

WORKPLACE SAFETY AND INSURANCE APPEALS TRIBUNAL

DECISION NO. 1058/00

[1] This appeal was heard in Toronto on October 27, 2003, by Tribunal Vice-Chair M. Crystal.

THE APPEAL PROCEEDINGS

[2] The worker appeals the decision of Appeals Resolution Officer John Tinto, dated May 14, 1998. That decision concluded that the worker was not entitled to:

- i) benefits for injuries to the head, neck, shoulders or both feet and
- ii) supplementary benefits pursuant to section 43(9) subsequent to September 1, 1996.

[3] The worker appeared and was represented by Mr. Enio Zeppieri, legal counsel. Although notified, the employer did not participate in the appeal.

[4] This appeal was originally heard on May 2, 2000 and July 31, 2000 by Mr. Eban Bayefsky, Vice-Chair. Mr. Bayefsky is no longer with the Tribunal and Mr. Crystal replaced him as Vice-Chair with the parties' consent. Mr. Crystal reviewed transcripts prepared of the proceedings conducted on May 2, 2000 and July 31, 2000.

THE RECORD

[5] The material in the Case Record, dated October 29, 1999, prepared by the Office of the Vice-Chair Registrar (Exhibit #1) was considered. In addition, Addendum No. 1 dated March 2, 2000 (Exhibit #2), the Hearing Ready Certification Letter dated March 6, 2000 (Exhibit #3), correspondence from the employer dated March 27, 2000 (Exhibit #4), medical reports and records dated October 25, 1995 (Exhibit #5), an undated written statement prepared by the worker (Exhibit #6), an undated transcript of the proceedings conducted on May 2, 2000 (Exhibit #7), an undated transcript of the proceedings conducted on July 31, 2000 (Exhibit #8), Post-Hearing Addendum No. 1 dated October 15, 2003 (Exhibit #9), correspondence from the worker's legal counsel dated October 21, 2003 (Exhibit #10), correspondence from the Tribunal to the parties dated December 4, 2000 (Exhibit #11) and Post-Hearing Addendum No. 2 dated November 25, 2003 (Exhibit #12) were considered.

[6] Oral evidence was heard from the worker. Submissions were made by Mr. Zeppieri.

THE ISSUES

[7] The issues to be determined in this appeal are whether the worker is entitled to:

- i) benefits for injuries to the head, neck, shoulders and both feet and
- ii) supplementary benefits pursuant to section 43(9) subsequent to September 1, 1996.

[8] The worker has also raised the issue of whether he is entitled to costs.

THE REASONS

(i) Background

[9] The worker suffered a workplace injury on September 26, 1994. On that date he was installing doors and drywall in the course of a renovation project when he injured his low back. The worker was initially treated at the emergency department of a local hospital on the date of the accident. The emergency room record provided a diagnosis of low back strain. The treating physician at the emergency department also prepared a Physician's First Report dated September 26, 1994. That report stated that the worker had twisted his low back "lifting drywall/door" and provided a diagnosis of "soft tissue low back strain". A further Physician's First Report was prepared on September 28, 1994 by the worker's family physician, Dr. Oswald John. That report provided a diagnosis of "sprained lower back". That report stated that the worker was expected to make a complete recovery in four to six weeks. A Progress Report prepared by Dr. John dated December 8, 1994 stated that the worker was expected to make a complete recovery in three to four weeks. A further Progress Report prepared by Dr. John dated January 3, 1995 stated that a complete recovery was expected in two to three weeks and that a course of treatment at the Canadian Back Institute was strongly recommended. Each of these progress reports provided a diagnosis of "Mechanical Backache".

[10] The worker was seen at the Canadian Back Institute on January 16, 1995 and a "Worker's [sic] Compensation Board Assessment Report" was prepared by Grace Liu, physiotherapist, which stated in part:

CURRENT COMPLAINTS:

[The worker] complains of constant low back pain, primarily on the left side, along with intermittent left leg pain to the level of the calf, which increases with exercise, pressure on the leg. [The worker] also complains of neck pain travelling to the shoulder area bilaterally, more so on the left.

[The worker] indicated that he had been provided with stretches primarily for the neck area, Tylenol medication, and ultrasound treatment once weekly.

OBJECTIVE FINDINGS

[The worker] presented with a mild lordotic lumbar spine and forward head posture. Lumbar range of motion was moderately reduced in flexion and markedly reduced in extension. Cervical range of motion was within normal limits for flexion, extension, rotation, however, was mildly reduced in side bending. Lumbar range of motion was moderately reduced in flexion and extension. Lumbar flexion and extension worsened the low back symptoms.

There was decreased left dorsiflexion and extensor hallucis longus extension compared to the right, however, other neurological examination was normal.

Based on Waddell signs, [the worker] tested positive from symptom magnification testing. The non-organic findings that were positive were non-anatomical tenderness, acetabular rotation, cogwheeling to muscle testing and overreaction.

As well, [the worker] appeared to be quite protective of his movements during examination....

[11] The worker was referred by the Board to the Regional Evaluation Centre (REC) at the Orthopaedic and Arthritic Hospital for assessment. A report on his assessment dated February 2, 1995 was prepared by Dr. Richard Holtby and K. Horvath, physiotherapist. The report reviewed the worker's history and stated that his principal complaint was with the lower back, aggravated by changes in weather, prolonged sitting, repetitive bending and lifting. The report also noted that the worker demonstrated functional overlay. It stated in part:

Current situation:

At the time of our assessment [the worker's] principal complaint was with his lower back...He also complains of pain in his right shoulder and neck region and also down his left leg. These pains started later when he started his exercise programs at the Back Institute and he relates them to lifting weights....

Impression:

It was our clinical impression that [the worker] was suffering with a lumbar spine strain with some functional overlay. He was felt to be generally deconditioned. We felt that the pain in his shoulder and lower extremities was related to his exercise therapy.

[12] The worker was discharged from his therapy at the Canadian Back Institute and a "Discharge Report for Workers' Compensation Board" dated February 15, 1995 was prepared by James DeSerrano, kinesiologist and Grace Liu, physiotherapist. The report stated that the worker reported no significant improvement in his neck and back pain, subjectively, and that objectively, no significant improvement was noted either.

[13] The report stated that the worker demonstrated "overt signs of symptom magnification". The report noted that the worker had a number of barriers to his return to work and recommended that the worker be referred for vocational rehabilitation (VR).

[14] The worker was referred by Dr. John to Dr. Bernard Woolford, orthopaedic surgeon, who saw the worker and provided a report dated February 23, 1995. The report provided a diagnosis of L4-5 disc prolapse and "a strain of the right rotator cuff during his rehabilitation activities." Dr. Woolford arranged a physiotherapy program for the worker's shoulder and back. Dr. Woolford prepared a further report date March 16, 1995 which stated that the worker was having problems with the lower back, left leg, shoulder and foot. The report noted that the worker had soreness around the plantar fascia of the left foot. Degenerative change in the foot was also noted.

[15] The worker had a total body bone scan performed on March 17, 1995. The report on the scan prepared by Dr. James Arnott, radiologist, stated that the worker had "marked increase in uptake in the acromion process of the right shoulder as well as mild uptake in the patella of both knees. There was also mild uptake in the feet and wrists, but marked increased uptake in the plantar surface in the left calcaneum. The report concluded by stating:

The changes in the joints are all consistent with degenerative arthritic change. There is a plantar fasciitis in the left calcaneum. The remaining bones are unremarkable.

[16] A CT scan was performed on the worker's lumbar spine on April 24, 1995. The scan disclosed that the worker had "mild circumferential bulging of the L4-L5 and L5-S1 discs" but that "no disc herniation or spinal stenosis" was seen.

- [17] The worker was contacted by the Board's VR services in April 1995 and a General VR Assessment Report dated May 1, 1995 was prepared by the Board's VR Caseworker. The report reviewed the worker's accident, medical and vocational history and concluded that a vocational evaluation would be appropriate. The evaluation was arranged with Lacroix, Scher Consultants.
- [18] By correspondence from the Board dated May 9, 1995, the worker was advised that, after review by the Board's medical staff, the Board had determined that the worker was not entitled to benefits for the right shoulder.
- [19] The worker underwent his vocational evaluation with Lacroix, Scher Consultants on May 18, 1995 and a report on the evaluation prepared by J. Michael Lacroix and Christine Gerow was prepared. The report noted that the worker would be eligible for a number of entry level positions with minimal on-the-job training, involving sales or light duty factory jobs and that other positions such as building inspector or co-ordinating and supervisory positions might be appropriate for him with necessary upgrading and retraining. The worker continued to look for work while considering his vocational goals. The materials included a VR Plan which was undated, but appears to have been prepared in October 1995. The plan provided for the worker to attend an introductory computer course, attend a Creative Job Search Training program and be involved in a six month job search. The Plan set out vocational goals of "Building Sales" and "Gate Attendant".
- [20] Dr. Woolford saw the worker again in September 1995 and prepared a report dated October 4, 1995 which stated that the worker felt that he was not doing any better and continued to experience pain in the shoulder and neck. The worker indicated that he had pain at the lumbar and thoracolumbar levels of the spine and around the right shoulder blade. Although the worker had some residual stiffness of the right shoulder and sciatic symptoms in the left leg, he did not have any neurological findings. Dr. Woolford stated that he made no further arrangements to see the worker.
- [21] An internal Board memorandum dated December 20, 1995 stated that the Board had determined that the worker's injury had left him with a loss of earning capacity and that he was entitled to a future economic loss (FEL) benefit. The memorandum also stated that because the worker was co-operating with VR services that he was further entitled to VR supplement.
- [22] By correspondence dated May 24, 1996 the worker was advised that he was entitled to a 17% non-economic loss (NEL) benefit in relation to his low back injury.
- [23] The worker attended computer training made but made slow progress. A VR Action Memo dated June 20, 1996 reflected a meeting between the VR Caseworker, an employment counsellor at the training centre where the worker had been taking computer training and the worker. The memo noted that the worker's main obstacle was his typing speed (five words per minute) and concluded that the worker should be referred to a Creative Job Search Training program.
- [24] Dr. Oswald prepared a report dated June 13, 1996 which stated that the worker had had a good medical history prior to September 26, 1994 when he sustained his workplace injury. The

report also noted that the worker's "complaints were even aggravated when he attended the Canadian Back Institute."

[25] The worker participated in a Creative Job Search Training program in July 1996, however, an internal Board memorandum dated July 17, 1996 reflecting a telephone conversation between the VR Caseworker and the facilitator of the program stated that the worker had low self-confidence, a negative attitude and limited motivation. The facilitator also thought that the worker's ability to find employment was slim. The VR Caseworker prepared an internal Board memorandum dated August 28, 1996 which stated in part:

Obstacle:

The worker's non-compensable problem:

This main factor is the single most debilitating factor in this worker's rehabilitation. I have been unsuccessful in shifting the worker's focus from the medical to the rehabilitative.

The worker is currently investigating medical options regarding his head problems.

Until the issue is resolved, vocational rehabilitation cannot continue as the worker's self-perceived restrictions are precluding him from securing successful employment as a sales clerk.

Status:

VR supplement will be closed effective Sept 1st 1996

Worker will continue to receive the [future economic loss] award.

Closure category: Not employed: self perceived restrictions; non-compensable.

[26] By correspondence from the Board dated September 3, 1996 the worker was advised that he was not entitled to further supplementary benefits pursuant to section 43(9) of the Act. The letter stated that it had been noted that the worker had been experiencing non-compensable head problems which had become an obstacle to his VR. The letter noted that because the worker was no longer involved in a VR program, he would not be entitled to further supplementary benefits pursuant to section 43(9).

[27] The worker was referred to Dr. Farouk Dindar, neurologist, who noted in a report dated September 12, 1996 that an MRI scan done on the worker on August 23, 1996 did not provide evidence of spinal stenosis or changes in the spinal cord in the cervical spine, although there was some evidence of mild degenerative changes. Dr. Dindar stated that he was referring the worker to Dr. Pflug to obtain an opinion on whether the worker's neck symptoms were likely the result of his physiotherapy treatments.

[28] The worker was seen on October 25, 1996 by Dr. Michael Pflug, specialist in internal medicine, who prepared a report of that date [the date at the top of the report is October 25, 1995, however this is an error]. The report reviewed the worker's accident and treatment history. It noted that following the accident the worker attended at the Canadian Back Institute for physiotherapy and that he developed pain in his neck and shoulders following that treatment. The report stated in part:

[subsequent to physiotherapy treatment] He suffered exacerbation of pain and stiffness around neck and shoulders and also low back pain which became increasingly disabling.

Because of the relationship to W.C.B. and his ongoing coverage and his fear of losing it, he persevered in spite of these pains. He did, however, explain to the therapist that the exercises were bringing out new burning pains over the top of his shoulders and were also exacerbating low back pain including left, more than right sciatic nerve root irritation. He was told that he had to persevere and it would help him, though they did make some modification to the lifting exercises. Once he was discharged he followed the exercise schedule but avoided exercises which made him feel worse...

PRESENT SYMPTOMS:

He continues to suffer from occipital tension headaches for an hour and a half everyday. They may extend to the vertex of the head and be associated with paresthesias. He has pain and stiffness at the back of his neck and a burning pain in both shoulders. He has constant low back pain radiating into the interscapular area. He has left-sided sciatic nerve root irritation with pain from the gluteal area, into the lateral thigh, down to his calf and even into his foot. He has an awkwardness and stiffness in the ankles, left more than right, for much of the day and exacerbated by walking or standing. He is able to sleep but when he wakes up in the morning he can hardly move because of pain around neck and shoulders and has to push himself to get going. He keeps himself active. He does help in the household...

SUMMARY:

In summary this man suffers from sequelae of a soft tissue injury to his low back, mechanical back pain and left-sided sciatic nerve root irritation and extension of pain to neck and shoulders related to intensive exercises at the Canadian Back Institute. He now suffers from fibromyalgia...

PROGNOSIS:

This man is not employable. While he is pain-focussed and exhausted by his pain and discouraged by his lack of concentration, I feel that through a piecemeal approach with an active exercise program and pain management program, we could achieve some improvement.

[29] The worker was seen by Dr. J. A. Mayer, neurologist, on December 12, 1996. His report of that date stated in part:

You will also recall that [the worker] was injured in a work related accident that occurred on September 26, 1994. In his therapy program at the Canadian Back Institute because of strenuous exercise he injured himself further.

At the present time [the worker] is suffering pain in the right side of his neck, his shoulder, his low back, his left leg and his left foot. He has completed a computer course. However, he is not able to work in computers. He states that if he sits looking at the computer he develops increasing pain in the back of his neck and head and he feels as if his head is frozen. He cannot do that job for that reason....

[30] The worker was referred by Dr. Pflug to Dr. Lila Georgevich, neurologist, who saw the worker and prepared a report dated March 24, 1997 in relation to the worker's headaches. The report noted that the worker attributed his headaches to his course of physiotherapy. The report stated in part:

I think these are classic muscle contraction headaches. The secret to treatment of these is actual relaxation of the muscles however this is often hard to achieve. Pain medications are just gap measures. I think that he could benefit from both medical and non-medical approaches. I think massage therapy would give him some benefit...

[31] In April 1997 the worker underwent electrodiagnostic testing by Dr. Dindar to assess whether nerve root irritation in the lumbar spine was associated with the worker's left leg symptoms. The studies were normal.

[32] Correspondence dated April 4, 1997 from the Board to the worker's former representative, confirmed to the worker and the representative that entitlement for the neck, head, right shoulder and left foot were denied, noting that there was no indication that the worker had injured his head or neck as a result of his workplace accident. The letter also stated that a supplementary benefit was not payable in that VR services had been closed and the worker was not entitled to a medical supplement.

[33] The worker saw Dr. Pflug again on February 13, 1998 and the doctor provided a further report of that date. The report concluded by stating:

On examination he is resigned and depressed. He is tender in both occipital areas and across the shoulders. Shoulder movement is normal for flexion and abduction, but reduced to reaching lumbosacral junction on internal rotation. He was tender over the lower lumbar interspaces. Straight leg raising was to 70 degrees with exacerbation of low back pain. Knee and ankle reflexes symmetrical. He has 16 out of 18 fibromyalgia trigger points.

[Diagnosis]:

- 1) Sequelae of soft tissue injury to his back with a chronic pain syndrome and left sciatic nerve root irritation.
- 2) Post-traumatic fibromyalgia
- 3) Post-traumatic stress syndrome and reactive depression

Recommendation: He should keep up an active exercise program.

He is unemployable. He is not retrainable.

[34] Dr. Pflug saw the worker again on October 15, 1998 and prepared a further report of that date on his condition. The report concluded by stating:

SUMMARY

In summary this man presents with a history of degenerative cervical disc disease and lumbar disc disease, a history of back and neck injury and a further injury to his neck and maybe his brain stem from traumatic manipulation of his neck at the Canadian Back Institute.

I am concerned by the episodes of myoclonic jerks and blackouts, which he has mentioned in the past and which are increasing in frequency. They present a risk of his driving and he should not drive...

He sleeps poorly and he might benefit from an anti-depressant. I am not sure whether he is still taking Amitriptyline. I do not know the new anti-depressants and whether they have an effect on non-restorative sleep. While he has attended the fibromyalgia course with the Arthritis Society, he never has attended a heated pool exercise program and he may not be physically and mentally fit to do so – but it would be worth trying.

[35] The worker was seen by Dr. Mayer again on April 20, 1999 and the doctor's report of that date noted that the worker suffered low back pain as a result of the accident and that he subsequently developed pain in the neck which worsened with physiotherapy treatment. The

report noted that the worker was never able to return to work following the original injury. The report stated in part:

At the present time he has the following complaints:

1. Almost constant headaches. He has been seeing a psychiatrist, Dr. Barron. He feels confused.
2. He has neck pain and burning in the neck aggravated by neck movement.
3. There is pain in both shoulders
4. His feet are swollen and when he walks he has a sensation as if he is walking on two balls.
5. He has low back pain which prevents him from bending or lifting.
6. His short term memory is poor and he cannot concentrate
7. He has a whistling noise in the back of his head that has been present for the last 1½ years. He did have some hearing tests and apparently these were within normal limits
8. The left side of his face feels hot.
9. He has developed pain in his left chest and he is seeing a heart specialist, Dr. Selby.
10. He has pains in all of his joints but especially the hips and the knees....

On examination neck movements are restricted to less than half normal. He is tender throughout his cervical spine.

There is restricted shoulder movement bilaterally. Abduction of either shoulder is 100 degrees....

IMPRESSION

[The worker] does have degenerative changes noted in his cervical and lumbosacral spine.

In addition he has anxiety neurosis.

He has not been able to work since September of 1994.

(ii) Applicable law

[36] The workplace accident which is the subject of this appeal occurred on September 26, 1994. Accordingly, the worker's entitlement to benefits in this appeal is governed by the pre-1997 Act ("the Act").

[37] In this appeal the worker is seeking a benefit pursuant to section 43(9) of the Act. That provision states:

43(9) If a worker who is receiving compensation under this section is co-operating in a Board-authorized vocational or medical rehabilitation program,

- (a) that began before the date of the Board's review under clause (13)(a); or
- (b) that began within twelve months after a determination is made under subsection 42(21) of an unanticipated deterioration in the worker's condition,

the amount of compensation otherwise determined under this section shall be supplemented so that the total compensation payable to the worker while the worker is

co-operating in the rehabilitation program is equal to 90 per cent of the worker's pre-injury net average earnings.

(iii) Analysis

[38] In the circumstances giving rise to this appeal the Board has determined that, as a result of an injury resulting from his workplace accident, the worker is entitled to benefits for a permanent impairment of the low back. The worker has been awarded a 17% NEL benefit for that injury. In this appeal, however, the worker is claiming entitlement to benefits for injuries to his head, neck, shoulders and feet. The worker is also seeking ongoing entitlement to a supplementary benefit pursuant to section 43(9). The worker's ongoing entitlement to such a benefit was concluded effective September 1, 1996 when VR services were closed to the worker by the Board.

[39] In addition, the worker's counsel has also made submissions that the worker is entitled to an amount for costs, primarily attributable to the delay that the worker has experienced since his appeal was first heard by the Tribunal in May 2000. Each of these issues shall be addressed below.

(a) Entitlement to benefits for both feet

[40] The worker has claimed that he is entitled to benefits for injuries to both feet. The worker did not report an injury to the feet at the time of the workplace accident. The worker's report of accident did not refer to an injury to the feet. The initial medical reporting referred to a back injury, but did not refer to any injury to the feet.

[41] The worker was referred to Dr. Bernard Woolford in February 1995. A report dated March 16, 1995 stated that the worker had soreness and degenerative changes in the left foot. Plantar fasciitis was diagnosed by Dr. Woolford. The worker also had a total body scan in March 1995 which disclosed further degenerative changes and plantar fasciitis in the feet.

[42] In my view, the workplace accident, as a result of which the worker injured his low back, is not compatible with an injury to the feet. There is no compelling evidence before which could support a finding that the worker's foot problems are attributable to the workplace accident or with treatment of a condition which arose from the accident.

[43] The worker is not entitled to benefits for injuries to his feet.

(b) Entitlement to benefits for the neck, head and both shoulders

[44] The initial reporting of the workplace accident of September 26, 1994 by the worker and the employer does not refer to an injury of the head, neck or shoulders. As noted above the initial reporting refers to an injury of the low back. Similarly, the initial medical reporting does not refer to an injury to the head, neck or shoulders. The emergency room report of September 26, 1994 and the Physician's First Report of the same date only refer to an injury to the low back. Similarly, the Physician's First Report prepared by the worker's family physician, Dr. John, dated September 28, 1994 refers only to an sprained lower back. Dr. John also provided Physician's Progress Reports dated December 8, 1994 and January 3, 1995 which each provided a diagnosis of "Mechanical Backache". Neither of these reports provided any

indication that the worker had injured his neck, head or shoulders as a result of his workplace accident.

- [45] The worker does not contend, however, that he injured his head, neck or shoulders as a direct result of the September 1994 accident. Rather, it appears to be his contention that these injuries resulted from physiotherapy treatment for his back injury which he received at the Canadian Back Institute, and that he is entitled to benefits for these injuries on the basis of the injuries being secondary to the treatment that he received for his back injury. *Operational Policy Manual* Document No. 03-04-03 allows entitlement for a disability resulting from treatment for a compensable injury or condition.
- [46] In the worker's testimony which was recorded on transcripts, and in particular in the translation of a written statement made by the worker which was also translated in the transcripts, the worker has provided evidence that he believed that he was treated aggressively at the Canadian Back Institute and that his neck was manipulated or he was given certain exercises which involved movement of the neck which caused injuries to his neck.
- [47] I also note that a number of the medical reports, refer to the fact that the worker suffered injuries as a result of treatment received at the Canadian Back Institute. The REC report stated that the worker's neck and shoulder injuries started "later when he started his exercise programs at the Back Institute". Dr. Woolford's report dated February 23, 1995 stated that the worker had suffered "a strain of the right rotator cuff during his rehabilitation activities". Dr. Oswald reported on June 13, 1996 that the worker's complains were "aggravated when he attended the Canadian Back Institute." Dr. Pflug reported on October 25, 1996 that the worker suffered exacerbation of pain in the neck and shoulders after his physiotherapy treatment at the Canadian Back Institute. Dr. Mayer reported on December 12, 1996 that the worker "injured himself further" in his program at the Canadian Back Institute.
- [48] I note, however, that in the Assessment Report prepared by the Canadian Back Institute dated January 16, 1995, the worker complained of low back pain, but that he also complained of "neck pain travelling to the shoulder area bilaterally..." This report is the first reference in the medical information that the worker had a problem with the neck or shoulders.
- [49] As for an injury to the head, Dr. Georgevich stated in her report dated March 24, 1997 that the worker's headaches were also attributed by the worker to his course of physiotherapy and stated that the headaches were "classical muscle contraction headaches" and that the worker would benefit from "both medical and non-medical approaches."
- [50] I also note that the discharge report provide by the Canadian Back Institute did not make reference to any incident during the worker's treatment in which the worker had injured his neck. The report stated that the worker's range of motion did not improve from his treatment. The report did, however, state that he "demonstrated overt signs of symptom magnification." This observation was consistent with reporting at the REC as well as reporting by the Canadian Back Institute upon his admission to the physiotherapy program there.
- [51] I find that the workplace accident itself is not compatible with an injury to the neck, shoulders or head. I accept that as a result of that accident the worker injured his low back,

however, there is no evidence which can support a finding that the worker injured his neck, shoulders or head as a result of the accident. Further, neither the worker nor his treating physicians reported that the worker had any problems with the neck, shoulders or head between the date of the accident in September 1994 and his admission to the physiotherapy program in January 1995.

[52] The question then arises as to whether the worker injured his neck, shoulders or head as a result of his physiotherapy treatment. Although there are several medical reports which are noted above which refer to the worker injuring his neck and shoulders during physiotherapy treatments, these reports were based on histories given by the worker to each of the respective reporting physicians. The reporting physicians had no basis for their reports that the worker was injured as a result of his physiotherapy treatment apart from what the worker told them. It follows that the medical reports which concluded that the injuries to the upper body were secondary to the physiotherapy treatment are no more reliable than the worker's testimony to that effect.

[53] In my view, a critical piece of evidence in this appeal is the report prepared by the Canadian Back Institute physiotherapist upon the worker's admission to physiotherapy. The report stated that the worker was complaining of pain in his neck and shoulders. At the time the report was prepared, the worker had not yet begun his physiotherapy treatment. It follows that since the worker had neck and shoulder pain prior to his beginning treatment at the Canadian Back Institute, the neck and shoulder pain was not caused, at least initially, by the treatment.

[54] The question then arises as to whether the treatment at Canadian Back Institute permanently aggravated the worker's neck, shoulder or head condition. There are no objective findings which are capable of supporting that view. Given the evidence that the worker demonstrated "overt symptom magnification" and "functional overlay" I must find, on a balance of probabilities, that it is unlikely that the worker suffered a permanent aggravation of his neck, shoulder or head pain as a result of the physiotherapy treatment.

[55] On the basis of this evidence I find that neither the workplace accident of September 26, 1994 nor the treatment that the worker received as a result of that accident significantly contributed to any organic injuries suffered by the worker to his neck, shoulders or head. The issue of entitlement on a non-organic basis is not before me in this appeal.

(c) Entitlement to supplementary benefits pursuant to section 43(9) subsequent to September 1, 1996

[56] In its correspondence dated September 3, 1996 the Board advised the worker that he was not entitled to further supplementary benefits pursuant to section 43(9) of the Act because he was no longer involved in a VR program. The letter noted that the worker was suffering from non-compensable problems which had become an obstacle to his continued participation in VR. In the internal Board memorandum dated August 28, 1996, the Board's VR Caseworker stated that the worker's main problem was in relation to his head. The facilitator to the worker's job search program stated that the worker's ability to secure employment was "slim" and that he attributed that view to the worker's low of confidence, negative attitude and limited motivation.

[57] For reasons that are set out above, I have found that the worker is not entitled to benefits for injuries to the neck, head or shoulders. I note that Dr. Pflug stated in his report dated February 13, 1998 that the worker was not trainable.

[58] Section 43(9) of the Act provides that a worker is entitled to a supplementary benefit if the worker is in receipt of a FEL benefit pursuant to section 43 of the Act and participating in a VR or medical rehabilitation program. Although the worker was in receipt of a FEL benefit as of September 1, 1996, beyond that date the worker was no longer participating in a VR program. Particularly in light of the assessment by the facilitator of the worker's job search program and Dr. Pflug's subsequent statement that the worker was not trainable, I find that it is probable that as of September 1, 1996 the worker would not benefit from continued participation in a VR program and that it was appropriate for the Board to close VR services to him as of that date. I also find that subsequent to September 1, 1996 the worker was not participating in a medical rehabilitation program in relation to his compensable injury which would entitle him to benefits pursuant to section 43(9).

[59] Accordingly, I find that, subsequent to September 1, 1996, the worker is not entitled to a benefit pursuant to section 43(9) of the Act.

(d) Entitlement to costs

[60] In the circumstances of this appeal the worker is seeking costs. In submissions on the issue of costs, the worker's counsel noted that the Tribunal had never before awarded costs but that the circumstances of the appeal made the worker's case unique. It was counsel's submission that because the resolution of the worker's appeal had been delayed as a result of the Tribunal's failure to deliver a decision promptly, the worker had suffered prejudice and he was entitled to costs. The submission stated that the worker had requested costs in the amount of \$10,000.00 "as reimbursement and recognition of the Tribunals [sic] conduct."

[61] Counsel's submission made reference to the Tribunal's Decision No. 99/91A. That decision found that the Tribunal did not have jurisdiction to make an award of costs. It noted that the Tribunal has neither explicit nor implied power to order costs. It pointed out that in 1973 the Legislature removed the Board's explicit power to order costs and that such legislative action should be interpreted to mean that had the Legislature intended the Tribunal to exercise power to order costs, it would have explicitly reserved such power to the Tribunal. The Panel in that decision also stated that it saw no "practical necessity" for implying a power to order costs.

[62] Although in *Decision 99/91A* the issue was whether the Tribunal had power or jurisdiction to order that the costs of one party be paid by the other, in my view the same considerations as were set out in that decision apply to the issue of whether the Tribunal has power to order that costs be paid to a party resulting from delay. I find that the Tribunal has neither the explicit nor implicit power to order costs in the circumstances of this appeal. I also find that it is not a "practical necessity" for the Tribunal to have the power to order costs in the course of controlling its own process. Although the delay experienced by the worker in the circumstances of this appeal was regrettable, such delay does not give rise to any entitlement to an amount for costs.

THE DECISION

[63] The appeal is denied.

1. The worker is not entitled to benefits for the head, neck, shoulders or both feet.
2. The worker is not entitled to a benefit pursuant to section 43(9) for the period subsequent to September 1, 1996.
3. The worker is not entitled to any amount for costs.

DATED: May 11, 2004.

SIGNED: M. Crystal