

Noteworthy Decision Summary

Decision: WCAT-2005-06751 **Panel:** Herb Morton **Decision Date:** December 19, 2005

Medical Review Panel certificate – Finality of certificate – Reconsideration of certificate – New medical evidence – Section 65 of the former Workers Compensation Act – Section 246 of the Workers Compensation Act – Section 36 of the Workers Compensation Amendment Act (No. 2), 2002

A Medical Review Panel (MRP) found that the worker's symptoms were not caused by his work. Subsequent medical resonance imaging (MRI) investigations suggested the worker's symptoms were related to a work injury. The Workers' Compensation Board (Board) denied the worker's request to consider the new medical evidence on the basis that it was bound by the MRP certificate. The panel agreed that the MRP certificate was binding on the Board. However, there was no evidence the Board had turned its mind to the question of whether the new medical evidence warranted a reconvening of the MRP or the establishment of a new MRP. The panel referred these questions to the Board for determination.

The worker developed chest wall and left shoulder complaints in 1998. The Board found that his symptoms were not causally related to his 1991 work injury. The worker requested examination by an MRP. In 2001, the MRP concluded the worker had left rotator cuff tendonitis of unknown cause and the 1991 work injury had not caused his chest and left shoulder disability.

The worker subsequently had MRI investigations of his left shoulder. Based on the new evidence, a specialist in rheumatology and internal medicine concluded that the worker had a full thickness tear involving the superior labrum. He further concluded the labral tear was compatible with his work injury and was likely responsible for the referral of pain pattern into the chest and the Board had not recognized a connection to the left shoulder injury.

The worker requested the Board to adjudicate his claim based on the new medical evidence. The Board concluded it was bound by the MRP certificate and was unable to provide the worker with a new decision. The worker requested a review by the Review Division of the Board, which confirmed the decision. The worker appealed to the Workers' Compensation Appeal Tribunal.

The panel noted that it would be contrary to section 65 of the former *Workers Compensation Act* (Act) for the Board to embark on a reconsideration of a matter on which an MRP certificate had been provided. Thus, the MRP certificate was conclusive and binding and was not subject to reconsideration by the Board on the basis of new medical evidence.

The panel then considered whether the Board had the authority to reconvene the MRP, or appoint a new MRP, on the basis of significant new medical evidence. The panel noted that the former Appeal Division, in *Decision #97-0278*, concluded that it was possible to reconvene an MRP on the basis of significant new medical evidence. However, the panel also noted that the worker's right to request the MRP to be reconvened on the basis of new evidence might have been extinguished by section 36 of the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) which removed the MRP appeal process from the legislation.

As there was no evidence the Board had turned its mind to the question as to whether any other consideration might be available regarding the new medical evidence provided by the worker, the panel referred the following questions back to the Board for determination under section 246(3) of the Act:

- (a) Is reconsideration of the 2001 MRP certificate on the basis of significant new medical evidence still available to the worker, or was the right to seek such reconsideration extinguished by Bill 63?
- (b) If this avenue still exists, does the new medical evidence provided by the worker constitute significant new medical evidence warranting a reconvening of the MRP (or establishment of a new MRP)?

The worker's appeal was suspended pending receipt of the Board's determination.

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Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed *Review Decision #26090* dated February 11, 2005 to the Workers' Compensation Appeal Tribunal (WCAT). The review officer confirmed a decision dated October 15, 2004 by a case manager of the Workers' Compensation Board (Board). The case manager concluded that she was bound by a Medical Review Panel (MRP) certificate dated September 29, 2001, which found that the worker's left shoulder complaints were not related to his September 4, 1991 work injury. Accordingly, she was unable to make a new decision concerning his left shoulder complaints, based on new medical evidence. In his March 24, 2005 notice of appeal, the worker submits that, in light of new medical evidence, his left shoulder tear injury should have been accepted by the Board despite the prior Medical Review Panel certificate on his claim.

Although invited to do so, the employer is not participating in this appeal. By letter dated June 10, 2005, the workers' adviser stated that the worker had received advice and assistance but was not being represented by their office.

The worker initially requested that his appeal be considered on the basis of a "fast track" read and review. He subsequently requested additional time for submissions, and this was granted until August 15, 2005. The worker's written submissions dated August 17, 2005 were hand delivered to WCAT. The worker subsequently sought to submit additional medical evidence on September 7, 2005. The lateness of this material did not cause any delay in my consideration of this appeal. I exercise my discretion to receive the late material for consideration (*Manual of Rules of Practice and Procedure* (MRPP) item #10.20).

Issues(s)

Does the Board have authority to consider the new medical evidence submitted by the worker regarding the cause of his left shoulder problems, or is the September 29, 2001 MRP certificate binding?

Jurisdiction

The Review Division decision is appealable to WCAT under section 239(1) of the Act. WCAT may consider all questions of fact, law and discretion arising in an appeal, but is not bound by legal precedent (sections 250(1) and 254 of the Act). WCAT must make its decision based on the merits and justice of the case, but in so doing must apply a

published policy of the board of directors that is applicable (section 250(2) and 251 of the Act).

Background and Submissions

Appeal Division Decision #00-1864 dated November 24, 2000 found that the worker's chest wall and left shoulder complaints in December 1998 were not causally related to his September 1991 work injury. The worker requested examination by a MRP in relation to this decision. By certificate dated September 29, 2001, the MRP found that the worker had a disability with respect to his left shoulder. On the issue of causation, the MRP certified:

4. a) The cause of the worker's left shoulder disability is left rotator cuff tendonitis of undetermined etiology.
- b) The work injury of September 4, 1991 was not of causative significance in producing a chest or left shoulder disability.

The MRP also found that the worker was suffering from diffuse left pectoral pain of unknown etiology, which was not disabling.

Subsequent to the MRP certificate, the worker underwent further medical investigations. Magnetic resonance imaging (MRI) of his left shoulder on July 21, 2003 was reported as follows:

IMPRESSION

1. Low T1 signal in the supraspinatus tendon as well as streaky increased T2 signal is consistent with calcific tendinopathy.
2. Tiny region of linear high signal in the anterior labrum. If there is clinical suspicion of a labral injury, an MR arthrogram is suggested for further evaluation.
3. Small oval lesion within the glenoid of the scapula is non specific. If appropriate, plain radiographs of the left shoulder could be performed for further assessment.

A second MRI on June 15, 2004 was reported to show the following:

IMPRESSION

Gadolinium MR arthrogram of the left shoulder demonstrates a moderate to large partial articular surface tear of the supraspinatus tendon as well as changes of supraspinatus tendinopathy which are at least moderate in degree. Marked calcific tendinitis is also noted. Examination also demonstrates a SLAP lesion which involves the biceps anchor with associated bicipital tendinitis.

By report dated July 16, 2004, Dr. M. F. Baker, a specialist in rheumatology and internal medicine, reviewed the June 15, 2004 MRI report and commented:

This demonstrates the previously noted marked calcific tendonitis, in the distal supraspinatus tendon and also some degenerative changes in the supraspinatus tendon proximal to the calcific tendonitis; however, the most marked abnormality is a moderate sized articular surface partial tear extending through half the substance of the tendon. There is a full thickness tear involving the superior labrum. This begins posterior to the biceps anchor and extends anterior to the biceps anchor. The biceps tendon also demonstrates signal hyperintensity, indicating partial tears. This labral tear will require some surgical remedy. There is evidence of glenohumeral joint space reduction, but the labral tear will not heal without reattachment. This labral tear has probably been present for a long period of time. It would then account for referred pain into the left upper chest, as supraspinatus tendon pain is usually referred into the shoulder and into the arm. [The worker] is going to have to see an orthopaedic surgeon and will likely have to have surgery on his shoulder.

It is my opinion that his labral tear is compatible with an old injury and would likely be responsible for a referral of pain pattern into the left upper chest that was noted by WCB many years ago. This, however, was not connected to the left shoulder and the left shoulder injury was not recognized.

By decision dated October 15, 2004, the case manager advised the worker as follows:

You have requested that the consult report of Dr. Baker dated July 16, 2004 relating to the left shoulder be adjudicated by the WCB.

As you are aware, the Medical Review Panel provided a certificate dated September 29, 2001. In that certificate the Medical Review Panel stated that the cause of any left shoulder disability that the worker was experiencing was of undetermined etiology and that the work injury of September 4, 1991 was not of causative significance in producing a chest or left shoulder disability. Therefore, the Medical Review Panel had determined that any left shoulder injury is not related to the work injury of September 4, 1991.

I am bound by the Medical Review Panel Certificate dated September 29, 2001. Therefore, I am unable to provide you with a new decision regarding the left shoulder complaints as outlined in Dr. Baker's consult report of July 16, 2004.

The worker requested review by the Review Division. By decision dated February 11, 2005, the review officer confirmed the case manager's decision. The review officer reasoned in part:

The Workers' Adviser requested a decision adjudicating new medical reports, and assisted the worker in his Request for Review. The Workers' Adviser has not advanced any argument that the Board Officer had the jurisdiction to make a finding of causation between the work injury of September 4, 1991 and the worker's continuing left shoulder symptoms, given the Medical Review Panel Certificate on causation.

On review, I find that the Medical Review Panel Certificate is clear and consistent, and has certified that the work injury was not of causative significance in producing a left shoulder disability. While the worker writes that the recent medical reports should be adjudicated, because they were not considered by the MRP (and could not have been considered as they did not exist at the time of the Certificate), I find that the Board Officer did not have jurisdiction to undertake any such adjudication. Policy item #103.86 confirms that a Medical Review Panel Certificate is binding on the Board. The policy does confirm that certain Medical Review Panel Certificate decisions could be followed by new decisions of the Board Officer. However, these are generally related to decisions pertaining to the nature and extent of the disability of a worker after the Certificate has been issued. In this instance, the Medical Review Panel certified that the worker's left shoulder problems were not caused by the work injury. This is a question of causation, not the nature and extent of disability. While subsequent medical reports have clarified the nature and extent of the worker's left shoulder disability, they do not alter the binding Certificate decision that no left shoulder disability was caused by the work injury of September 4, 1991.

The issue of the cause of the worker's left shoulder complaints was clearly before the Medical Review Panel. They have provided a Certificate concluding that the work injury was not of causative significance in producing a left shoulder disability. It was not open for the Board Officer to reach any other decision contrary to that certified by the Medical Review Panel. As a result, I find no error in the Board Officer's decision of October 15, 2004. I deny the worker's request.

By submission dated August 17, 2005, the worker argues:

Had I known the information that I know now at my Medical Review Hearing in 2001, I know that the result of the panel's review would have worked out in my favour....

I strongly disagree with the decision of the panel, in which the panel had found that the cause of any left shoulder disability was of unknown etiology. . . .

I am asking for reconsideration, as I feel that my injury and many years of pain are worth the time it will take for you to review this claim.

On September 7, 2005, the worker also provided a copy of a report concerning a whole body bone scan performed on August 26, 2005.

Findings and Reasons

By resolution dated November 14, 2004, the board of directors approved policy amendments concerning reopening and reconsideration. The amendments to item #C14-101.01 of *Volume 1 of the Rehabilitation Services and Claims Manual* included the following:

This policy clarifies the types of decisions that do not constitute a reconsideration or a reopening of a previous decision.

(a) New matters not previously decided

The need to adjudicate new matters not previously decided and make decisions on these matters may occur at various points during the adjudication of a claim.

The limits in the *Act* on the Board's ability to change previous decisions through a reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the *Act* and policy that do not question previous decisions.

Situations in which the Board may make a new decision on a matter not previously decided may generally include, but are not limited to the following:

- Initial entitlement to temporary or permanent disability benefits;

- Acceptability of additional medical conditions identified during the adjudication of a claim or acceptability of further injury or disease that arises as a consequence of a work injury;

The policy resolution stipulated that it was effective on January 1, 2005 and applied to all decisions made on or after that date. This policy clarification did not exist at the time the October 15, 2004 decision was issued, and was not stated to apply to appeal decisions. I have considered, however, whether an application of the reasoning contained in this policy clarification would have made any difference to the October 15, 2004 decision. Was this a situation in which the new medical evidence provided by the worker identified an additional medical condition, arising as a consequence of a work injury, which could be adjudicated as a new matter?

I note, however, that the introduction to the policy amendment set out above explains that the limits in the Act on the Board's ability to change previous decisions through a reconsideration or a reopening are not intended to restrict the Board's ability to make new decisions in accordance with the Act and policy "that do not question previous decisions". Dr. Baker advises that the labral tear has probably been present for a long period of time. This is not a situation where it is being argued that a new medical condition has developed as a consequence of a prior accepted injury, or an additional medical condition has been identified which was outside the scope of the matters previously decided on the claim. Rather, the new medical evidence appears to indicate that the worker suffered a labral tear, which was not diagnosed at the time of the MRP certificate. In other words, it appears to call into question the MRP certification that the work injury of September 4, 1991 was not of causative significance in producing a chest or left shoulder disability.

Section 65 of the Act formerly provided:

A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and proceedings by or before the panel must not be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court.

It would be contrary to section 65 of the former Act for the Board to embark on a reconsideration of a matter on which a binding and conclusive MRP certificate had been provided. Although section 65 of the Act was repealed effective March 3, 2003, section 35 of the *Interpretation Act*, R.S.B.C. 1996, ch. 238, provides:

Repeal**35 (1) If all or part of an enactment is repealed, the repeal does not**

- (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect,
 - (b) **affect the previous operation of the enactment so repealed or anything done or suffered under it,**
 - (c) **affect a right or obligation acquired, accrued, accruing or incurred under the enactment so repealed,**
 - (d) subject to section 36 (1) (d), affect an offence committed against or a contravention of the repealed enactment, or a penalty, forfeiture or punishment incurred under it, or
 - (e) affect an investigation, proceeding or remedy for the right, obligation, penalty, forfeiture or punishment.
- (2) Subject to section 36(1), an investigation, proceeding or remedy described in subsection (1)(e) may be instituted, continued or enforced and the penalty, forfeiture or punishment imposed as if the enactment had not been repealed.

[emphasis added]

I find that the MRP certificate of September 29, 2001 continues to have a binding and conclusive effect, notwithstanding the repeal of section 65 of the Act (as part of the amendments contained in the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) which removed the MRP appeal process).

Accordingly, I agree with the reasoning expressed by the review officer, in terms of the case manager's lack of authority to reconsider the conclusions provided in the MRP certificate regarding the cause of the worker's left shoulder and chest problems on the basis of new medical evidence. As the MRP certificate is conclusive and binding, it is not subject to reconsideration by the Board on the basis of new medical evidence.

There is, however, another question which was not addressed by the case manager or the review officer. This concerns whether the Board has authority to reconvene the MRP (or appoint a new MRP) on the basis of significant new medical evidence. The British Columbia Court of Appeal commented regarding the effect of the former section 65 in the case of *Kooner v. BC (WCB)*, (1991) 78 D.L.R. (4th) 38, (1991) 54 B.C.L.R. (2d) 83, as follows:

It is common ground that the statement in Section 65 that the panel's certificate is "conclusive as to the matters certified" and "binding on the board" does not mean it is necessarily to be regarded as "final" -- that is to say as precluding any later review of the claimant's status by another panel.

This is a point of obvious importance to the outcome of the appeal. In normal circumstances it would be difficult to conceive of a decision being "conclusive" and "binding", and yet not "final". But it is of the essence of the scheme established by the Act that decisions on compensation will be open to review in the light of changing conditions, whether the change be to rehabilitative or employment opportunities, medical knowledge or the medical status of the claimant. Decisions of the Board must be open to reconsideration where new considerations arise. It would be incongruous in such circumstances that the decision of a medical review panel on appeal from a decision of the Board could not be reconsidered. If that were so, then it would follow that a decision of the Board upheld on appeal by a panel would be immutable, whereas a decision not appealed, because the worker had accepted it, could be reconsidered.

Chief Justice Sloan, who recommended the establishment of the medical review procedure in his 1952 Report on the Workmen's Compensation Act and System said (at p. 143) that the decision of panel ("Medical Review Board") should be "final and binding only at the time it is made" and "final and binding in relation to the facts and circumstances existing at the time of the decision", and that it should remain so "unless and until there is & material change in those facts and circumstances". No doubt cause of the contradiction inherent in the concept of 'qualified finality', the word "final" is omitted from the legislative language used to create the scheme.

A copy of *Appeal Division Decision #97-0278* dated February 25, 1997 is attached as Appendix A to my decision, with identifying information removed. (That decision preceded the posting of Appeal Division decisions on the internet beginning in 2000). In that case, the Appeal Division panel reasoned that the possibility of reconvening a MRP on the basis of significant new medical evidence continued to exist, notwithstanding the May 1995 amendments to the *Rehabilitation Services and Claims Manual* which removed any reference to this possibility. Those amendments deleted the former RSCM item #103.58, "Reconsideration of Certificate", which stated:

There are two types of new evidence relating to matters to which a Medical Review Panel has certified. The first type is evidence which indicates that the panel made a fundamental mistake concerning the claimant's medical condition or status at the time the certificate was issued. For example, it may become evident that the panel was provided with the wrong x-rays or examined the wrong part of the worker's body. The second type is evidence which indicates that the claimant's condition or status may have changed since the certificate was issued, so that the compensable consequences of the certificate are no longer appropriate. For example, a partial disability may have deteriorated into total disability or a condition not previously disabling may have worsened and become disabling.

As a result of Section 65, the board, itself, is unable to act on the first type of evidence. That does not necessarily mean, however, that there is nothing which can be done if it is determined that a fundamental mistake was made by a Medical Review Panel. If, within a reasonable period after a certificate is issued, perhaps one year, new evidence becomes available indicating that a fundamental mistake has been made and if it is possible for the Board to reconvene the Medical Review Panel which issued the certificate, the Board may, at its discretion, do so. Where the panel determines that, as a result of its mistakes, its previous certificate was wrong, the certificate will be considered null and void and the panel will issue a new certificate to be substituted for it. Where, however, a longer period has elapsed before the mistake becomes evident or the original panel members can no longer be reconvened, the Board will, if it concludes that further action is necessary, convene a new Medical Review Panel. In this case, the certificate of the original panel would be binding up to the date of any certificate issued by the new panel.

The second type of new evidence, that is, evidence indicating that the claimant's condition has somehow changed, may be treated differently. The Medical Review Panel certificate is binding on the Board only as to matters as these stand at and prior to the date of the certificate. As to the extent and nature of disability after the date of the certificate, it is open to the Board to make a decision without reference back to the original panel or to a new panel, as long as that decision is not inconsistent with the Medical Review Panel certificate.

A further question arises, however, in relation to the November 30, 2002 and March 3, 2003 amendments to the Act contained in Bill 63. Sections 7, 34 and 36 of Bill 63 were brought into force effective November 30, 2002. Section 7 provided for the repeal of sections 58(3) to (5) and 63(1), concerning access to MRPs. The remainder of Bill 63 came into force on March 3, 2003, including section 6 of Bill 63 which repealed sections 58(1) and (2), 59 to 62, 63(2) to (4) and 64 to 66 (*Order in Council No. 1038*), accessible at: (<http://www.wcat.bc.ca/publications/list-regulations.htm>). The transitional provisions contained in Part 2 of Bill 63 included the following:

Medical review panel proceedings

- 36** (1) All proceedings pending under sections 58(3) to (5) and 63 (1) of the Act on the repeal date are to be continued and completed.
- (2) The rights and obligations of the parties to a proceeding referred to in this section must be determined in accordance with the law as it was on the date

- (a) the party requested an examination under section 58(3) or (4) or a determination under section 63(1), or
- (b) the board decided that a worker must be examined under section 58(5),

as the case may be.

- (3) If, before the repeal date,
 - (a) a person has not exercised a right under section 58(3) or (4) of the Act, and
 - (b) the time period within which that right must be exercised would not have expired but for the repeal of that right on the repeal date,

that person may exercise that right before the time period referred to in paragraph (b) has expired.

The reference in section 36 to the “repeal date” was defined in section 34 as meaning “the date section 7 of the amending Act comes into force”, which was November 30, 2002.

A question for consideration is whether any right the worker may have had prior to March 3, 2003, to request that the MRP be reconvened on the basis of new evidence, was extinguished by Bill 63. Was the effect of the statutory amendments to make “final” the MRP certificates which were previously “binding and conclusive”, but subject to reconsideration by the MRP in certain limited situations? A further issue is whether, if the Board has any remaining authority to consider such issues, the medical evidence provided in this case would warrant a reconvening of the MRP.

Past practice was that requests for a reconvening of a MRP on the basis of new medical evidence would be addressed by the MRP Registrar. Although the functions of the MRP Department have been largely wound down, my understanding is that resources remain available to deal with any residual MRP appeals or requests for clarification of MRP certificates.

It is not apparent from the reasoning provided by the case manager, and the review officer, as to why they did not refer the new medical evidence submitted by the worker to the MRP Registrar for consideration. Did they conclude, without so stating, that such consideration is no longer available? Were they unaware of the possibility of such consideration? Or, did they simply address the narrow issue regarding the scope of the case manager’s jurisdiction, and leave it up to the worker to apply for consideration by

the MRP Registrar (if such consideration remains available). It is not evident as to whether the case manager and review officer turned their minds to the question as to whether any other consideration might be available regarding the new medical evidence provided by the worker, or whether they concluded that such consideration was no longer available without explaining this to the worker.

Section 246 of the Act provides:

- (3) If, in an appeal, the appeal tribunal considers there to be a matter that should have been determined but that was not determined by the Board, the appeal tribunal may refer that matter back to the Board for determination and suspend the appeal proceedings until the Board provides the appeal tribunal with that determination.

- (4) If the appeal tribunal refers a matter back to the Board for determination under subsection (3), the appeal tribunal must consider the Board's determination in the context of the appeal and no review of that determination may be requested under section 96.2.

Pursuant to section 246(3), I refer the following questions back to the Board for determination:

- (a) Is reconsideration of the 2001 MRP certificate on the basis of significant new medical evidence still available to the worker, or was the right to seek such reconsideration extinguished by Bill 63?

- (b) If this avenue still exists, does the new medical evidence provided by the worker constitute significant new medical evidence warranting a reconvening of the MRP (or establishment of a new MRP)?

As the question posed in (a) above has significance beyond this particular claim, I consider it useful to obtain the Board's determination rather than simply proceeding to address these questions in my decision.

Conclusion

Pursuant to section 246(3) of the Act, I refer the two questions stated above to the Board for determination. I suspend my further consideration of the worker's appeal until the Board provides WCAT with its determination. The Board's determination will be disclosed to the worker and the employer, and they will have a further opportunity to comment before a final WCAT decision is made on the worker's appeal. I consider it appropriate to provide the employer with further notice, as this referral under section 246(3) involves additional questions which were not addressed in the prior decisions.

Herb Morton
Vice Chair

HM/cda

Appendix A**DECISION OF THE APPEAL DIVISION****#97-0278**

February 25, 1997

RE:

Panel Appointed:
Anne-Marie Drosso

The worker, who sustained a compensable injury on February 22, 1991, appeals the review board findings of September 18, 1996. In those findings, the review board panel dealt with three issues involving three separate Board decisions.

The first issue concerns a C6-7 discectomy and fusion performed on October 3, 1994. In a letter dated November 23, 1994, the claims adjudicator advised the worker that this procedure could not be accepted as a compensable consequence of his February 22, 1991 injury because of the medical review panel certificate dated February 8, 1994 (the "certificate"). According to the claims adjudicator, the certificate which is binding precluded the Board from compensating the worker for this procedure.

The second issue concerns the worker's request that the Board consider whether the 1991 injury combined with a 1989 compensable injury necessitated the C6-7 discectomy and fusion. In a letter dated March 13, 1995, the claims adjudicator denied the worker's request on the basis that the certificate had disposed of that issue.

The third issue concerns the worker's request that he be re-examined by a medical review panel since new evidence showed a herniated disc at the C6-7 level. In a letter dated March 23, 1995, the medical appeals officer refused to refer the worker to a medical review panel for examination, stating that there were no outstanding medical issues which can be resolved by a medical review panel.

In its findings, the review board panel agreed with all of the above Board decisions. The review board panel reasoned that, since the medical review board panel found that the worker had suffered a soft tissue strain and his ongoing back and neck problems were not causally related to his compensable claim, his appeal of the November 23, 1994 and March 13, 1995 decisions must be denied. The review board panel considered that it would be inconsistent with the certificate to accept the October 1994 surgery as compensable and concluded that the medical appeals officer was correct in saying that there were no outstanding medical issues to be resolved by a medical review panel.

The certificate states:

The undersigned member of the Medical Review Panel certify to the issues in this claim as follows.

1. The condition of the worker is fairly good.
2. The worker does now have a disability with respect to his back and with respect to his neck.
3. The disability which the worker has with respect to his low back is a subjective appreciation of pain in the absence of any objective abnormal physical findings. In the presence of a normal range of motion of the worker's low back the worker has a subjective experience of pain and therefore voluntarily limits his bending and lifting.

The disability which the worker has with regards to his neck is a subjective experience of pain associated with a decreased range of motion of his cervical spine, particularly extension, which reduces his capacity to extend and rotate his neck.

4. The Panel believes that the disability the worker has with regards to his back is entirely the result of poor physical conditioning and obesity.

The Panel believes that the disability the worker has with regard to his neck is entirely due to poor physical conditioning and voluntary restriction of movement. ~~The Panel entirely due to poor physical conditioning and voluntary restriction of movement.~~ The Panel believes that the worker suffered a soft tissue injury as a result of the compensable work injury of February 22, 1991. The Panel believes that this soft tissue strain injury would initially have produced pain and a decreased range of motion on a temporary basis. The Panel believes that this soft tissue injury would have been well healed within one year of the time of the injury. The Panel believes that following the soft tissue injury the worker became less physically active and the inactivity has led to the present disability.

5. (b) The Panel believes that the compensable injury of February 22, 1991 was of causative significance in regard to the disability which existed for a period of months following that injury. The Panel believes that the compensable injury of February 22, 1991 was initially the only cause of the temporary disability regarding the neck

and back of the worker at the time but by 6 months later the work injury of February 22, 1991 was of only minor causative significance.

The Panel believes that the disability which has existed from approximately one year after the February 22, 1991 compensable injury up until and including the present time is solely the result of causes other than the compensable injury of February 22, 1991 and that injury has not been of causative significance in this disability.

6. The Panel believes that the two causes of disability, that is initially the soft tissue strain resulting from the compensable injury of February 22, 1991, and subsequently the physical deconditioning which the worker has undergone, have independently resulted in disability as they did not co-exist but one followed the other.
7. The Panel does not believe that the worker was temporarily disabled for any further periods of time as a result of the compensable injury of February 22, 1991.
8. (a) The Panel believes that the worker suffered from a pre-existing asymptomatic degenerative condition of the cervical spine and was able to find no evidence that this condition has been activated, accelerated or aggravated by the compensable injury of February 22, 1991.

(b) The worker did not suffer from any pre-existing disability which was activated, accelerated or aggravated by the compensable injury of February 22, 1991.
9. The worker does not now have a disability related to the compensable injury of February 22, 1991. The Panel does not feel that any significant change in the worker's disability can reasonably be expected in the next 12 months unless the worker takes a significantly different approach to his perceived pain.
10. The Panel does not believe that the worker's ongoing back and neck problems are causally related to the work incident of February 22, 1991.

An operation report received at the Board on December 1, 1994, indicates that a C6-7 discectomy and fusion was performed on October 3, 1994 and states in part that "[t]he CT scan revealed a herniated disc at the C6-7 level, more so on the right side with

impingement of the C7 root. It was felt that [the worker] would benefit from single level C6-7 fusion”.

In a letter dated November 13, 1996 addressed to the appeal officer, the worker’s representative refers to the contents of the operation report and states as well:

Also the Vancouver Hospital and Health Science Center Workers’ Compensation Board Patient Summary dated October 2, 1994 shows:

Diagnosis

Traumatic spondylopathy - Most responsible
Late effect of Unspecified injury - secondary

It is respectively submitted that [the worker] had a continuity of a medical problem relating to his cervical spine since his compensable injury and until the operation in 1994. It is further submitted that the Medical Review Panel was unaware that [the worker] had a herniated disc at the time of the examination in 1993.

Section #103.86 entitled, *Certificates Binding on the Board* states in part:

A decision by a Medical Review Panel that a worker has no disability could be followed by a decision of the Board officer made a week after the Medical Review Panel decision that the worker had a disability if there was evidence that a new disability had arisen on the same claim after the Medical Review Panel had issued its certificate. Similarly it is open to the Board to make a decision as to the nature and extend of ability of a worker after a certificate is issued without being bound by the terms of that certificate if there is evidence that the worker’s condition has changed, so long as the decision is not inconsistent with the original Medical Review Panel certificate.

It is respectfully submitted that if the Appeal Division or Medical Review Panel was to determine that they agreed that [the worker’s] diagnosis of spondylopathy was attributed to his worker’s compensation board accepted injury claim, this would be in adherence to the policy found in Section #103.86 of the Rehabilitation Services and Claims Manual.

Also, there is nothing in the Workers’ Compensation Act that states that a Medical Review Panel certificate cannot be appealed to another Medical Review Panel or that the certificate cannot be reviewed by the same panel.

In light of the circumstances, it is respectfully submitted that the medical and factual evidence adduced, [the worker's] ongoing back complaints and Dr. Sweigel's diagnosis of Traumatic Spondylopathy are sufficient to at least meet, if not exceed, the test of balance of possibilities, as set in Section 99 of the Act.

Also, it is respectfully submitted that the Appeal Division can accept [the worker's] surgery as being compensable under Section #103.86 of the Rehabilitation Services and Claims Manual or that a Medical Review Panel be appointed to address the outstanding issues of [the worker's] C6-7 discectomy and fusion and any decision with respect to the Act be made in favour of the worker. . .

(Reproduced as written)

In a letter dated November 28, 1996, the employer's representative comments on the above submission as follows:

The representative seeks to have the worker re-examined by a MRP or to have his 1994 surgery accepted. The Board has determined that the MRP Certificate dealt with the relevant issues surrounding the relationship of his neck complaints to the previous claims in 1989 and 1991.

The representative quotes several sections of the manual which deal with when a certificate is binding on the Board. Basically the section states if there is new evidence to relate a new disability to the old injury then the matter can be reconsidered. There is no new disability. The Panel ruled that the problems that worker was having in 1994 were not the result of the previous claims. The Panel suggested that they did not anticipate any significant change unless the worker took a significantly different approach to his problem. The Panel also ruled the worker had pre-existing degeneration which they state was not aggravated by the injury. The surgical report states the pre and post operative diagnosis as cervical spondylosis with a herniated disc. There was no indication in the narrative of the operative report that a frank disc protrusion was found.

The fact the worker had surgery in 1994 does not constitute new evidence. The MRP acknowledged he had ongoing complaints but did not relate them to the prior WCB injuries. They concluded that the disability present after one year could not be related to the compensable injury. What led to the surgery then would be causes other than the injury which has been dealt with by the Panel. This would include his pre-existing spondylosis.

(Reproduced as written)

In a final submission dated December 19, 1996, the worker's representative refers to the evidence of a herniated disc, pointing out that "none of the physicians or specialists, including the Workers Compensation Board Advisors or Medical Review considered or entertained the option that [the worker] have a C.T. scan or myelogram of his cervical spine to rule out the possibility of a herniated or problematic disc. As well, Dr. Schauburger, [the worker's specialist] neglected to consider one". The worker's representative reiterates that the fact that the worker had surgery in 1994 constitutes new evidence and meets the criteria found in policy item #103.86 of the Rehabilitation Services and Claims Manual (the "Manual").

RELEVANT STATUTORY PROVISIONS AND POLICIES

The Workers Compensation Act (the "Act") contains several provisions concerning the medical review panel appeal process. Section 65 of the Act states:

CERTIFICATES CONCLUSIVE

65. A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and no proceedings by or before the panel shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court.

Prior to May 1995, the Manual contained the following two policies regarding the nature and effect of medical review panel certificates.

Policy item #103.56 "Certificate Binding on the Board" stated:

Section 65 provides that "A certificate of a panel under sections 58 to 64 is conclusive as to the matters certified and is binding on the board. The certificate is not open to question or review in any court, and no proceedings by or before the panel shall be restrained by injunction, prohibition or other process or proceeding in any court or be removable by certiorari or otherwise in any court." This means that any subsequent decision of the Board or finding by the review board, at any point in time, must be consistent with the certificate. For example, a decision by a Medical Review Panel that a worker has no disability can be followed by a Clams Department decision that there is a disability, even a week later if there is **evidence** that the worker suffered a further disability in this interval. The Claims Department cannot however decide that the worker has a disability even 10 years later if the medical evidence is such that there has been no change in the worker's condition and it simply alleges that the original diagnosis by the Medical Review Panel was wrong.

To be binding on the Board, however, the documents must be “a certificate”. This in turn means that the document must relate to issues specified in #103.52-#103.55, and that the decisions made on the appeal must relate to “a medical decision” of the Board or medical finding of the review board. A document is not “a certificate” to the extent that it purports to decide any non-medical issue; for example, a question of non-medical fact, or a question of entitlement to compensation. If the document includes any decisions on those non-medical issues, those decisions are not a legally valid part of the certificate and therefore are irrelevant.

As an example, a compensable injury led to an operation that had not been authorized by the Board. The disability resulted from the operation. The Medical Review panel stated in its certificate that “the patient’s present disability is not due to the accident of June 30, 1971.” The conclusion that the disability was not due to the accident was a conclusion of law, not of medical science. It was, therefore, an excess of jurisdiction by the panel, and to the extent that it contained that statement the document was not a certificate under Section 65. It was therefore not binding on the Board, nor was it of any persuasive value. In the certificate, the panel also concluded the disability from which the claimant was then suffering was caused by the operation. That was a conclusion of medical science. To that extent, therefore, the document was a valid certificate and the conclusion binding on the Board.

As far as possible, where a Medical Review panel disagrees with a Board Medical Advisor/Consultant’s opinion, that Medical Advisor/Consultant should not be involved in the immediate implementation of the certificate. This may not be practicable in some situations, for example, if the Board has only one Medical Advisor/Consultant of a particular specialty or the Medical Advisor/Consultant is at a particular location on staff and this doctor’s advice is required both before and after the certificate (emphasis added).

Policy item #103.58 “Reconsideration of Certificate” stated:

There are two types of new evidence relating to matters to which a Medical Review Panel has certified. The first type is evidence which indicates that the panel made a fundamental mistake concerning the claimant’s medical condition or status at the time the certificate was issued. For example, it may become evident that the panel was provided with the wrong x-rays or examined the wrong part of the worker’s body. The second type is evidence which indicates that the claimant’s condition or status may have changed since the certificate was issued, so that the compensable consequences of the certificate are no longer appropriate.

For example, a partial disability may have deteriorated into total disability or a condition not previously disabling may have worsened and become disabling.

As a result of Section 65, the board, itself, is unable to act on the first type of evidence. That does not necessarily mean, however, that there is nothing which can be done if it is determined that a fundamental mistake was made by a Medical Review Panel. If, within a reasonable period after a certificate is issued, perhaps one year, new evidence becomes available indicating that a fundamental mistake has been made and if it is possible for the Board to reconvene the Medical Review Panel which issued the certificate, the Board may, at its discretion, do so. Where the panel determines that, as a result of its mistakes, its previous certificate was wrong, the certificate will be considered null and void and the panel will issue a new certificate to be substituted for it. Where, however, a longer period has elapsed before the mistake becomes evident or the original panel members can no longer be reconvened, the Board will, if it concludes that further action is necessary, convene a new Medical Review Panel. In this case, the certificate of the original panel would be binding up to the date of any certificate issued by the new panel.

The second type of new evidence, that is, evidence indicating that the claimant's condition has somehow changed, may be treated differently. The Medical Review Panel certificate is binding on the Board only as to matters as these stand at and prior to the date of the certificate. As to the extent and nature of disability after the date of the certificate, it is open to the Board to make a decision without reference back to the original panel or to a new panel, as long as that decision is not inconsistent with the Medical Review Panel certificate (emphasis added).

Effective May 1995, policy item #103.86 "Certificate Binding on the Board" states:

Section 65 provides that a properly constituted certificate which certifies to a medical decision of a Medical Review Panel is conclusive as to the matters certified to and is binding on the Board. Any subsequent decision of the Board or finding by a Review Board, at any point in time, must be consistent with the certificate. For example, a Board officer in the Compensation Services Division could not decide, e.g. even 10 years after a Panel certificate was issued stating there was no disability, that the worker had a disability, if there was no change in the medical evidence upon which the Medical Review Panel certificate was based. However, a Medical Review Panel certificate is binding on the Board only to matters as they stand at and prior to the date of the certificate. A decision by a Medical Review Panel that a worker has no disability could be followed by a decision of the Board officer made a week after the Medical Review

Panel decision that the worker had a disability if there was evidence that a new disability had arisen on the same claim after the Medical Review Panel had issued its certificate. Similarly it is open to the Board to make a decision as to the nature and extent of disability of a worker after a certificate is issued without being bound by the terms of that certificate if there is evidence that the worker's condition has changed, so long as that decision is not inconsistent with the original Medical Review Panel certificate.

The Manual no longer includes a policy concerning the reconsideration of medical review panel certificates.

ISSUE

The certificate was issued on February 8, 1994. In the certificate, the medical review panel stated that "the worker suffered a soft tissue injury as a result of the compensable work injury of February 22, 1991 . . . this soft tissue injury would have been well healed within one year of the time of the injury". It also stated that "[t]he disability which the worker has with respect to his low back is a subjective appreciation of pain in the absence of any abnormal physical findings". In the accompanying narrative report, the medical review panel stated that it "was unable to find any radiographic evidence or any evidence on physical examination of an injury or underlying disease process or pathology which would account for the worker's complains of pain and apparent restriction of his cervical spine". Approximately 4 weeks after the certificate was issued, a CT scan revealed a herniated disc at the C6-7 level. Of what consequence(s), if any, does this evidence have for the certificate? Can this evidence now be taken into account, notwithstanding the certificate's contents?

ANALYSIS

The certificate, the CT Scan, the claims adjudicator's and the medical appeals officer's decisions all preceded the changes to the policies concerning medical review panel certificates. The preliminary question arises, therefore, as to whether, in the adjudication of this appeal, I should be guided by the pre-1995 policies or the new policies.

Where a change in policy reflects a changed interpretation of the law, the applicable policies would be the new policies. That is, if a particular policy that purported to give effect to a statutory provision was found to be inconsistent with the terms of the statute and was, therefore, replaced by a new policy, it would be appropriate to apply the new policy.

However, changes in policy may be discretionary. Some statutory provisions may be given effect in different ways. In such circumstances, where there is a change in policy, it is less obvious whether the old or the new policies ought to be applied to a case under

appeal. It could be argued that relevant (and sometimes competing) considerations in those circumstances are whether the change is prejudicial to the appellant and whether the change gives better guidance to the decision-maker by defining matters more clearly.

In the case before me, the policy concerning the reconsideration of medical review panel certificates was deleted. No explanation is given in the Manual as to why that policy was deleted. Was it deleted because it was viewed as inconsistent with the Act? Or, was it deleted simply as a matter of discretion? Does the deletion of this policy signify that the governors intended to abolish altogether the process of reconsideration? As none of the answers to these questions are apparent from the Manual, I propose to examine the issue before me under both the old and the new policies. It may be that the resolution of the issue would yield the same results under both sets of policies, in which case the question of which policy should be applied would be moot.

The evidence of a C6-7 herniation under the old policies

In my opinion, under the old policies, the evidence of a C6-7 disc herniation would have warranted reconvening the medical review board panel that issued the certificate or, if the original panel members were no longer available, convening a new medical review panel. As indicated earlier, policy item #103.58 stated that “[i]f, within a reasonable period after a certificate is issued, perhaps one year, new evidence becomes available indicating that a fundamental mistake has been made and if it is possible for the Board to reconvene the Medical Review Panel which issued the certificate, the Board may, at its discretion, do so. . . . Where, however, a longer period has elapsed before the mistake becomes evidence or the original panel members can no longer be reconvened, the Board will, if it concludes that further action is necessary, convene a new Medical Review Panel”. Granted the case before me does not involve a fundamental mistake such as the medical review panel relying on the wrong x-rays or examining the wrong part of the worker’s body. Rather, the case before me involves fresh evidence that was not before the panel. But I think that it would have been consistent with the spirit of policy #103.58 to view such evidence as warranting a reconsideration of the matters certified by a medical review panel. I note that, up until the mid 1980’s, the Manual specifically contemplated the reconsideration of a medical review panel certificate because of fresh evidence obtained as a result of a surgery performed after the medical review panel certificate was issued. Consider policy item #88.58 dated October 1978 which stated:

The certificate of a Medical Review Panel is not subject to reconsideration by the Board.

It can happen, however, that a situation arises in which there does appear to be good ground for reconsideration. For example, the patient may have had surgery since the Panel decision, and the surgery may have produced fresh evidence on the medical problem. Even in that situation, the Board

still does not consider that it has itself authority to set aside the decision of a Medical Review Panel. But the Board might ask a Medical Review Panel to reconsider the matter and issue a fresh certificate.

The evidence of a C6-7 herniation under the new policies

In my opinion, the evidence that surfaced as a result of the CT scan does not constitute the type of evidence contemplated by policy item #103.86. In accordance with policy item #103.86, if a worker's condition changes after the medical review panel issues its certificate, the Board may take into account this change and make a fresh decision. It would be far-fetched to interpret the evidence of the C6-7 disc herniation as evidence of a new problem that arose after the certificate was issued.

In the absence of a policy such as the old policy item #103.58 that was deleted from the Manual effective May 1995, it would appear at first blush that, under the new policies, the evidence of the C6-7 herniation can have no effect on the worker's claim, in light of the certificate. Could it be argued, however, that the deletion of policy item #103.58 from the Manual does not necessarily preclude finding the reconsideration of a medical review panel certificate warranted, if the medical review panel made a fundamental mistake, if new evidence arose as a result of a surgery, etc.? In other words, since the published governors' policies are now silent on those issues, can one simply infer that the Board continues to have the power to reconvene a medical review panel or convene a new one in order to have a medical review panel certificate reconsidered? This really raises the question of whether the Act permits such reconsiderations. If the Act does not permit such reconsiderations, the old policy item #103.58 would have been unlawful and, if this is the case, it may explain why the policy was deleted from the Manual. I consider it important, therefore, to determine whether or not the reconsideration envisaged by the old policy item #103.58 is consistent with the statutory terms defining the nature and effect of medical review panel certificates.

Is the reconsideration envisaged by the old policy item #103.58 consistent with s. 65 of the Act?

Section 65 provides in part that a certificate of a medical review panel "is conclusive as to the matters certified and is binding on the board". That language describing the nature and effect of medical review panel certificates has been in the legislation since 1959.

In Kooner v. B.C. (W.C.B.) 54 B.C.L.R. (2d) 8, the Court of Appeal commented on the meaning of the terms contained in s. 65 at some length. Speaking for the court, Mr. Justice Taylor stated at pp. 90-91:

It is common ground that the statement in s. 65 that the panel's certificate is "conclusive as to the matters certified" and "binding on the board" does

not mean it is necessarily to be regarded as “final” — that is to say, as precluding any later review of the claimant’s status by another panel.

This is a point of obvious importance to the outcome of the appeal. In normal circumstances it would be difficult to conceive of a decision being “conclusive” and “binding” and yet not “final”. But it is of the essence of the scheme established by the Act that decisions on compensation will be open to review in the light of changing conditions, whether the change be to rehabilitative or employment opportunities, medical knowledge or the medical status of the claimant. Decisions of the board must be open to reconsideration where new considerations arise. It would be incongruous in such circumstances that the decision of a medical review panel on appeal from a decision of the board could not be reconsidered. If that were so, then it would follow that a decision of the board upheld on appeal by a panel would be immutable, whereas a decision not appealed, because the worker had accepted it, could be reconsidered.

Chief Justice Sloan, who recommended the establishment of the medical review procedure in his 1952 Report on the Workmen’s Compensation Act and System, said (at p. 143) that the decision of a review panel (“Medical Review Board”) should be “final and binding only at the time it is made” and “final and binding in relation to the facts and circumstances existing at the time of the decision,” and that it should remain so “unless and until there is a material change in those facts and circumstances.” No doubt because of the contradiction inherent in the concept of “qualified finality,” the word “final” is omitted from the legislative language used to create the scheme. . . (emphasis added).

The above statements from the Court of Appeal suggest very strongly in my view that the type of reconsideration envisaged by the old policy item #103.58 is consistent with the terms of s. 65. In fact, the Court specifically considered policy item #103.58 and did not call in question its validity. The statements also suggest that the old policy item #103.56 (now policy item #103.86) is consistent with the terms of s. 65 — that is, it is open to the Board to make some fresh decision, if a worker’s condition changes after a medical review panel certificate is issued.

Thus, in light of Kooner, it would seem wrong to conclude that policy item #103.58 was deleted from the Manual because it was inconsistent with the Act. The deletion of that policy must be viewed, therefore, as more in the nature of a discretionary change than a change dictated by an amended interpretation of the statutory terms. A decision must be made, therefore, as to whether policy item #103.58 applies to this claim since it was in the Manual at the time the certificate was issued. Alternatively, a decision must be made as to whether the type of reconsideration which this policy envisaged remains available, despite the fact that the policy itself was deleted from the Manual.

RESOLUTION OF THIS CASE

Policy item #103.58 was in existence at the time the certificate was issued and at the time the decisions by the claims adjudicators and medical appeals officer were made. That policy provided a clear procedure whereby the new evidence regarding the worker's C6-7 herniation could be considered. In accordance with that policy, it would be proper to request the original medical review panel to reconsider the matters it certified and issue a fresh certificate, or to request a new medical review panel to issue a fresh certificate in light of this evidence.

If the current policies are interpreted as precluding the reconsideration of a medical review panel certificate on the basis of the type of evidence that arose in this worker's case, then applying the new policies would be clearly prejudicial to the worker whereas applying the old policies would provide him with the remedy he seeks, namely, a re-examination by a medical review panel. Taking this into account as well as the fact that the certificate and the first level adjudicative decisions were issued when the old policies were still in existence, I find it reasonable to apply policy item #103.58 to this worker's case. That is not to say that every time a policy that is beneficial to a claimant is replaced by a policy that is prejudicial, the beneficial policy must automatically be applied. That would depend, amongst others, on how well defined the new policy is as compared with the old policy, the reasons for the change in policy and, of course, the timing of the change in relation to the events underlying the claim at issue.

If I am wrong in concluding that an old policy may be applied to a case under appeal, I would still conclude that the type of reconsideration process contemplated by the deleted policy item #103.58 is available to this worker — albeit the process is no longer explicitly provided for in the policies. As pointed out in Kooner, Chief Justice Sloan made it very clear that the scheme established under the Act requires a certain amount of flexibility. There must be some room to rectify a medical review panel certificate, if there is a material change in the facts and the circumstances which form the basis of this certificate. According to Justice Taylor in Kooner it is, in recognition of that need, that the Legislature used the term “conclusive” as opposed to “final” when it enacted the provisions concerning medical review panel certificates. In the absence of any statement in the current policies to the contrary, I find it reasonable to infer that, if grounds for reconsideration are met (such as new evidence arising out of a recent surgery), a medical review panel may be asked to reconsider a matter.

I have considered whether inferring that a medical review panel certificate may be reconsidered on the basis of new evidence is wrong since no express statutory authority provision confers this reconsideration authority. I note that in Practice and Procedure Before Administrative Tribunals, vol. 3, (Carswell, 1995), Robert W. Macaulay and James L.H. Sprague indicate at pp. 28-8.10-8.10(1) that the courts have inferred a power to a tribunal to review one of its own decisions in various circumstances, even where there is no express statutory authority. Such circumstances include where the tribunal decision is ultra vires and where there is new evidence that

was not available with due diligence at the time the decision was rendered. Thus, it is not inconsistent with the case law to infer, in the circumstances of this case, that the Board has the authority to reconvene a medical review panel or to convene a new one in order to have the certificate reconsidered. The evidence that surfaced in connection with the surgery could be characterized as evidence that was not available with due diligence at the time the certificate was issued.

I have also considered whether the fact that the Act specifically includes a reconsideration provision concerning new evidence with respect to appeal division decisions would suggest that it implicitly rules out the reconsideration of medical review panel certificates on the basis of new evidence. Under the Act, appeal division decisions are "final and conclusive"; medical review panel certificates are conclusive as to the matters certified and are binding on the board. As indicated earlier, the Court of Appeal in Kooner attached some significance to the absence of the word "final" in s. 65 of the Act. It could be argued, therefore, that the express provision concerning the reconsideration of appeal division decisions on the basis of new evidence was enacted so as to ensure that these decisions could be reconsidered on this ground. I note that, on p. 28-8.10 of Practice and Procedure Before Administrative Tribunals, Macaulay and Sprague discuss use of the word "final" in a statute to describe the nature of a decision and suggest that the word "final" is usually interpreted as closing the door to reconsiderations, unless there is an express statutory provision allowing for reconsiderations.

I consider that the new evidence regarding the worker's C6-7 disc provides a sufficient basis for reconvening the medical review panel that issued the certificate and for requesting that it reconsider the matters certified therein and issue a fresh certificate. If the original panel members may not be reconvened, the evidence provides sufficient basis to convene a new panel and request it to issue a fresh certificate.

The file will be referred to the medical review panel section for it to make the necessary arrangements for the reconsideration of the certificate to proceed.

The worker's appeal is allowed as set out above.

Anne-Marie Drosso
Appeal Commissioner

AMD/ps