanes and Another*⁵ where it was held that the costs for which Rule 23 (2) of the

⁵ (1994) 179 CLR 403 per Mason CJ, Brennan, Deane, Dawson and McHugh JJ.

Supreme Court Rules 1970 (NSW) provided were confined to money paid or liabilities incurred for professional legal services and did not include compensation for time spent by a litigant who was not a lawyer in preparing and conducting his case.

- 56 In relation to what I have referred to as ‘general expenses’ and any further costs sought by the Applicant, it is appropriate that I confirm the Respondent’s submission that any further costs sought by the Applicant are payable on County Court Scale, to be assessed by the Costs Court in default of agreement.

Judge Jenkins
Vice President