Noteworthy Decision Summary

Decision: WCAT-2006-02341 **Panel**: Herb Morton **Decision Date:** May 31, 2006

Medical Review Panel certificate – Reconsideration – New medical evidence – Ability to reconsider Medical Review Panel certificate extinguished by the Workers Compensation Amendment Act (No. 2), 2002 – Quorum insufficient to reconvene Medical Review Panel

The effect of the amendments to the *Workers Compensation Act* (Act) occasioned by the *Workers Compensation Amendment Act (No. 2), 2002* (Bill 63) is that Medical Review Panel (MRP) certificates may not be reconsidered on the basis of significant new evidence.

An MRP concluded in 2001 that the worker's symptoms were not work-related. The worker argued that subsequent medical resonance imaging (MRI) investigations in 2003 and 2004 suggested his symptoms were work-related. 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 worker appealed to the Workers' Compensation Appeal Tribunal (WCAT). 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. In *WCAT Decision #2005-06751* (also a noteworthy decision), the panel suspended the appeal under section 246(3) of the Act and referred two questions 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)?

The Board determined that reconsideration of an MRP certificate is not available after Bill 63. The Board also determined that even if reconsideration were available, the new evidence provided would not provide sufficient grounds for a reconsideration to take place.

The panel made a number of findings after receiving the Board determinations:

- The worker's request for reconsideration following the Bill 63 amendments was properly addressed by reference to the amended Act, including Bill 63's transitional provisions.
- The Board's practice of reconvening MRPs prior to Bill 63 was not based in the Act or Board policy.
- As the chair of the MRP who issued the 2001 certificate had retired and was no longer available, there was no authority under the Act for the remaining members of the MRP to be quorumed to reconsider the certificate.
- The provisions in the former Act authorizing the Lieutenant Governor in Council to appoint an MRP were repealed by Bill 63. These were preserved only for transitional cases (MRP proceedings that were pending on the November 30, 2002 repeal date or requests for MRP examinations made within the 90-day statutory time-frame regarding medical

decisions made prior to the repeal date). Apart from these cases, the Board does not have the authority to convene a new MRP.

- The worker did not have a vested right to obtain reconsideration of the MRP certificate on the basis of new evidence obtained after the repeal date.
- The section 96(5) (a) 75-day time limit on the Board's reconsideration authority does not have any direct relevance to this question because it does not involve reconsideration by the Board.

In view of the panel's conclusion on the first issue, it was not necessary to decide the second issue. The worker's appeal was denied. The MRP certificate is conclusive and binding and not subject to reconsideration on the basis of significant new evidence.

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Introduction

This decision is the second part to *WCAT Decision #2005-06751* dated December 19, 2005. That decision concerned the worker's appeal of *Review Decision #26090* of the Workers' Compensation Board (Board) dated February 11, 2005, which confirmed the case manager's decision of October 15, 2004. 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 *WCAT Decision #2005-06751*, I agreed with the reasoning expressed by the review officer concerning 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 pursuant to the former section 65 of the *Workers Compensation Act* (Act), it is not subject to reconsideration by the Board on the basis of new medical evidence. However, I suspended consideration of the worker's appeal pursuant to section 246(3) of the Act, in order to refer two questions 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)?

The MRP registrar provided her determinations on these questions in a decision letter addressed to the worker dated January 27, 2006.

The time for the making of the WCAT decision was extended by the WCAT chair by 90 days until June 5, 2006 on the basis of complexity, pursuant to section 253(5)(a) of the Act. A submission dated March 29, 2006 was provided by the workers' adviser on behalf of the worker, and the worker provided a late submission dated April 27, 2006. I have exercised my discretion to receive the latter submission for consideration. The employer is not participating in this application, although invited to do so.

The worker has not requested an oral hearing. I agree that the legal and medical issues raised by his appeal can be properly considered on the basis of written submissions without an oral hearing.

In this decision, I have dealt with the two issues addressed by the MRP registrar under separate headings below. I will for convenience refer to the *Workers Compensation Amendment Act (No. 2), 2002* as Bill 63.

Issue(s)

Can a MRP be reconvened, or a new MRP established, to reconsider its certificate on the basis of significant new evidence (obtained after the Bill 63 amendments)? Alternatively, was this avenue extinguished by the statutory amendments contained in Bill 63? 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)?

Jurisdiction

This decision concerns the worker's appeal from *Review Decision #26090* dated February 11, 2005, under section 239(1) of the Act. WCAT's jurisdiction in hearing this appeal was described in *WCAT Decision #2005-06751*. Pursuant to section 246(4), where WCAT refers a matter back to the Board for determination under section 246(3), WCAT must consider the Board's determination in the context of the appeal.

A. Can a MRP be reconvened (or a new MRP established) to reconsider its certificate on the basis of significant new evidence?

(a) MRP Registrar's Decision concerning MRP reconsideration

The MRP registrar concluded that reconsideration of an MRP certificate is not available following Bill 63. She further found that even if reconsideration were available, the new evidence provided in this case would not provide sufficient grounds for a reconsideration to take place.

The MRP registrar noted that the policy formerly contained at #103.58 of the *Rehabilitation Services and Claims Manual* recognized the possibility of reconsideration of MRP certificates. While that policy was repealed in 1995, the Board in practice continued to allow reconsiderations on the basis of the criteria set out in former policy #103.58. The MRP registrar noted that *Appeal Division Decision #97-0278* (accessible on the WCAT website as an attachment to *WCAT Decision #2005-06751*) found that reconsideration of MRP certificates continued to be available after the repeal of policy #103.58 and discussed the grounds on which such reconsideration might occur.

The MRP registrar concluded, however, that the legislative changes that took effect in 2002 and 2003 as a result of Bill 63 now preclude such reconsiderations. She reasoned in part:

> …Having regard to the lapse of time since the first panel and the fact that the chair of the 2001 Panel has retired and is no longer available, a new Panel would have to be set up if reconsideration were agreed to in this case. However, the appointment of that Panel would have to be made under section 58(5) of the *Act*, which no longer exists. In other words, the Board now has no legal authority to appoint a new Panel in any case.
>
> ...there is at this time no body (or bodies) continuing in existence as MRPs that could reconsider prior MRP certificates and the Board has no authority to appoint new MRPs.

With respect to section 36 of the transitional provisions contained in Part 2 of Bill 63, the MRP registrar reasoned:

> This section provides for all appeals to the MRP in process at the time of the repeal to be continued and for new appeals to be filed after that date to the extent there is time left in the normal time period for making an appeal. There is no provision in this or any other section for requesting reconsideration of prior MRP certificates. Section 36(2) is limited to the MRP proceedings leading up to the issue of the MRP certificate and would not continue previous rights to request reconsideration that may have existed at the time the appeal to the MRP commenced.

The MRP registrar noted that section 256 of the Act gives WCAT the authority to reconsider WCAT and Appeal Division decisions on certain grounds. She noted:

> Therefore, unlike MRPs, *Bill 63* provided specifically for reconsiderations of past AD decisions. Although it made no such provision for the Review Board, this was likely because there is an alternative remedy relating to the Review Board, notably a right to appeal or request an extension of time to appeal to WCAT.

In her determination, the MRP registrar identified a key difficulty in determining the effect of the legislative changes contained in Bill 63 regarding the possibility of obtaining reconsideration by a MRP:

> The fact that specific provision was made for appealing or reconsidering prior Review Board and Appeal Division but not prior Medical Review Panel certificates is indicative that reconsideration of MRP certificates was

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> not intended. **It might be suggested that this is not significant because even before *Bill 63* there was no specific power to reconsider MRP certificates and it may have been envisaged that the Board would continue its prior practice of reconsidering certificates without specific authority….**
>
> [emphasis added]

The MRP registrar found that this issue required consideration of the Board's general reconsideration power, which was curtailed by Bill 63 to a 75-day time frame. She cited the 1991 decision of the British Columbia Court of Appeal in *Kooner v. BC (WCB)* (1991) 78 D.L.R. (4th) 38, (1991) 54 B.C.L.R. (2d) 83, noting:

> …The court pointed out that "it would be incongruous...that the decision of a medical review panel on an 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." The reverse is true since *Bill 63*. It would now be incongruous that a decision of the MRP could be reconsidered after a lapse of 75 days but not a Board decision that was not appealed to the MRP.

The MRP registrar concluded:

> Another significant factor is that the MRP determined the key medical issues on a claim but did not determine entitlement to compensation. Every MRP certificate is followed by a Board decision determining entitlement to compensation based on the medical findings of the Panel. The 75 day time limit on reconsidering Board decisions applies to these entitlement decisions. Even if significant new evidence, medical or otherwise, is provided suggesting that a decision made more than 75 days before is in error, the decision cannot be changed in the absence of fraud and [*sic*] misrepresentation.
>
> I conclude that, if it were otherwise possible to continue the Board's prior practice of permitting reconsiderations of MRP certificates, this practice would have to be revised in accordance with the obvious intent in the current *Act* that there be limits on reconsiderations and increased finality in decision making. This would suggest that reconsiderations would have to be confined within the 75 day period allowed for reconsidering other decisions, which in practice would mean that no reconsiderations of prior Medical Review Panel certificates could now take place.

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The MRP registrar concluded that reconsideration of a MRP certificate is not available following Bill 63.

(b) Submissions concerning MRP reconsideration

The workers' adviser expresses partial agreement with the MRP registrar, stating that "Since there is no formal succession of MRPs in place, and Section 58(5) no longer exists...the WCB can no longer decide that a new MRP has to examine the worker." However, she does not agree that a new panel needs to be convened. The policy at #103.58 previously stated:

> **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.
>
> [emphasis added]

The workers' adviser submits that the new evidence became available less than three years after the MRP certificate. She submits that in this situation, it should be accepted that this was a reasonable period to reconvene the MRP.

With respect to the fact that the chair of the 2001 MRP has retired and is no longer available, the workers' adviser submits that this does not speak against reconvening the panel. She reasons:

> …Policy item #103.58 said that if the "*original panel members*" could no longer be reconvened, a new panel needed to be convened. It did not say that if the chair was not available, the original panel was defunct. We submit that in order to exercise its authority, the entire MRP does not have to be available. In accordance with the concept of quorum, it is common that administrative tribunals composed of more than one individual can still exercise their authority when a minimum number of a collective is present. In case of the MRP, it appears that the panel members should be

> sufficient to form a quorum, especially since they, as opposed to the chair, are the specialists in the area of medical dispute.
>
> Thus, the MRP should be capable of reconsidering its certificate if a quorum of its members can be reconvened. This avenue was not explored by the MRP Registrar, and unless this is impossible, the argument that the original panel is unavailable should be rejected.
>
> For the reasons outlined above, the issue as to whether there is any body (or bodies) continuing to exist as MRPs after Bill 63 is not relevant for this appeal.

The workers' adviser expresses disagreement with the reasoning of the MRP registrar concerning the significance of the 75-day time constraint on the Board's reconsideration authority. She submits that the Board never had authority to reconsider MRP certificates. Under the former section 65, the Board was unable to act in the case of new evidence showing a fundamental mistake in the original MRP certificate. This was not changed by Bill 63 and the 75-day time limit does not apply.

The workers' adviser further submits that the MRP registrar's reasoning in relation to the *Kooner* decision is not convincing. She reasons:

> ...under new provisions a WCAT decision is final and conclusive (Section 255), yet it can be reconsidered on the basis of new, substantial and material evidence at any time. However, an initial WCB decision cannot be reconsidered after 75 days. We do not think there is any logical justification for this distinction in the law but this is the scheme of the legislation after *Bill 63*.

The workers' adviser further reasons:

> The MRP Registrar indicates that since every MRP certificate requires a WCB implementation decision, the latter would fall under the 75-day rule and could no longer be changed if this time period had expired.
>
> We do not agree. If the new medical evidence shows a fundamental flaw in the original certificate and it has to be reconsidered, the original certificate becomes a nullity and the same happens to any implementation decision by the WCB. We submit that all WCB entitlement decisions that flow from reconsidered MRP certificates have to be done again. This would be under an extended application of Section 65 as it read prior to *Bill 63*. The new certificate would have to be acted upon.

The workers' adviser submits that Bill 63 did not change the ability to reconvene MRPs for the purpose of reconsidering certificates.

(c) Statute and regulations

By Regulation (*Order in Council No. 1038*, November 28, 2002), sections 7, 34 and 36 of Bill 63 were brought into force effective November 30, 2002, and the remaining sections of the Act were brought into force effective March 3, 2003. The Regulation stated:

> On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and consent of the Executive Council, orders that the following provisions of the *Workers Compensation Amendment Act (No. 2), 2002*, SBC 2002, c. 66, are brought into force by this regulation:
>
> ***(a) sections 7, 34 and 36, effective November 30, 2002;***
>
> ***(b) the Act except sections 7, 34 and 36, effective March 3, 2003.***

Section 7 of Bill 63 stated: "***Sections 58 (3) to (5) and 63 (1) are repealed***." Accordingly, these sections governing access to MRPs were repealed effective November 30, 2002 (subject to the transitional provisions contained in section 36 of Bill 63).

Section 6 of Bill 63 stated "***Sections 58 (1) and (2), 59 to 62, 63 (2) to (4) and 64 to 66 are repealed***." As the remainder of Bill 63 (including section 6) came into effect March 3, 2003, these remaining sections governing the establishment, process and effect of MRPs were repealed effective March 3, 2003.

Transitional provisions were contained in Part 2 of Bill 63 (as sections 34 to 44 of Bill 63). Section 34 provided a number of definitions for terms used in Part 2, which included the following:

> **Definitions**
> **34** In this Part:
>
> **"repeal date"** means the date section 7 of the amending Act comes into force [November 30, 2002];
>
> **"transition date"** means the date section 232 (1) of the Act, as enacted by the amending Act, comes into force [March 3, 2003].

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Section 36 of Bill 63's transitional provisions stated:

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.

Under section 36, all MRP proceedings pending on the November 30, 2002 repeal date, were to be continued and completed. As well, workers and employers retained the right to request a MRP examination under section 58(3) or (4), for a medical decision made prior to November 30, 2002 (within the 90 day statutory time frame which applied to the initiation of such requests). Section 36(2) provided that the rights and obligations of the parties to such a proceeding must be determined in accordance with the law as it was on the date the party (or the Board) requested the examination.

Section 44 of Bill 63's transitional provisions contains a power to make regulations:

44 The Lieutenant Governor in Council may make regulations respecting any matters that, in the opinion of the Lieutenant Governor in Council, are insufficiently provided for, or not provided for, in Part 2 of the amending Act and that are necessary

> (a) for the orderly transition to the appeal tribunal of proceedings before the review board and the appeal division, and
>
> (b) for the orderly completion of proceedings before the medical review panel on the repeal date, including the delegation to the appeal tribunal of all or any of the functions or responsibilities of the Board under sections 58 to 64 of the Act.

There has not been any delegation to WCAT of any of the functions or responsibilities of the Board under sections 58 to 64 of the Act, under section 44(b) of Bill 63.

B.C. Reg. 23/2004, entitled *Medical Review Panel Transitional Regulation*, provided:

> **1** If it is necessary for a chair of a medical review panel to be appointed in order to complete any proceedings referred to in section 36 (1) of the *Workers Compensation Amendment Act (No. 2), 2002*, the chair may be appointed by the Lieutenant Governor in Council on the terms and conditions established by the Lieutenant Governor in Council.

(d) Reasons and Findings concerning MRP reconsideration

The analysis by the MRP registrar has flagged a key difficulty in resolving the interpretive issue raised by this appeal. As the Board's prior practice or authority for reconvening MRPs prior to the Bill 63 amendments was not directly based on any specific provision in the Act or policy, there is a question as to the effect of the statutory changes contained in Bill 63.

The analysis by the MRP registrar concerning this question referred to the 75-day statutory constraint on the Board's reconsideration authority contained in section 96(5)(a) of the Act. I agree with the submissions by the workers' adviser on this issue. I do not consider that this limit on the Board's reconsideration authority has any direct relevance to the question as to whether a MRP can be reconstituted to reconsider its decision on the basis of significant new evidence. As this does not involve reconsideration by the Board, the time constraint on the Board's reconsideration authority does not apply. At most, the 75-day time limit on the Board's reconsideration is indicative of a legislative intent to provide for an increased level of the finality in the workers' compensation system. It must also be recognized, however, that the legislature tempered this finality of Board decision-making. Under section 96.2(4) of the Act, the chief review officer has authority to grant an extension of time for review of a Board decision, where special circumstances existed which precluded the filing of a timely request for review and an injustice would otherwise result. The legislature has left a window of opportunity for obtaining review of a Board decision, even after the

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75-day time period for reconsideration by the Board has expired. Accordingly, the 75-day constraint on the Board's reconsideration authority does not reflect a legislative intent that there be absolute finality regardless of circumstance.

As well, policy of the board of directors currently clarifies, at item C14-101.01 of the *Rehabilitation Services and Claims Manual*, *Volume I*, the types of decisions that do not constitute a reconsideration or a reopening of a previous decision. The policy states, in part:

(b) Implementation of Review Division Decisions or WCAT Decisions

> On a review or an appeal, the Review Division and the WCAT may make a decision that confirms, varies or cancels the decision under review or appeal. The Review Division and WCAT decisions are final and must be complied with by the Board.
>
> Varying or canceling a decision may make invalid other decisions that are dependent upon or result from the decision under review or appeal.
>
> The reconsideration and reopening requirements under section 96 do not limit changes to previous decisions that are required in order to fully implement decisions of the Review Division or the WCAT.

The same reasoning would apply in respect of any new certificate issued by an MRP on reconsideration. Implementation of a binding certificate would similarly not involve the Board's reconsideration authority. Implementation of MRP certificates involves a new matter for decision. For these reasons, I do not consider that the 75-day time limit on the Board's reconsideration authority provides useful guidance in determining whether an MRP certificate is subject to reconsideration on the basis of new evidence.

The workers' adviser submits that MRP should be capable of reconsidering its certificate if a quorum of its members can be reconvened. Thus, she submits that the issue as to whether there is any body (or bodies) continuing to exist as MRPs after Bill 63 is not relevant for this appeal.

The provision of quorum findings may be authorized by statute or regulation. For example, section 5 of the *Workers Compensation Act (Review Board) Regulation*, B.C. Reg. 32/86, formerly provided:

> (5) Where a member is unable to complete his duties or responsibilities on a panel, the chairman may
>
> (a) appoint a member, including himself, to replace that person,

(b) **direct that the remaining persons comprising the panel constitute a quorum for the determination of an appeal, and that the findings of the quorum shall be the decision of the panel**, or

(c) exercise his authority under subsection (3).

[emphasis added]

Section 83 of the current Act provides:

83(1) The chair must preside at meetings of the board of directors.

(2) Meetings of the board of directors must be held at the call of the chair at any place in British Columbia that the chair determines.

(3) A majority of the voting directors in office constitutes a quorum at a meeting of the board of directors.

(4) A vacancy on the board of directors does not impair the right of the other directors to act.

[emphasis added]

Section 238(6) of the Act currently provides for the appointment of WCAT "precedent panels" consisting of up to seven members. While the term "quorum" is not used, section 238(10) of the Act similarly provides:

(10) Despite subsections (6) and (7), if a member of a panel constituted under subsection (6) is unable to complete an appeal, the chair may direct the remaining members of the panel to complete the appeal and make the decision of the appeal tribunal.

In the text *Administrative Law in Canada*, Fourth Ed. (Ontario: Butterworths, 2006) Sara Blake states at pages 83 to 85:

A quorum prescribes the minimum number of members of the tribunal who are required to make a decision. Most statutes fix the number of members of the tribunal as well as the quorum. If not, the Interpretation Act may fix the quorum. A vacancy in the tribunal does not affect the tribunal's ability to make decisions provided a quorum remains. A statute may permit the Chair of the tribunal to reduce the quorum on a case-by-case basis.

...

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Where a quorum is prescribed by statute or regulation, a hearing by fewer than that number is invalid and a decision is void. If one member is lost, leaving no quorum, the remaining members may not continue the hearing. They cannot continue even if the absent member is replaced, because the replacement has not heard the evidence presented before joining the panel. A new panel must commence the hearing anew. Similarly, if the tribunal is constituted by a single person who is unable to complete the proceeding, the replacement must start the proceeding anew. Lack of a prescribed quorum may not be waived by the parties because the purpose of a quorum is to serve the public interest through the collective wisdom of a minimum number of members. However, a change in the membership of the panel part way through a hearing may be waived.

Most cases regarding quorum are concerned with loss of a quorum because of loss of a member. A person who ceases to be a member of the tribunal also ceases to be a member of each hearing panel to which the person is assigned, unless the statute provides that the member's appointment continues for the purpose of completing ongoing proceedings and rendering decisions….

[footnotes removed]

Section 18 of the *Interpretation Act*, RSBC 1996, ch. 238, provides:

18 (1) **If in an enactment an act or thing is required or authorized to be done by more than 2 persons, a majority of them may do it**.

(2) If an enactment establishes a board, commission or other body consisting of 3 or more members, in this subsection called the "association", the following rules apply:

(a) if the number of members of the association provided for by the enactment is a fixed number, at least 1/2 of that number of members constitutes a quorum at a meeting of the association;

(b) if the number of members of the association provided for by the enactment is not a fixed number, at least 1/2 of the number of members in office constitutes a quorum at a meeting of the association, as long as the number of members is within the maximum or minimum number, if any, authorized by the enactment;

(c) an act or thing done by a majority of the members of the association present at a meeting, if the members present

constitute a quorum, is deemed to have been done by the association;

(d) a vacancy in the membership of the association does not invalidate the constitution of the association or impair the right of the members in office to act, if the number of members in office is not less than a quorum.

[emphasis added]

With respect to MRPs, however, responsibility for certifying to the Board was not assigned to the MRP as a whole. The Act formerly provided in sections 60 and 61:

> 60 Within a reasonable time after the appointment of the specialists, the chair must arrange for the examination of the worker, and a review of the records of the board, by the chair and the other members of the panel.
>
> 61(1) The decision of a majority of the panel is the decision of the panel, and within a reasonable time after the examination of the worker **the chair must certify to the board** ...

[emphasis added]

As responsibility for certifying to the Board was specifically assigned to the MRP chair, I do not consider that section 18 of the *Interpretation Act* operates to authorize the remaining members of the MRP to reconsider their certificate on a quorum basis.

Under the former Act, responsibility for certifying to the Board on behalf of the MRP rested with the MRP chair. While section 61(1) of the Act permitted a majority decision, it did not contemplate a quorum decision. Given the process set out in section 59 for the selection of one specialist by the worker and another specialist by the employer, and the requirement that the chair certify to the Board, I do not consider that the statute contemplated the provision of quorum findings (in which one specialist or the chair was absent).

Accordingly, it is necessary to find some other basis for determining whether reconsideration of the 2001 MRP certificate on the basis of significant new medical evidence is still available to the worker, or whether the right to seek such reconsideration was extinguished by Bill 63.

To the extent the worker's request for reconsideration by the MRP is seen as requiring an exercise by the Board of its authority under the former section 58(5), that avenue is no longer available. Section 58(5) of the Act was repealed effective November 30, 2002, subject to section 36 of Bill 63's transitional provisions.

Another obstacle stems from section 6 of Bill 63, which concerned the repeal of sections 58 (1) and (2), 59 to 62, 63(2) to (4) and 64 to 66. These provisions concern the authority for the Lieutenant Governor in Council to appoint a MRP chair and to appoint a medical committee to prepare lists of specialists, the procedures for appointing MRPs in individual cases, the examination by the MRP, certification by the MRP, the authority of the MRP to determine its own procedure, the payment of the costs of the examination by the Board, the Board's authority to provide a statement of foundational non-medical facts, and the conclusive effect of an MRP certificate. These provisions provide the necessary infrastructure or "support" mechanisms and authority for establishing MRPs.

These provisions are preserved by section 36 of Bill 63's transitional provisions, in connection with MRP proceedings pending on the November 30, 2002 repeal date, and in connection with requests by workers and employers for a MRP examination (within the 90-day statutory time frame which applied to the initiation of such requests) in relation to a medical decision made prior to November 30, 2002.

Section 44 of Bill 63's transitional provisions gives authority to the Lieutenant Governor in Council to make regulations. It might be argued that the issue raised in this appeal is one on which a regulation could be provided, on the basis that it was "insufficiently provided for, or not provided for, in Part 2 of the amending Act". However, section 44 requires both that this condition be met, and that the matter be one which is necessary for the orderly completion of proceedings before the medical review panel on the repeal date (November 30, 2002). In respect of such matters, the Lieutenant Governor in Council was also given the authority to, by regulation, delegate to WCAT all or any of the functions or responsibilities of the Board under sections 58 to 64 of the Act.

In my view, the wording of sections 36 and 44 of Bill 63's transitional provisions provides the best guidance regarding the intent of the legislature. I find no basis for concluding that the "support" mechanisms and authority for establishing MRPs under sections 58 to 64 of the Act continue to exist, except in respect of the "transitional" cases for which provision is made in section 36 of Bill 63. The workers' adviser expresses agreement with the MRP registrar, that the Board can no longer decide that a new MRP has to examine the worker.

While section 36 provides for all appeals to the MRP in process on November 30, 2002 to be continued, and for new appeals to be filed after that date to the extent there was time left in the normal time period for making an appeal, there was no provision in this or any other section for requesting reconsideration of prior MRP certificates. The necessary statutory "support" mechanisms and authority for establishing MRPs, which were previously contained in sections 58 to 64 of the Act, no longer exist.

The new evidence obtained by the worker in this case included MRI reports dated July 21, 2003 and June 15, 2004, as well as expert opinion evidence interpreting these reports. This new evidence did not exist at the time sections 58 to 64 of the Act were repealed. I do not consider that the worker's application for reconsideration may be

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viewed as one which was pending at the time of the November 30, 2002 repeal date or the March 3, 2003 transition date. Accordingly, I am lead to the same conclusion (in connection with this worker's application which was based on new evidence obtained following the Bill 63 amendments) as the MRP registrar at page 3, where she found that there is at this time no body (or bodies) continuing in existence as MRPs that could reconsider prior MRP certificates and the Board has no authority to appoint new MRPs.

At the Second Reading of Bill 63 in the Legislature, the Minister of Skills Development and Labour commented concerning the purposes and effect of the legislative changes (*Hansard*, 2002 Legislative Session: 3rd Session, 37th Parliament, Morning Sitting, Vol. 9, No. 3, October 22, 2002, at page 3935):

> **Hon. G. Bruce:** Mr. Speaker, Bill 63 amends the workers compensation appeal process. It replaces Bill 56, Workers Compensation Amendment Act (No. 2), 2002, introduced May 30 of this year. The new legislation has the same policy goals as Bill 56, but we have made improvements to the legislation....**We have also changed the provisions related to reconsiderations and reopening to increase finality.**
>
> With this bill we aim to make the appeal process more responsive to injured workers and employers alike....The changes that we are introducing will accomplish three main goals: first, limit the amount of time that it takes to reach a decision; second, improve the quality and consistency of decision-making; **and third, end the cyclical nature of the current process**.
>
> [emphasis added]

The Minister further stated (at page 3936):

> The tribunal's [WCAT's] decisions will be final and binding, and the possibility for future reconsideration of the matter by the WCB has been eliminated. **This will break the endless cycle of appeals that is perpetrated under the current system. It has been reported by some that this lack of finality has been as difficult to endure as the initial injury. We need to break that cycle and let people get on with their lives.** What we are proposing is a fair and balanced system that places a real emphasis on timeliness and quality and consistency of decision-making.
>
> This bill also includes extensive transitional provisions that ensure those with appeals in the system or the right to appeal will be treated fairly and equitably. Anyone with an appeal filed in the system will have that appeal

> heard....When the legislation takes effect, those with the right to file an appeal will be able to do so under the previous time limits.
>
> [emphasis added]

During the Committee Stage of Bill 63, the Minister provided additional explanation concerning the effect of the Bill 63 amendments on the opportunities for seeking further consideration based on new evidence. *Hansard* records the following exchange between the Minister and opposition member (*Hansard*, 2002 Legislative Session: 3rd Session, 37th Parliament, Afternoon Sitting, Vol. 9, No. 9, October 28, 2002), at page 4119:

> **Hon. G. Bruce:** ...In respect to a reconsideration, the board has 75 days for a reconsideration and then 23 days — in which time, if there's still not a happy decision with that — for it to go to the Workers Compensation Appeal Tribunal....
>
> **J. MacPhail:** My second question on this was: are the rights for reconsideration under this bill the same as the previous legislation, or do injured workers have fewer opportunities or rights to bring new evidence forward now?
>
> **Hon. G. Bruce:** ...To be clear, you can't take the new evidence back to the board. That decision is made. But you can bring new evidence to the internal review, and you can bring new evidence to the Workers Compensation Appeal Tribunal, the arm's-length organization....

My conclusion regarding the effect of these provisions is consistent with the expressed intent by the Minister to provide increased finality. However, I have not relied on this expression of intent for the purposes of my decision, as that general intent was capable of being fulfilled in a range of fashions.

I similarly note that my determination is consistent with the wording of B.C. Reg. 3/2004, entitled *Medical Review Panel Transitional Regulation*, which provided authority for the appointment of an MRP chair in order to complete any proceedings referred to in section 36(1) of Bill 63. This regulation did not provide authority for the appointment of MRP chairs in the future, for the purpose of reconsidering MRP certificates on the basis of significant new evidence.

Section 35 of the *Interpretation Act* 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,
...

This provision makes section 65 applicable, notwithstanding its repeal, in relation to the binding and conclusive effect of the MRP certificate. It might be argued that having obtained an MRP certificate, the worker could claim that there was a right "acquired, accrued, accruing or incurred" under the former legislation to seek reconsideration of that MRP certificate on the basis of new evidence which was not affected by the repeal of the legislation. I do not consider, however, that the worker had any accrued or accruing right to seek reconsideration (under the former Act) of the MRP certificate, on the basis of new medical evidence which was obtained following the Bill 63 amendments. In this case, the new evidence (and the worker's application for consideration on the basis of this new evidence) did not come into existence until after the Bill 63 amendments. I do not consider that the worker, after these amendments, had any vested right to obtain reconsideration of the MRP certificate on the basis of new evidence obtained after that date. While the situation might be different had the worker's application been initiated to the Board prior to the Bill 63 amendments (see the reasoning in *WCAT Decision #2005-02379* and the decision of the Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General),* [1994] 1 F.C. 742, appeal dismissed, [1994] 3 S.C.R. 1100), I need not address that question for the purposes of this decision. I find that the worker's request for further consideration following the Bill 63 amendments is properly addressed by reference to the amended Act, including Bill 63's transitional provisions.

The legislature has authority to determine the avenues of review and appeal which are available under the workers' compensation system. I am unable to conclude that the legislature contemplated the establishment of MRPs following the Bill 63 amendments, to reconsider prior MRP certificates on the basis of significant new evidence. No authority was provided to support the continuing appointment of such panels, except to the extent specified in section 36 of Bill 63's transitional provisions.

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In summary, I find that the wording of Bill 63 (including its transitional provisions) does not, after these amendments, support an application for reconsideration by an MRP on the basis of significant new evidence.

B. Significant new medical evidence

Both the workers' adviser, and the worker, have provided submissions expressing disagreement with the January 26, 2006 conclusion by the MRP registrar that the new evidence provided in this case would not provide sufficient grounds for a reconsideration to take place.

In view of my conclusion on the first issue, it is not necessary that I proceed to consider whether the new medical evidence provided by the worker constitutes significant new medical evidence warranting a reconvening of the MRP (or establishment of a new MRP).

C. Expenses

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

Conclusion

I confirm the January 27, 2006 determination by the MRP registrar in finding that reconsideration of an MRP certificate is not available to the worker following the Bill 63 amendments to the Act, on the basis of significant new evidence obtained following these amendments. In view of my conclusion on this issue, it was not necessary that I assess whether the new medical evidence provided in this case was significant. Accordingly, based on the reasons provided in this decision and in *WCAT Decision 2005-06751* dated December 19, 2005, the worker's appeal of *Review Decision #26090* dated February 11, 2005 is denied. I confirm the review officer's decision. The case manager has no 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. The MRP certificate is conclusive and binding, and is not subject to reconsideration on the basis of significant new evidence.

Herb Morton
Vice Chair

HM/jd/gw