

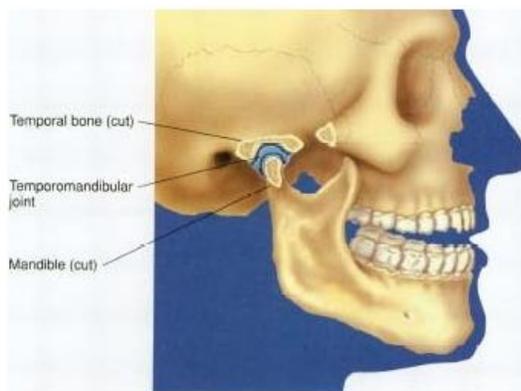


## What is TMJ?

Article provided by Health Cost Management

— by **Thomas W. Albert, MD, DMD**

What is TMJ? The anatomical definition is the Temporomandibular Joint, which is a defined anatomic structure with multiple parts where the top of the mandible (lower jaw) moves against the temporal bone of the skull. The mandible and temporal bone are separated by a cartilage or “disc” within the joint, as shown below.



Common usage of the term TMJ is to describe a symptom complex of fascial pain and dysfunction.

The first 25 mm of the jaw opening swings just like a door hinge. After that, the mandible moves forward as well as rotates. Measuring motion may help define a specific injury with the joint itself. TMJ clicking is due to abnormal or irregular movement of the disc. Locking of the jaw occurs when the disk is out of position and blocks translation.

A common conception is that any of the following indicates that a patient may have “TMJ”: some type of facial pain, clicking and popping of the jaw, headaches, biting problems, tinnitus or earaches. The TMJ concept beyond objective anatomy is not well defined and has multiple definitions. Many textbooks have been published with very different descriptions of TMJ. In actual practice, almost any facial pain or dysfunction may be called “TMJ”. However, only those with truly objective findings upon examination should have a diagnosis of “TMJ”. Objective findings are verifiable indications

of injury or disease that are reproducible, measurable and observable.

A physical examination for the purpose of diagnosing TMJ includes the following:

- Facial – symmetry / asymmetry
- Location of symptoms
- Palpation of structures – bony landmarks, muscles
- Range of motion – straight opening, protrusion, lateral
- Noises – palpitation, auscultation (listening), what part of movement
- Occlusion
- Condition and state of repair of teeth
- Wear patterns of teeth – evidence of grinding or clenching
- Neurologic examination (cranial nerves)
- Condition of mucosa (mouth tissue) - looking for tumors

The following diagnostic studies are also important for the purpose of diagnosis:

- Arthrograms – dye injected into the joint spaces – dynamic view
- MRI – open and closed views
- Plain radiographs

The position of the discs as shown in the diagnostic studies is important to the diagnosis. Normal position in the open and closed views indicates normal function of the joint. Displacement of the discs may provide objective evidence of a TMJ diagnosis. Degenerative changes of the joint may also be visible in the studies.

Subjective findings are much less conclusive and may be derived from many other causes besides TMJ. They include headaches, earaches and stress – real but hard to define.

Initial treatment for TMJ consists of a soft, non-chew diet, NSAIDS and relaxation techniques. Following that, more focused modalities such as a bite guard / night guard may be useful. Physical therapy focused on muscles of mastication (chewing) and

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neck may help in many cases. The therapy must be based on clear goals with timely reassessment and be of limited duration and emphasize home maintenance. Successful physical therapy for TMJ requires a therapist who is experienced specifically in this area.

Surgery is reserved for well-defined problems where there are clinical and imaging findings of internal derangements. It should be applied when the patient is unresponsive to reasonable non-

surgical modalities. Surgery is rarely adequate by itself and should be applied only after weighing the potential benefits against the risks.

Most individuals will respond within three to six months with simple non-surgical modalities and should be medically stationary by that time. If the non-surgical modalities are not effective and surgery is applied, most patients should be medically stationary within four to six months after surgery.

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## TMJ & Personal Injury Claims

— by Bruce M. White

# MITCHELL, LANG & SMITH

*Editor's Note: Please join us in welcoming the law firm of Mitchell Lang & Smith as a regular contributor to our monthly newsletter.*

TMJ complaints are not uncommon in the general population, and generally they are not due to trauma. Frequently, however, a claimant will allege a TMJ injury from trauma when there is no evidence of a blow or other impact to the face or jaw. The diagnosis often relies on the onset of complaints after a trauma such as a rear end auto accident, despite minimal evidence of objective findings of a TMJ disorder (objective findings include displaced discs, popping or clicking of the jaw joint on movement, and restricted or abnormal opening of the jaw).

Claimants who seek medical attention with TMJ complaints after a relatively low speed auto accident often present a similar profile. The complaints, in addition to TMJ symptoms, typically include ongoing neck pain, headaches, vertigo or other inner-ear associated problems, and fibromyalgia. Often such claimants will be particularly susceptible to stress or psychological issues.

Studies have demonstrated that forces on the TMJ from normal use (for example, chewing) are much greater than the forces applied to the jaw joint from a whiplash injury or other trauma not involving a direct blow to the jaw. In defending such claims, in addition to evaluating objective evidence of a TMJ disorder, it is important to determine:

- the onset of symptoms relative to the date of trauma
- prior medical and dental history and treatment
- pre-existing evidence of clenching or grinding the teeth
- probable forces to the head, neck and jaw from the trauma

There is much debate in the medical literature whether a typical whiplash injury can result in a TMJ disorder ("TMD"). However, claimants with such complaints often have prolonged treatment without relief and allege significant damages and permanent injury. A review of jury verdicts in the Northwest involving TMJ complaints discloses a wide disparity in verdicts or arbitration awards. However, with careful preparation and expert support, such TMJ complaints are usually successfully challenged. ❖

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Case Study



## Increased Risk of Attorney Fees in PIP Claims

— by Jeffrey D. Eberhard

ORS 742.061 provides for the recovery of attorney fees if an insurer fails to settle a first party claim within 6 months. Subsection 2 of the statute, however, provides an exception for personal injury protection (PIP) insurers who have 1) “accepted coverage and the only issue is the amount of benefits due the insured,” and 2) consented to submit the case to binding arbitration. Last month, the Oregon Supreme Court examined the exception in *Grisby v. Progressive Preferred Ins. Co.*, \_\_\_ Or \_\_\_, Civ. No. S054196, Oregon Supreme Court (August 9, 2007). The Court’s holding severely limits the protection from attorney fees once thought to be provided by the exception.

Omar Grisby sustained injuries when his vehicle was rear-ended by another driver. Grisby filed for PIP benefits with his insurer, Progressive. Shortly thereafter, Progressive sent Grisby a letter in which it acknowledged his policy, agreed to pay for reasonable and necessary medical expenses related to the accident, and consented to submit any dispute regarding the amount of PIP benefits due to binding arbitration. Although Progressive did pay Grisby for various medical expenses and loss of income relating to his injury, it refused to pay for \$4,042 worth of chiropractic treatment it deemed to be unrelated to the accident. After failing to convince an arbitrator that the disputed chiropractic treatments were related to the accident, Grisby requested a trial *de novo*.

The trial jury found Grisby’s chiropractic treatments were related to the accident and awarded him damages accordingly. However, the trial court denied Grisby’s request for almost \$50,000 in attorney fees, concluding that his claim came within the exception of ORS 742.061(2) because Progressive had prop-

erly accepted coverage for the accident and that the dispute regarding payment of the chiropractic treatment was nothing more than a dispute about the amount of benefits that were due. The Oregon Court of Appeals affirmed.

On appeal to the Oregon Supreme Court, Grisby argued that by denying payment for his chiropractic treatments, Progressive did not “accept coverage” and that the dispute about those treatments involved more than just a dispute about the “amount of benefits due.” After evaluating the text and context of the applicable statutes, the Oregon Supreme Court agreed with Grisby and held that, for the purposes of the exception to the attorney fee statute, whether an insurer properly “accepts coverage” is not limited to a one-time decision about whether the accident triggered the policy, but rather, an ongoing series of decisions “accepting” or “denying” coverage of particular claims for services rendered by medical providers. In addition, the court concluded that an “issue” as to the “amount of benefits” referred to in ORS 742.061(2) is an issue that concerns the dollar level of a claim for services that a medical provider submits to an insurer, not an insurer’s denial of a particular claim for services, such as chiropractic treatment. The Court held that by refusing to pay for Grisby’s chiropractic treatment, Progressive did not simply dispute the “amount” of Grisby’s claims for the services provided by the chiropractor, but rather, it denied a partial claim for benefits as being

**Claims Pointer:** A PIP dispute over whether a particular treatment was related to a covered injury will not be considered a dispute involving “the amount of benefits due” for the purposes of the PIP exception to the attorney fee statute. An ORS 742.061 letter may no longer protect a PIP insurer from paying attorney fees in cases where it has refused to pay for a particular treatment as being unrelated to the accident. Disputes over “dollar level,” of a particular treatment, however, will still be protected from fees.

unrelated to the accident. Accordingly, the Court held that the exception to the attorney fee statute did not apply in this case and Grisby was entitled to recover reasonable attorney fees. The case was remanded to the trial court for further proceedings.

Although the practical effect of this holding remains uncertain given the factual circumstances of this particular case, it is likely that the *Grisby* decision will bring about an increase in the number of lawsuits involving PIP benefits as plaintiff attorneys seek fees where they were previously thought to be unavailable. ❖

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## Pesticide Spray Drift Case Can Be Very Costly

— by Rudy Lachenmeier and Lori DeDobbelaere

Ever since Rachel Carson published her ground breaking and polarizing book, *Silent Spring* in 1962 which dealt with the pesticide DDT and its thinning effects on the egg shells of birds, and since the controversial use of Agent Orange in Vietnam, the use of any chemical spray has become a very emotional issue. As a result, a pesticide spray drift case can be very costly in both time and money to defend. It is a challenge to keep the court and the jury (not to mention the parties) focused on the science and the law and to prevent the case from veering into an emotional, knee-jerk reaction to the use of pesticides. This article will address some of the areas that someone defending a pesticide spray case must focus on at the beginning of the case in order to keep the case on track legally and scientifically.

### The Notice Statute

ORS 634.172(1) provides:

No action against a landowner, person for whom the pesticide was applied or pesticide operator arising out of the use or application of any pesticide shall be commenced unless, within 60 days from the occurrence of the loss, within 60 days from the date the loss is discovered, or, if the loss is alleged to have occurred out of damage to growing crops, before the time when 50 percent of the crop is harvested, the person commencing the action:

(a) Files a report of the alleged loss with the State Department of Agriculture;

(b) Mails or personally delivers to the landowner or pesticide operator who is allegedly responsible for the loss a true copy of the report provided for under paragraph (a) of this subsection; and

(c) Mails or personally delivers to the person for whom the pesticide was applied a true copy of the report required under paragraph (a) of this subsection if that person is not the person commencing the action.

“The apparent purpose of the statute is to permit the adverse party to inspect and determine the alleged damage, thereby permitting mediation of the claim.” *Malaer v. The Flying Lion Inc*, 65 Or. App. 154, 157, 670 P.2d 214 (1983). A claimant’s failure to file a Report of Loss with the Oregon Department of Agriculture (“ODOA”) within the time frames laid out in the statute is “fatal” to his claim against the “landowner, person for whom the pesticide was applied or pesticide operator.” *Id* at 158. Accordingly, it is imperative to immediately determine when the spraying occurred and when the claimant first discovered any damage to his property.

However, an adverse party can be estopped from raising the limitations period found in ORS 643.172 (1). In *Malaer*, plaintiffs owned 14 acres of productive filbert trees. Defendants sprayed an adjoining wheat field with a pesticide which resulted in about ½ of plaintiffs’ property becoming contaminated. Within one week of the spraying, plaintiffs notified Oregon State University extension service of the over-spray. Within three weeks, plaintiffs notified defendants of their claim. Shortly thereafter, an adjuster from defendants’ insurance carrier came out to plaintiffs’ property to inspect the damage. The adjuster told plaintiffs that he would “take care of the claim,” that he thought the claim was “legitimate” and that “you don’t need to worry about it.” The adjuster did not tell plaintiffs that they needed to notify the State and plaintiffs were unaware that they needed to do so. Plaintiffs never did file a notice of loss with the State.

The court held that “the failure to report the loss to the Department of Agriculture is fatal. The evidence is that the extension agent is an employe (sic) of Oregon State University, not the Department of Agriculture. We hold that plaintiffs did not substantially comply with the notice provisions of ORS 634.172 (1).” However, the court further held that defendants may be estopped from challenging notice due to the statements of the insurance adjuster. The court reasoned that the statements that he “would take care of the claim” and “you don’t need to worry about it”

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*(Continued from Pesticide Spray Drift)*

could be interpreted to mean that the insurance company was promising to pay the claim. The court determined that it was a genuine issue of material fact that should be decided by the jury. Accordingly, it is very important to watch what is being said to a claimant.

It is also important to keep in mind that not all people applying pesticides are covered by this statute. According to ORS 634.106(13), a “pesticide operator” is “a person who owns or operates a business engaged in the application of pesticides upon the land or property of another.” If the person applying the pesticide does not operate a commercial pesticide application business, he would not be protected by this statute (unless of course, he was also the landowner).

It is currently an open question in Oregon regarding exactly when the notice period begins to run. The authors recently had an herbicide overspray case in which damage to one crop was allegedly discovered two days after the spraying while damage to another crop was not discovered until almost 60 days later. Notice was given to the ODOA 110 days after the initial spraying but only 57 days after the discovery of damage to the second crop. An issue that was never determined since the case settled was when did the 60 days start to run.

Another issue that arose in that case was whether an oral report to the ODOA would satisfy the statute. Plaintiffs had orally notified the ODOA within 60 days of the discovery of the damage to the first crop but did not file a written report with the ODOA. On summary judgment, the court stated there were genuine issues of material fact (without specifying what those facts were) and basically punted this issue to the jury. The court agreed that the statute appeared to contemplate written notice but still refused to grant summary judgment. Accordingly, even though the statute appears to be fairly cut and dry, it is not and can be a trap to the uninformed.

### **The Science**

As soon as you receive notice that there has been a potential overspray of a pesticide, it is vital that you immediately have soil and plant samples taken to determine if the pesticide used can be found in the soil or plant material. Some pesticides have

relatively short half-lives so the quicker the testing can be performed the better. For instance, according to the EPA, 2,4-D, one of the most commonly used herbicides in the world, has a half-life in terrestrial environments of 6.2 days. In other words, if you were to test for 2,4-D 60 days after it was sprayed, there would only be 1/1024 of the 2,4-D remaining and it soon would be below detectable levels.

It is important to determine if what the plants are exhibiting could have been caused by the chemical used. For instance, 2,4-D can kill broadleaf plants but does not harm grass in any way. Glyphosate (the active ingredient in Round-Up) will kill broadleaf plants and grasses. If the defendant sprayed 2,4-D and you see grass dying, it could not have been the 2,4-D that was sprayed causing the grass to die but it could be glyphosate.

Many diseases can mimic pesticide damage and vice versa. Different pesticides can have similar symptoms. It is therefore very important that a differential diagnosis is performed. In other words, it is important to eliminate other causes for the problems that are being seen with the plants. Could the problems have been caused by another chemical, a disease, an insect, farming techniques or a combination of these things?

Furthermore, as they say in medicine “the dose determines the poison.” For example, a little water is healthy; too much water will kill you. Consequently, it is necessary to determine just how much of the pesticide would have reached the off-target plants and how resistant the plant at issue is to the chemical that was used.

Finally, sometimes small amounts of an herbicide will actually stimulate growth of a plant. Therefore, it is important to mark off the area where the herbicide would have reached and see if there is a difference in growth patterns between the plants in that area and the plants not in that area.

### **The Spray Event**

According to the EPA Spray Drift Task Force, the most important thing to look at to determine if drift is possibly is the droplet size. Accordingly, you need to determine the size and type of nozzle used, the height of the nozzles and the pressure at which the chemical was applied. The smaller the droplet size, the greater the chance that the chemical could drift.

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It is also very important to determine the weather the day of the spraying (and in some cases for days afterwards). Of course, this does not need to be done as quickly as the soil and plant testing. However, at some point you will need to determine the temperature range on the day of the spraying, the humidity, the wind speed and its direction and whether an inversion occurred. Hiring a meteorologist is an efficient and accurate way of determining the weather surrounding the spray event. ❖