

Noteworthy Decision Summary

Decision: WCAT-2006-00854-RB **Panel:** Herb Morton **Decision Date:** February 22, 2006

Medical Review Panel certificate – Scope and implementation of certificate – MRP recommendations in narrative report – Sections 5(5), 61(1), 61(2), and 65 of the former Workers Compensation Act

The Workers' Compensation Board (Board) must not read into a Medical Review Panel (MRP) certificate more than is either certified or may be reasonably inferred from the issues and certificate when read as a whole.

The worker, a pharmacy technician, applied for compensation in August 1996 for tingling and numbness in her arms and hands, neck pain, and headaches. She claimed these symptoms arose between April and May 1996, when she worked overtime, was on call 24 hours a day, and was not being supervised by a pharmacist. The Board denied the claim. The worker appealed this decision to the (former) Review Board and then to the (former) Appeal Division. Both appeals were denied. The worker then requested an examination by a MRP.

In 2000, the MRP certified that the worker had a prior disability with respect to her neck, shoulders, and headaches and suffered from occasional muscle contraction headaches. She had muscle contraction caused by prolonged, sustained positioning while working in a fume hood. Use of painkillers was a secondary, minor contributing cause. The MRP certified that the worker's headaches were caused by her work activities as a pharmacy technician from July 1996 to September 1996. In its accompanying narrative report the MRP recommended the worker undergo further neurological evaluation and be considered for referral to a pain clinic.

The worker submitted a second claim for the same symptoms on the basis that these were caused by ergonomic problems in the workplace. The Board consolidated the worker's second claim with her first as they involved the same issues. In 2002, the worker requested further neurological testing and referral to a pain clinic. The Board responded by stating that it interpreted the MRP's recommendations as relating to the worker's pre-existing condition and not her temporary symptoms caused by her work and that, furthermore, it was not bound by the contents of the MRP's narrative report.

The panel noted that the MRP certified that the worker had a pre-existing condition and did not have a pre-existing disability and that these terms are not interchangeable. The panel concluded that the reference to a pre-existing condition meant that the worker's symptoms before her work injury were not disabling, and did not mean her symptoms were unrelated to her work activities. The panel concluded the Board had incorrectly interpreted the MRP certificate as meaning the worker's ongoing problems were the result of a pre-existing non-compensable condition.

The panel addressed the scope of the MRP findings, noting that it is important that the legally binding effect of an MRP certificate be respected. This requires giving effect to the MRP's actual findings and not reading into the MRP certificate more than is actually certified, or which may reasonably be inferred from the issues and certificate when read as a whole. Thus, while it was correct to state that the MRP found the worker had recovered from her injuries relating to

her work activities between April 11, 1996 and July 25, 1996, and that she did not have a disability at the time she was examined in November 2000, the MRP did not address the question as to whether the worker's continuing work activities would cause any problems in the future. Given the absence of any disability at the time of the MRP examination and the focused nature of the issues posed to the MRP, it would be an error to assume the MRP pursued the type of far-ranging inquiry as commonly occurs in other cases.

As the MRP did not address issues related to the worker's ongoing disability, the Board needed to adjudicate these issues. Policy item #103.86 of the *Rehabilitation Services and Claims Manual, Volume I* provided that any subsequent decision of the Board must be consistent with the MRP certificate. The MRP recognized that the worker's employment activities resulted in muscle contraction secondary to prolonged, sustained positioning. Thus, the Board was required to consider whether similar activities in later time periods caused any further problems.

The panel then addressed the issue of the MRP's recommendations for medical treatment. The panel noted that the MRP did not have jurisdiction to certify to the Board concerning treatment, even where the problems were work-related. Thus, it was appropriate for the MRP to make treatment recommendations in its narrative report, rather than in its certificate. The panel did not agree that the MRP's recommendations for further neurological testing and referral to a pain clinic related to a non-compensable pre-existing condition as there was no indication the MRP identified any non-work cause of the worker's pre-existing condition.

The panel referred the matter back to the Board for adjudication under section 38(2) of the transitional provisions contained in Part 2 of the *Workers Compensation Amendment Act (No. 2), 2002*. The panel directed the Board to consider the MRP's suggestions that the worker have a further neurological evaluation and be referred to a pain clinic.

The worker's appeal was allowed.

WCAT Decision Number : WCAT-2006-00854-RB
WCAT Decision Date: February 22, 2006
Panel: Herb Morton, Vice Chair

Introduction

The worker has appealed two decisions dated June 19, 2001 and June 18, 2002. These decisions concern the effect of a Medical Review Panel (MRP) Certificate dated November 28, 2000.

The worker's appeal from the June 19, 2001 decision was initiated by a notice of appeal – part 1 dated August 14, 2001. She felt the June 19, 2001 decision was wrong because: "THEY PUT IT TOGETHER WITH A PREVIOUS CLAIM THAT WAS FILED FOR ONLY A 6 WEEK PERIOD." Her appeal from the June 18, 2002 decision was initiated by a notice of appeal – part 1 dated August 29, 2002. She felt the June 18, 2002 decision was wrong because: "THE MRP CONTRADICTS ITSELF AND SAYS I AM NOT INJURED BUT GOES ON TO SAY I NEED FURTHER TEST. CLARIFICATION FROM MRP PENDING. AND THE MRP WAS FOR A SIX WK PERIOD IN 1996 NOT UP TO NOW." [Quotes reproduced as written.]

In her notice of appeal – part 2 dated August 29, 2002, the worker requested an oral hearing. She also provided a letter dated September 16, 2002, explaining why she considered her claim should be accepted. At the worker's request, her appeals were "parked." By letter dated June 2, 2005, the Workers' Compensation Appeal Tribunal (WCAT) inactive inquiry clerk advised the worker that WCAT was ready to proceed. By letter dated August 24, 2005, the WCAT appeal liaison advised the worker that her appeals would proceed by way of written submissions, and requested the worker's submission by September 14, 2005. On September 8, 2005, the worker advised that she had not voluntarily "unparked" her appeals, and requested that she be given the minimum six months for submissions from the date her appeals were "unparked" by WCAT on June 2, 2005, in reliance on WCAT's published practice and procedure (*Manual of Rules of Practice and Procedure* item #26.65(c)). The time for the worker's submissions was extended until December 2, 2005, and her submissions were received on November 29, 2005. A submission dated December 12, 2005 was provided by a consultant representing the employer. Although invited to do so, the worker did not provide a rebuttal. Upon reviewing this matter further, I agree that the issues raised by the worker's appeals can be properly considered on the basis of written submissions without an oral hearing. The issues are largely medical/legal, and concern the effect of the MRP Certificate and the subsequent developments regarding the worker's condition.

Issue(s)

Has the MRP Certificate been properly implemented? Should the MRP's recommendations for further treatment be accepted by the Workers' Compensation Board (Board) under the worker's claim? Are any ongoing problems experienced by the worker causally related to her employment? Is the MRP Certificate determinative, or are there additional medical issues to be adjudicated which were not addressed by the MRP?

Jurisdiction

The worker's appeals were filed with the former Workers' Compensation Review Board (Review Board). On March 3, 2003, the Review Board and the Appeal Division of the Board were replaced by WCAT. As her appeals had not been considered by a Review Board panel before that date, they have been decided as WCAT appeals (see Bill 63, the *Workers Compensation Amendment Act (No. 2), 2002*, section 38.) Pursuant to section 42 of Bill 63's transitional provisions, in making this decision I will apply the policies of the former governors (panel of administrators) which were in effect at the time the decisions were issued. Section 42 provides:

As may be necessary for the purposes of applying sections 250 (2) and 251 of the Act, as enacted by the amending Act, in proceedings under sections 38 (1) and 39 (2) of the amending Act, published policies of the governors are to be treated as policies of the board of directors.

Background

The worker was employed as a hospital pharmacy technician, in a northern community. She started working for the hospital in May, 1991. She had taken a six-month pharmacy technician course.

She filed an application for compensation dated August 19, 1996, stating that she was suffering from a headache which started on June 30, 1996. She reported she had worked overtime with a locum pharmacist from April 11, 1996 until April 30, 1996, as well as being on call 24 hours a day from April 11, 1996 until May 24, 1996. From May 1, 1996 until May 23, 1996, she worked with no pharmacist at all, with overtime hours. The department normally had two pharmacists. In her application for compensation, the worker stated she had missed several part days before leaving work completely on July 25, 1996. She described her symptoms as tingling and numbness in her arms and hands, as well as headache and pain in her neck muscles.

By letter dated December 18, 1996, the worker's employer paid her a 10% increase in wages in relation to the period from April 10, 1996 until May 23, 1996, "on a without prejudice basis," stating: "We recognize the increased responsibility and workload that you took on during this period when we had no pharmacists..."

By decision dated September 16, 1996, a claims adjudicator, Occupational Disease Services, denied the worker's claim. He found that the worker had described stress and stress related symptoms resulting from the general demands of her work, and that stress resulting from such factors was not compensable. The worker appealed this decision to the Review Board.

In a Review Board finding dated November 25, 1998, the worker's claim for a stress condition was denied. The Review Board panel reasoned in part:

Following a careful review of all of the available evidence, this Review Board panel denies [the worker's] appeal from the Claims Adjudicator's September 16, 1996 decision. In reaching our finding we are guided by the Commissioners decision #102. This claim related to physical and emotional exhaustion alleged to have been caused by work stress. While we find this particular case is not identical to that of [the worker], there are similarities and the guidelines contained in the Commissioners decision have application in [the worker's] appeal.

...

The panel finds the situations described in the Commissioners decision #102 have application in [the worker's] claim and appeal. [The worker] related her stress symptoms to working excessive overtime, increased job responsibility and lack of support from her employer. The panel finds the problems encountered by [the worker] and described in detail by her to the panel, are more of the nature of industrial relations matters and are not covered by compensation.

The worker appealed the Review Board finding to the Appeal Division. *Appeal Division Decision #99-0862* dated May 28, 1999 denied the worker's appeal. The panel reasoned in part:

The worker's representative stated in her submission that the worker developed a severe headache somewhere towards the end of May. If this were the case, it would be easier to associate the headache with the employment situation from April 10 to May 23, 1996. But, the headache developed at the end of June, five weeks after the end of the period of significant overtime and lack of pharmacists. This in itself suggests that the two are not connected. The duration of the problem also makes a

relationship unlikely. The worker was still experiencing severe headaches almost one and a half years after the end of the 5 week period of stress to which the headaches are attributed. The medical evidence provided in support of the worker's claim does not address these issues.

...

Dr. Lutz concludes by saying that the neck shoulder region is very susceptible to work and ergonomic stresses. He indicates that problems in this area may develop when the shoulders are held in an elevated position for lengthy periods and that stress caused by overload at work adds to this syndrome.

The reports of Dr. Lee and Dr. Clarke suggest that a particularly stressful period at work may have caused a tension headache. These comments are quite speculative and certainly not sufficient evidence to establish a work relationship given the late onset of the headache, the severity and the duration. It also appears from Dr. Lutz' report that the problem may be primarily biomechanical. Essentially, it appears that the cause of the worker's headaches has not yet been determined. But, given the vague and somewhat contradictory medical evidence, the delayed onset, and the duration of the headaches I find that it is unlikely that they are work related.

Following the Appeal Division decision, the worker requested examination by an MRP. Dr. Lee's enabling certificate stated that the worker experienced severe and disabling tension headaches subsequent to changes in her work environment which made it far more physically and mentally stressful for her.

By memo dated October 29, 1999, a nurse adviser provided a detailed ergonomic assessment of the worker's job and working conditions (based on a visit to the worksite, and discussions with the worker and her pharmacist supervisor). This report concluded:

Impressions: Certainly there a [sic] lot of changes that could be done to all [the worker's] workstations excepting the supply room. The question of causation I leave to the Case Manager and whoever is asked to review this report or do an ergonomic assessment more detailed than myself.

In a claim log entry dated December 7, 1999, a case manager noted:

I spoke to [the worker] to advise that I have reviewed her prior claim. [Claim number] is for headaches and neck pain which she attributes to stress. The claim was disallowed, and that decision has been upheld by

the Review Board and the Appeal Division and is presently with the Medical Review Panel. I explained to [the worker] that in view of the fact that the MRP is addressing the cause of the same problems which she is claiming are due to her posture under this present claim, I am not prepared to make a decision on her most recent claim until the issue is dealt with by the MRP. I explained that she would either have to wait for the decision of the MRP or withdraw her appeal.

The worker was examined by an MRP on November 28, 2000. On December 20, 2000, the Board received a copy of the MRP Certificate.

To assist in considering the effect of the MRP Certificate, it is useful to set out the questions posed to the MRP together with the MRP's responses in its Certificate. These are as follows (with italics used for the MRP's certification):

1. What is the condition of the worker with respect to her neck, shoulders and headaches? Please include the Panel's diagnosis with regard to her neck, shoulders and headaches.

Answer: Condition of the worker with respect to her neck, shoulder and head aches is good. The Panel's diagnosis is muscle-contraction-type head, neck and shoulder pain.

2. Does the worker now have a disability with respect to her neck, shoulders or headaches? If not, could the Panel please advise the Board whether historically they believe that the worker did, at any time, have a disability with respect to her neck shoulders or headaches?

Answer: No current disability. The Panel advises that the worker did have a prior disability with respect to her neck, shoulder and head aches.

3. If the worker has (or had) such a disability, what is (or was) its nature and extent and in what ways does (or did) it affect the body function of the worker?

Answer: Pain in head, neck and shoulders, limiting worker from activities of daily living.

4. (a) If the worker has (or had) such a disability, what is (or was) the cause(s)?

Answer: Muscle contraction secondary to prolonged, sustained positioning while working in fume hood and rebound headaches associated with analgesic use.

- (b) Were the work activities between of causative significance in producing a disability?

Answer: Yes. Work activities between April 11, 1996 and July 25, 1996.

5. (a) If there is (or was) more than one cause of such a disability, how and to what extent is (or was) each cause significant?

Answer: Prolonged, sustained positioning, leading to muscle contraction pain was primary cause of this disability and analgesic use was a secondary, minor contributing cause.

- (b) If not already answered, how and to what extent is (or was) the work activities between April 11, 1996 until July 25, 1996 of causative significance?

Answer: See 5(a).

6. If the Panel has identified more than one cause of disability with respect to the worker's neck, shoulders and/or headaches, please explain:

- (a) Did each cause independently result in a disability and if so, what proportion of the disability found by the Panel is related to each cause?

Answer: No. See 6(b).

- (b) If each cause did not independently result in a disability, did two or more causes act together to result in a disability? If so, which causes acted together to result in a disability?

Answer: Muscle contraction disorder was major cause and led to analgesic use, which was a minor cause.

7. The Board has not recognized that the worker was temporarily disabled for any period of time as a result of her work activities between April 11, 1996 and July 25, 1996. Would the Panel please state whether they feel that the worker was temporarily disabled for any period(s) of time as a result of her work activities between April 11, 1996 and July 25, 1996 and, if so, what the nature and extent of the disability was during the period(s) of time.

Answer: Yes. Temporarily disabled from pain in head, neck and shoulders for severe muscle contraction.

8. (a) Did the worker suffer from any pre-existing condition?

Answer: Occasional muscle contraction headaches (recorded in 1996 as once every one to two months).

- (b) Did the worker suffer from any pre-existing disability?

Answer: No.

If the answer to (a) or (b) is affirmative, would the Panel please state if the pre-existing condition or disability was activated, accelerated or aggravated by her work activities between April 11, 1996 and July 25, 1996?

Answer: Yes. Aggravated by work activities.

9. If the worker now has a disability causally related to her neck, shoulders and/or headaches, has it changed to any significant extent since its commencement and, if so, what has been the nature and progress of that change? Is any significant change in the disability reasonably expected in the next 12 months?

Answer: Not applicable.

10. If not already answered, would the Panel please state whether the headaches for which the worker sought medical attention on July 8, 1996 and following were causally related to her work activities as a Pharmacy Technician between April 11, 1996 and July 25, 1996.

Answer: Yes. For July to September 1996.

[reproduced as written]

The MRP also provided a “narrative report” to the Board under section 61(2) of the former Act. Such a report is separate from the MRP Certificate, and does not have the legally binding effect of a Certificate pursuant to section 65 of the Act. The summary contained in the final paragraph of the MRP’s narrative report stated:

In summary, this lady has apparent muscle contraction head, neck and shoulder pain. This pain has been compounded by rebound headaches that are associated with use of analgesic medication. It is suggested that she have a further neurological evaluation and consideration be made to pain management at a multi-modal pain clinic. Active exercise would be better than massage therapy treatments.

In the narrative report, the MRP also noted the following (on page 4):

She has noted that her workload has increased dramatically over the past few years. Originally when she started doing intravenous chemotherapies, she would have about two per month, but now she has about 15-20 chemotherapy preparations per month.

She has been provided with some help with respect to ergonomics. She apparently has a foot rest, a lower monitor and a new chair, but the hood has not been altered in over four years, despite some requests. The hood presents a problem for her. She must maintain a head position close to the glass on the hood, her elbows are bent, her arms are up and there is an air space below her arms that restricts the area where she can actually move her arms. She often maintains constant workload periods for up to 2 hours in duration. On some heavy days, she may spend 100% of her time in the hood, but on an average day at 60-70%, particularly in the winter and spring months. In the summer, it may be 30 to 40% of her time.

Following receipt of the MRP Certificate, by decision dated March 30, 2001 the Board provided the worker with wage loss benefits for 42 days from July 25, 1996 until September 22, 1996.

Policy

At the time of the MRP Certificate, and the decisions by the Board case manager in 2001 and 2002, policy in the *Rehabilitation Services and Claims Manual* included the following:

#103.84 Cause of the Disability

Section 61(1)(d) of the Act requires the Panel to certify as to the cause of the disability. Cause is a word much like disability in that it has different meanings, depending on the context in which it is used. Sometimes it can refer to matters of natural science, sometimes to moral value judgements, and sometimes to questions of law. The purpose of the Medical Review Panel is to provide an appeal from "a medical decision of the Board" and it is in that context that the word "cause" must be interpreted. The Board interprets the word cause in Section 61(1) of the Act to refer to the etiology of a physical or psychological disability. It means cause insofar as it is a matter of medical science, but not cause insofar as it is a matter of moral value judgements, or law, or non-medical fact. (23) [Footnote: Decision 17, Workers' Compensation Reporter, Vol. 1. p.78.]

#103.86 Certificate Binding on the Board

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.

#103.87 Narrative Report of the Panel

Section 61(2) of the Act provides that the Panel may, in addition to and separately from the certification required under Section 61(1), make a report and recommendations to the Board on any matter arising out of the

examination of the worker and the review of the medical records. The recommendations, even if they deal with medical issues alone, are not binding on the Board.

Decisions of the Board

The June 19, 2001 decision by the case manager noted that in addition to the worker's claim for headaches as a result of her work situation, which was eventually appealed to the MRP, the worker had also made a claim for headaches which she related to her posture at work. This latter claim was consolidated into the former claim, as involving the same issues. In the June 19, 2001 decision, the case manager reasoned:

...The Medical Review Panel found that during that period of time [between April 11, 1996 and July 25, 1996], you were required to spend an increased amount of time using the fume hood. The Panel's decision was that your disability was a result of muscle contractions secondary to prolonged, sustained positioning while working in the fume hood, and rebound headaches associated with analgesic use.

The Medical Review Panel, however, found that you have recovered from these injuries and that there is no current disability related to your work activities.

The certificate of the Medical Review Panel is conclusive as to the matter certified, and is binding on the Board.

In a memo to file which was also dated June 19, 2001, the case manager commented:

Further the worker has a long medical history which is well documented in the prior medical history collected. The worker has a history of the following: thoracic outlet syndrome; high blood pressure; various stressors, labour, financial, etc; lack of physical fitness, spine discomfort. Any one of these conditions could be contributing to her experience of headaches.

[reproduced as written]

By letter dated May 22, 2002, the worker wrote to the case manager, stating:

...The Medical Review Panel states that I should have more neurological testing and that I should attend an inter-modal pain clinic.

With all of the ongoing problems that I am experiencing, mainly pain and severe headaches, that are causing me to miss work. I feel the further testing and the pain clinic are warranted.

[reproduced as written]

By decision dated June 18, 2002, the case manager responded to the worker's inquiry. She reviewed the contents of the MRP Certificate, and concluded:

The Medical Review Panel found that you have recovered from those injuries and that you were no longer disabled as a result of those activities.

The Panel advised that you did have a prior disability with respect to your neck, shoulder and headaches.

It is my interpretation of the Medical Review Panel certificate that any further neurological testing and/or treatment of on-going pain complaints would be related to your pre-existing condition rather than for the period you were temporarily disabled from work between April 11, 1996, and July 25, 1996 [sic].

In particular, given your report that you have had on-going problems with severe headaches, it would seem that they would be related to your pre-existing condition.

The certificate clearly outlined that you had recovered from your work injuries, and that there was no current disability related to those work injuries.

I note, at this juncture, that the June 18, 2002 decision erred in referring to the worker as having been temporarily disabled from work between April 11, 1996, and July 25, 1996. The worker was disabled from working from July 25, 1996 until September 22, 1996, as a result of her work activities between April 11, 1996, and July 25, 1996.

On August 29, 2002, the worker wrote to the registrar, MRP Department, to request clarification of the MRP Certificate. She stated:

...In this decision it states in the summary that I have further neurological testing and to consider a multi-modal pain clinic. I have asked that these two things be carried out as the Medical Review Panel is binding on the board, but they are refusing to do so based on the answer to question #2 in the statement of issues. This states that I have no further injury, which contradicts everything in the rest of the MRP finding....

By reply dated September 24, 2002, the Acting Registrar, MRP Department, explained:

Section 65 of the *Workers Compensation Act* gives very strong protection to a Medical Review Panel's certificate and states that it is conclusive and binding on the Board. However, the preparation of a Narrative Report is not mandatory and the contents of the Report are not binding on the Board. The Narrative Report is often prepared to alert a worker's physician about new medical findings and to recommend treatment concerning both compensable and/or non-compensable conditions.

The Acting Registrar found that the MRP Certificate was clear and consistent (i.e. that there was no basis for requesting clarification from the MRP).

Submissions

In her letter of September 16, 2002, the worker commented:

...I had not worked in the fume hood for 5 days before the MRP and so when they did their test I had no muscle contraction pain. I am still working in the fume hood for up to 2 hours at time and more often then I did in the past (with exception to the 6 week period in 1996), and don't understand how I wouldn't continue to get this pain if I was still doing what they said causes it....

...

...We know this injury is caused by the fume hood and aggravated by other work duties. I am still working in the fume hood on a daily basis with a maximum of 2 hours per session and while I don't have the pressures I had during the six week period in 1996, I continue to have problems. These problems have improved greatly since they installed a arm rest for me in the fume hood. It only took them 5 years from the first time I asked.

[reproduced as written]

By submission of November 27, 2005, the worker advises that she was recently assessed by a physiotherapist. The worker reports that the physiotherapist "found that my Peck Minor muscles were extremely shortened. She told me this would cause pinching of the nerves, which would cause extreme pain, numbness which could also cause headaches. She also told me this was a Repetitive Stress Injury (RSI)..."

(I note, at this juncture, that it would appear that the reference to the worker's "Peck Minor" muscles involves a misspelling of "pec minor." A chiropractic report submitted by the worker (which begins "Dear Francis") appears to have been printed from an internet search using the same misspelling.) The term "RSI" commonly refers to repetitive

strain injuries (see policy at RSCM #27.00 concerning Activity-Related Soft Tissue Disorders of the Limbs).

The worker further submits:

I feel that my original claim for stress and all the extra work I did at that time exacerbated my RSI injuries caused by the ergonomics of my work stations. At that time however I do not think the damage was to the point it is now, so I did recover from the injuries I sustained at that time. After years of working under the poor ergonomic conditions I am having Thoracic Outlet Syndrome, Carpal tunnel syndrome and Rotator cuff tendonitis symptoms, two of which I was already diagnosed with. The ergonomics of my computer work area were fixed in 1999, but I am still to this day working on the same chair in the Biological safety cabinet that I was in 1996. They added an arm rest in 1999, which did help, but when doing manipulations it cannot always be used. They hired a new technician three years ago...

[reproduced as written]

The worker has provided an article which is written in a similar format to a scientific report, but which in fact appears to be advertising by a company which manufactures a biological safety cabinet. She has also provided an article entitled "Laboratory Ergonomics: Risk factors and workbench assessment."

By submission of December 12, 2005, the employer's representative refers in particular to the MRP's responses to questions 2 and 10, noting that the MRP examination occurred in late 2000. He comments:

The Panel was aware of the worker suggesting she continued to have complaints as the narrative of the report mentions some lingering headaches. It is important to note that the worker had symptoms of thoracic outlet syndrome before 1996. She had other complaints as well. She is noted to be markedly overweight and not involved in any fitness activities. She has had some changes made to her work station though perhaps not as much as she would like.

...

...The Panel could have extended benefits for a longer time or suggested she had permanent impairment. They did not.

We ask WCAT to confirm the decision made by the WCB. No new claim should come from her complaints and as has been pointed out [by] several adjudicators, the decision of the Medical Review Panel is binding on the WCB and subsequent appellant bodies.

Reasons and Findings

The June 19, 2001 and June 18, 2002 decisions were focussed on the legally binding effect of a Medical Review Panel Certificate pursuant to section 65. These decisions concerned several different aspects of the MRP's findings and the worker's claims, which I have considered under the various headings below.

At the time of the decisions in 2001 and 2002, section 65 of the Act 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.

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:

- 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,
- ...

I find that the MRP Certificate of November 28, 2000 continues to have a binding and conclusive effect, notwithstanding the March 3, 2003 repeal of section 65 of the Act (as part of the Bill 63 amendments which removed the MRP appeal process).

(a) Consolidation of claim files

The claim which was ultimately appealed to an MRP was initiated as a claim for stress. However, the MRP found that the worker's disability was causally related to the physical nature of her work activities (i.e. the basis on which the second claim was initiated). I agree that it was appropriate to consolidate the worker's two claims into one, as involving consideration of the same body of evidence.

The worker experienced various stresses in her work involving workload, absence of supervision by a pharmacist at certain times, and turnover in the pharmacist positions. (The *Pharmacists, Pharmacy Operations and Drug Scheduling Act*, RSBC 1996, ch. 363, permits a support person (a non-pharmacist), to perform technical functions related to the dispensing, distribution or sale of drugs or the operation of a pharmacy, under the direct supervision of a pharmacist. Section 35 of that Act prohibits a support person from dispensing a drug or device listed or included by reference in the drug schedules unless supervised by a pharmacist.)

The Review Board and Appeal Division decisions found that any workplace “stress” was non-compensable. The MRP found the worker suffered temporary disability, due to “Muscle contraction secondary to prolonged, sustained positioning while working in fume hood and rebound headaches associated with analgesic use.” In other words, her disability resulted from the physical demands of her work activities rather than from other workplace stress. Accordingly, any “stress” or psychological pressure the worker may have experienced due to the work situation in 1996 is not a factor in my consideration of her appeals.

I confirm the June 19, 2001 decision to consolidate the worker’s two claim files. The worker’s appeal is denied on this issue.

(b) Compensable consequences

In clause 6(b) of its Certificate, the MRP found that two causes acted together to produce the worker’s disability. The MRP stated: “Muscle contraction disorder was major cause and led to analgesic use, which was a minor cause.”

As explained in the policy contained in Decision No. 17, “Re Disablement Following Unauthorized Surgery,” it is appropriate for an MRP to distinguish on a medical basis between the effects of a work injury, and the effects of medical treatment. However, it is within the Board’s jurisdiction to determine whether the consequences of medical treatment should be treated as consequences of the work injury, as a matter of law and policy. Policy at RSCM item #22.10 provided:

#22.10 Further Injury or Increased Disablement Resulting from Treatment

Where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable.

Accordingly, the two causes of the worker’s disability in 1996 were compensable. No issue has arisen on the worker’s claim in this regard. However, I consider it worth noting the above, as providing relevant background to the additional consideration below regarding the cause of the worker’s ongoing problems.

(c) Pre-existing condition or disability

In the June 18, 2002 decision, the case manager found on page 1 that: "The Panel advised that you did have a prior disability with respect to your neck, shoulder and headaches." In clause 8(b), the MRP certified that the worker did not suffer from any pre-existing disability. Accordingly, the June 18, 2002 decision erred on this point.

The case manager also referred on page 2 of her June 18, 2002 decision to the worker's pre-existing condition. The MRP certified in clause 8(a) that the worker had a pre-existing condition, consisting of occasional muscle contraction headaches (recorded in 1996 as once every one to two months). It is not evident whether the case manager simply used the terms pre-existing disability and pre-existing condition interchangeably. For the purposes of section 5(5) of the Act, these terms are not interchangeable, as a worker's compensation entitlement is not limited by reason of a pre-existing condition which did not amount to a disability.

The MRP certified that the worker had a pre-existing condition, consisting of occasional muscle contraction headaches (recorded in 1996 as once every one to two months). In clause 8, the MRP further certified that this pre-existing condition was "Aggravated by work activities."

The normal meaning of the term "pre-existing condition" would refer to a non-disabling medical abnormality which might or might not be symptomatic, which preceded the work activities between April 11, 1996 and July 25, 1996. It is not clear whether the MRP was using the term pre-existing condition in this fashion. Given the MRP's finding that this pre-existing condition involved "occasional muscle contraction headaches (recorded in 1996 as once every one to two months)," this would have involved the very limited time period between January 1, 1996 to April 10, 1996. Accordingly, this would have involved approximately two muscle contraction headaches during that limited period.

It is of interest to refer to the further description of this condition in the MRP's narrative report. On page 2, the MRP reviewed the evidence concerning the worker's employment situation in April and May, 1996, and noted:

During this time, she accumulated a large amount of overtime, but was also on call 24 hours a day for the pharmacy, since she was the only employee, particularly during May of 1996.

At some point, possibly prior to July of 1996, she was reported by a neurologist to have approximately one headache every one or two months. But because of the increased work load, as well as the position that she was involved with in performing her work, she noted the onset of more severe headaches that lasted for longer periods of time, usually

from one day to two days, but sometimes as long as eight days. She went off work in June of 1996 for 2 or 3 days, but the headaches persisted. Unfortunately, during that time, she was also returning to work for 2 or 3 hour periods of time to work and complete some of the activities in the pharmacy that were needed, since there was no specific replacement for her at that time. During that time, she noted a knotting sensation in her neck that would become a headache, initially in the occipital area, and then radiate in a tomahawk-like distribution to the front of her head. It did not involve the sides of her head and it was not a pounding headache. She did return to work, but when her symptoms were persistent, she was advised to cease working from July until September of 1996. During this time, she continued to have headaches, but these slowly resolved....

[reproduced as written, emphasis added]

On page 3, the MRP further noted:

She estimated that she was originally having one or two days a month off work from headaches, but this became more significant. She found that her pain was often worse on days when she worked for prolonged periods in the fume hood. Usually, she would develop some pain in the back of her shoulder area, particularly in the right trapezius area and this would radiate into her neck and the back of her head, and then anteriorly into the front of her head. Sometimes there was associated numbness in her hands, fingers and arms. She also consumed most of her sick time and holiday time for days off because of her headaches.

[emphasis added]

The discussion in the MRP's narrative report regarding the worker's pre-existing condition relates to her experiencing symptoms relating to her work in the fume hood, prior to going off work in July 1996. I interpret the MRP's reference to the worker's pre-existing condition as meaning that the worker's symptoms prior to her period of temporary disability from July to September, 1996 were not disabling, rather than as meaning that she was experiencing symptoms which were not related to her work activities. I find that the June 18, 2002 decision was in error, in interpreting the MRP Certificate as meaning that the worker's ongoing problems were the result of some pre-existing non-compensable condition. The worker's appeal is allowed on this issue. I reach the same conclusion on this point, whether the term pre-existing condition is read as referring to the period prior to the work exposure beginning April 11, 1996, or as referring to the period preceding the worker's temporary disability beginning July 25, 1996.

(d) Period of temporary disability

There is a possible deficiency in the MRP Certificate. Section 61(1)(e) of the Act required that the MRP certify to the Board regarding the following:

(e) if the worker, though no longer disabled, claims that he or she had a longer period of disability, total or partial, than that allowed the worker by the board, **then and in that event whether the worker was in fact disabled as a result of the happening or incident which caused the disability for a longer period than that allowed the worker by the board, and if so, for what longer period he or she was disabled** and the nature and extent of the disability during the period beyond that allowed the worker by the board, but not stated in terms of percentage of disability of the whole body.

[emphasis added]

It was part of the MRP's mandate to certify to the Board as to the duration of any period or periods for which the worker was temporarily disabled as a result of her work activities between April 11, 1996 and July 25, 1996. While the MRP provided an affirmative response to question 7, it did not proceed to specify the relevant period or periods. However, as the panel identified the worker's disability as involving pain in her head, neck and shoulders, and as the panel specified in clause 10 that the worker's headaches from July to September 1996 were a result of her work activities between April 11, 1996 and July 25, 1996, it may reasonably be inferred that this corresponded to the worker's period of temporary disability (as found in the prior decision of March 30, 2001).

(e) Scope of MRP findings

In the June 19, 2001 decision, the case manager concluded:

The Medical Review Panel, however, found that you have recovered from these injuries and that there is no current disability related to your work activities.

If this sentence was intended to refer only to the effect of the worker's work activities between April 11, 1996 and July 25, 1996, then it is correct. It is also correct that the MRP found the worker did not have a disability at the time of its examination.

If, however, this sentence was intended to indicate that the MRP had certified that any further problems experienced by the worker after July 25, 1996, were not causally related to her further work activities after July 25, 1996, then I would find that it was in error. The comments in the related file memo dated July 19, 2001 suggest that the

case manager intended this decision to deal with more than the effects of the worker's work activities between April 11, 1996 and July 25, 1996.

The questions posed to the MRP were expressly framed to focus the MRP's consideration on the significance, if any, of the worker's work activities "between April 11, 1996 and July 25, 1996." The questions posed to the MRP did not ask the MRP to address whether the worker's employment activities in general, outside of that time period, were of causative significance to her later symptoms. As well, because the worker did not have a disability at the time of the MRP examination on November 28, 2000, it was not necessary for the MRP to consider whether any factors other than the worker's employment "between April 11, 1996 and July 25, 1996" were of causative significance to her disability.

As the worker had no disability at the time of the MRP examination, and as the questions posed to the MRP were of a limited and focused nature, the MRP's jurisdiction to pursue a full inquiry under section 61 of the Act was narrower than might otherwise have been the case. For example, where a worker has a current disability at the time of the MRP examination, the MRP is required to certify as to the causes of that disability. This brings into play a broader inquiry by the MRP as to causation, including the worker's employment in general, other work injuries, and/or non-work causes. Given the absence of any disability at the time of the MRP examination and the focused nature of the issues posed to the MRP in this case, it would be an error to assume that the MRP pursued the type of far-ranging inquiry as commonly occurs in other cases.

It is important that the legally binding effect of an MRP Certificate be respected. The first part of this requirement is giving effect to the MRP's actual findings. The second part of this requirement is to not read into the MRP Certificate more than is actually certified, or which may reasonably be inferred from the issues and Certificate when read as a whole.

I am unable to read the MRP Certificate in this particular case as addressing the potential effect of the worker's ongoing work activities subsequent to the specified time frame (i.e. "between April 11, 1996 and July 25, 1996"). Given the manner in which the questions were posed to the MRP, and the findings of the MRP, it cannot be inferred that the MRP addressed the possible effects of the worker's employment outside of the time period "between April 11, 1996 and July 25, 1996." The MRP was not asked to consider whether the worker's work activities, in using the fume hood, either before or after the period April 11, 1996 and July 25, 1996, was of causative significance to her pre-existing condition, or to any subsequent problems experienced by the worker. The MRP certified that the effects of the worker's employment between April 11, 1996 and July 25, 1996 were temporary in nature. The MRP did not address the question as to whether the worker's continuing work activities, in using the fume hood, would cause any further problems for the worker.

Accordingly, it is necessary that there be an adjudication of such issues, in a fashion consistent with the MRP Certificate. RSCM item #103.86 provided that any subsequent decision of the Board, at any point in time, must be consistent with the MRP Certificate. The MRP Certificate recognized that the worker's activities using the fume hood resulted in muscle contraction secondary to prolonged, sustained positioning. The MRP was only asked to consider the significance of these activities in respect of the time period between April 11, 1996 and July 25, 1996. The worker raises a valid question, in pointing out that if this work activity during that period caused her disability, then consideration should be given to whether similar activities in later time periods caused any further problems. This would require consideration as to the factual demands of the worker's later employment activities. While the MRP Certificate does not apply in connection with the worker's later work activities, it would be appropriate to analyze these in a fashion consistent with the MRP's findings.

The prior Review Board and Appeal Division decisions, and the MRP Certificate, were concerned with the worker's temporary disability in July to September 1996. I do not read the MRP Certificate as addressing the question as to whether the worker's further work activities following her return to work on September 23, 1996 were of causative significance to any subsequent problems. To the extent the June 19, 2001 and June 18, 2002 decisions appear to treat the MRP Certificate as precluding any further consideration by the Board of the worker's problems after September 23, 1996, I find that the decisions were in error.

(f) Medical treatment recommendations

The case manager interpreted the MRP Certificate to mean that any further neurological testing and/or treatment of the worker's ongoing pain complaints would be related to her pre-existing condition rather than to the period the worker was temporarily disabled from work between April 11, 1996 and July 25, 1996.

The fact that the MRP made its recommendations regarding treatment in its narrative report, rather than in its Certificate, relates to a limitation on the MRP's jurisdiction. An MRP does not have jurisdiction to certify to the Board concerning treatment, even where the problems are work-related. It was appropriate for the MRP to provide its non-binding recommendations as to treatment in its narrative report, irrespective of whether the worker's ongoing problems were work related or not (see *Appeal Division Decision #98-0691*, 15 W.C.R. 597, and *Appeal Division Decision #99-1350*, 15 W.C.R. 675).

A central issue arising from the June 18, 2002 decision concerns the case manager's interpretation of the MRP Certificate as meaning that the worker's ongoing problems were causally related to a pre-existing non-compensable condition. I do not consider that the MRP Certificate had this effect.

The work demands during the particular period between April 11, 1996 and July 25, 1996 appear to have been particularly demanding, but only produced a period of temporary disability. The worker's prolonged, sustained positioning in using the fume hood lead to muscle contraction pain. In view of the MRP's findings that these activities produced a disability of a temporary nature, it is reasonable to infer that the worker's similar work activities in the past were of causative significance to the worker's pre-existing condition of occasional muscle contraction headaches (recorded in 1996 as once every one to two months). I see no indication in the MRP Certificate that it identified any non-work cause as being of causative significance in producing this pre-existing condition. The worker's appeal is allowed on this issue.

(g) Further Adjudication

The case manager appears to have found that the legally binding effect of the MRP Certificate precluded consideration as to whether the worker's further problems (i.e. outside the period of temporary disability from July to September 1996) were causally related to her employment. I find that this decision was based on a mistaken interpretation of the MRP Certificate. The MRP Certificate was limited to considering the effect of the worker's employment between April 11, 1996 and July 25, 1996. As the MRP did not address the effects of the worker's continuing use of the fume hood after that time period, that remains an issue to be adjudicated. For the purposes of my decision, I do not consider it necessary to determine whether such adjudication should be provided under this claim, or whether a new claim should be established in relation to the worker's work activities following July 25, 1996.

The June 18, 2002 decision was based on an interpretation of the legal effect of the MRP Certificate, which I have found to be incorrect. Consideration has not been given to the further medical investigations and treatment recommended by the MRP (apart from the incorrect interpretation of the MRP Certificate as meaning these would be related to a pre-existing non-compensable condition). There has been no consideration on the merits of the factual and medical evidence on the worker's claim, including the 1999 ergonomic assessment by the nurse advisor contained in October 29, 1999 claim log entry.

In the circumstances, I do not consider it appropriate to proceed to make a final decision regarding the merits of the factual and medical evidence on the worker's claim. I find the worker's appeals would be appropriately resolved by referring this matter back to the Board for adjudication pursuant to section 38(2) of the transitional provisions contained in Part 2 of Bill 63. Subsections 38(1) and (2) provide:

- 38 (1)** Subject to subsection (3), all proceedings pending before the review board on the transition date are continued and must be completed as proceedings pending before the appeal tribunal

except that section 253 (4) of the Act, as enacted by the amending Act, does not apply to those proceedings.

- (2) In proceedings before the appeal tribunal under subsection (1), instead of making a decision under section 253 (1) of the Act, as enacted by the amending Act, **the appeal tribunal may refer a matter back to the Board, with or without directions**, and the Board's decision made under that referral may be reviewed under section 96.2 of the Act, as enacted by the amending Act.

[emphasis added]

I refer the June 19, 2001 and June 18, 2002 decisions back to Board, for adjudication as to whether the worker's employment (in particular, the use of the fume hood) subsequent to the worker's return to work on September 23, 1996, was of causative significance to any neck or shoulder pain or headaches after that date (bearing in mind the MRP's findings as to the effect of the worker's employment in causing her temporary disability from July to September, 1996). This further adjudication should include consideration of the MRP's suggestions that the worker have a further neurological evaluation, that consideration be given to pain management at a multi-modal pain clinic, and that active exercise would be better than massage therapy treatments.

No expenses were requested, and it does not appear from a review of the file that any expenses were incurred related to these appeals. I therefore make no order regarding expenses of these appeals.

Conclusion

The June 18, 2002 decision is varied. It erred in finding that the worker had a pre-existing disability. It also erred in concluding that the MRP Certificate meant that the worker's further symptoms, for which the MRP suggested neurological testing and pain management treatment at a multi-modal pain clinic, were the result of a non-compensable pre-existing condition. I find that this interpretation of the MRP Certificate was in error. The question as to the cause of the worker's problems after September 23, 1996 is one which requires adjudication on the merits.

The June 19, 2001 and June 18, 2002 decisions by the case manager are referred back to the Board for further adjudication pursuant to section 38(2) of Bill 63. A decision should be provided as to whether the worker's employment (in particular, the use of the fume hood) subsequent to the worker's return to work on September 23, 1996, was of causative significance to any neck or shoulder pain or headaches after that date (bearing in mind the MRP's findings as to the effect of the worker's employment in causing her temporary disability from July to September, 1996).

This further adjudication should also address the MRP's suggestions that the worker have a further neurological evaluation, that consideration be given to pain management at a multi-modal pain clinic, and that active exercise would be better than massage therapy treatments.

If the worker or employer is not satisfied with any ensuing decision by the Board, a request for review may be made to the Review Division.

Herb Morton
Vice Chair

HM/cda/gwo