

Workers' Compensation Appeal Tribunal

Decision # 6

Claim No.: 82-0195

Date of Hearing: October 18, 2000

Date of Decision: December 12, 2000

Appeal Committee Members

Presiding Officer: Heather MacFadgen

Member representative of employers: Jan Stick

Member representative of workers: Karen Waroway

In attendance: The Worker
The Worker's representative - Michael Travill
Observer from the Workers' Advocate's office - Julie Docherty
Reporter/Recorder - Grey Mountain Sound Inc.

Location: Boardroom 1B Main, 419 Range Road
Whitehorse, Yukon Territory

Introduction

By his Notice of Appeal dated June 8, 2000, the worker appeals the decision of the Workers' Compensation Health and Safety Board ("board") Internal Review Committee ("IRC") dated February 18, 1998.

In its decision, the IRC upheld the November 27, 1997 decision of a board adjudicator to terminate the worker's permanent partial disability award which had been paid as a monthly pension benefit since 1990.

The worker and his representative, the workers' advocate, say that the adjudicator has no authority to reduce the permanent partial disability award made by three members of the Board on November 22, 1990.

The workers' advocate asks that the appeal committee reinstate the permanent partial disability award to the amount provided in the Board's decision in 1990. The workers' advocate says that the Board was acting as a "referee" in that decision, according to an earlier version of the *Workers' Compensation Act* in force at the time the worker's claim for hearing loss was accepted. In our reasons we will discuss this earlier legislation and how it applies in this case.

The hearing was held on October 18, 2000 before an appeal committee of the tribunal established by the tribunal Chair under section 18.3 (1) of the *Workers' Compensation Act*, 1992, as amended by SY 1999. C.23, s.11 (the "Act").

At the outset of the hearing, the appeal committee determined that it had jurisdiction under section 18.2(a) and 90.(1) (c) of the *Act* to hear the appeal.

The worker attended the hearing and gave evidence by affirmation. No one appeared on behalf of the employer.

The appeal committee considered all of the worker's record as provided by the board as well as board policies Policy CL-30, entitled "Suspension, Reduction and Termination of Compensation", effective date May 10, 1994; Policy GC-07, entitled "Role of the Medical Consultant," effective date January 26, 1995; and Policy CL - 46, entitled "Permanent Impairment", effective date 94-03-08 also provided by the board as relevant to the matter under appeal according to section 18.3 (4) of the *Act*.

During the hearing, the appeal committee accepted as Exhibit 1 excerpts from the transcript of the December 9, 1997 annual information meeting of the board, specifically pages 127 and 128.

[At the outset of the hearing, the Chair said that any new evidence submitted at the hearing would be provided to the board: the worker and his representative did not object to this.]

For the record, we point out that in a letter to the worker dated May 15, 2000 Karen Ruddy, chair of an appeal panel of the board, advised him that that the appeal panel which had heard his appeal had been unable to come to a decision. Ms. Ruddy referred the worker to the appeal tribunal.

Issues

1. What legislation and policy should be used to calculate the worker's entitlement in this case?
2. Did the adjudicator have the power to reduce the award made in a 1990 decision of the board when new evidence with respect to the worker's degree of hearing loss became available in 1997?
3. If not, should monthly pension benefits be reinstated?

Can, and if so, should, the tribunal re-open the 1990 decision of the board and deal with the new evidence and any other evidence it considers necessary in order to determine whether or not the 1990 decision should be varied?

Background

- (1) The worker has worked underground as a miner at various times since 1961, including 1970-1, 1976, and 1977-82 as a miner in the Yukon.
- (2) In February 1982, the worker reports to WCB that he has "gradual loss of hearing" which he attributes to noise exposure due to his occupation as a miner.
- (3) On April 8, 1982 the "Referee" finds the worker has a permanent partial disability ["PPD"] of 11%. [This award is based on an audiogram on February 5, 1982 which shows a sensory neural hearing loss to 50 decibels which an otolaryngologist diagnoses as "noise induced hearing loss (with a lot of noise exposure in the Yukon)".]

- (4) In June 1982, the worker again sees the otolaryngologist because of worsening hearing problems including sporadic “tinnitus.” [*Dorland’s Pocket Dictionary*, (25th ed.) defines tinnitus as “a noise in the ears, such as ringing, buzzing, roaring, or clicking.”] A second audiogram shows “bilateral moderately severe neural hearing loss” now “averaging 60 decibels” and the specialist reports the “patient is very deaf, making communication very difficult.”
- (5) In July 1982 the worker’s union representative asks for a review under section 22 of the 1973 *Workmen’s Compensation Ordinance* R.O.Y.T., c. W-5 (as amended to July, 1982) [the “Ordinance”] of the original assessment of PPD in light of the second audiogram. On July 29, 1982 the Referee changes his assessment of PPD to 16.8%. The worker requests a lump sum payment instead of monthly pension benefits and receives \$39,935.50.
- (6) In July 1990, further audiometric tests show a profound change in hearing with at least **80 decibel** hearing loss in both ears. The medical consultant says the worker should therefore be considered “completely deaf” and suggests a “permanent partial impairment of function of 30%.” The medical consultant also states that since this is the maximum rate for hearing loss, there is “no need for repeat testing” as there is little further that could be offered to the worker. (Because of a marked deterioration in hearing for this worker and several others, the medical consultant recommends checking the calibration of audiogram equipment before action is taken on the claims. This is done and the board’s medical officer reports that the audiogram equipment is in perfect working order.)
- (7) We note that the record indicates that worker continues to report tinnitus and the medical officer questions whether the worker’s high dosage of ASA [commonly known as “aspirin”] for the worker’s osteoarthritis may contribute to the tinnitus.
- (8) In October 1990 the board refers the worker’s PPD to the Board chairperson for further review under section 15 (1) of the *Ordinance*. On November 22, 1990, three Board members increase the PPD by an additional 13.2% based on the latest hearing tests. The worker’s adjudicator calculates a monthly pension benefit of \$281.45 effective September 1990 to implement the new PPD decision.
- (9) In October 1996 an adjudicator reports to the board that the worker’s hearing was reassessed at his request and testing “showed a mild conductive elevation in the right

ear since last testing still falling from severe to profound. The left ear is basically unchanged since last testing [1990].”

- (10) In June 1997, Voc-Aid Disability Management Services did an independent file review of the worker’s claim at the board’s request and recommended an auditory brain response test be done because the pattern of hearing loss in the previous audiogram was “not truly indicative of noise-induced hearing loss.” This comment is not explained.

- (11) On August 16, 1997 the Wild Rose Audiology Clinic in Edmonton reported on their testing of the worker’s hearing loss as follows: “moderate to severe sensorineural hearing loss bilaterally . . . ABR [that is, auditory brain response, hereafter "ABR"] thresholds were in agreement with audiometric thresholds between 1000 Hz and 4000 Hz. We note that it would appear from the audiometric graph and table (attached to the report) that at lower frequencies (250 Hz - 1000 Hz) the worker’s speech recognition threshold occurs at 40 to 50 decibels. However, at higher frequencies (2000 - 1000 Hz) the hearing level in decibels appears to drop for both ears from approximately 55 to **80 decibels** [See #6 above re **80 decibels**]. We cannot understand the corresponding ABR graphs without more information.

- (12) Both the medical consultant and the board’s audiometric technician interpreted the 1997 tests as evidence of a better level of hearing than indicated in the earlier tests. [But see our comment above with respect to 80 decibels.]

On November 27, 1997 the adjudicator (audiometric technician) informs the worker by letter that after a temporary adjustment period of 90 days, the worker will no longer be eligible for further monthly pension benefits because she now assesses his PPD at 15% - - a decrease from the previous 30%. She also writes, “as hearing loss is a permanent disability, the most accurate audiogram must be used in calculating compensation.” She also explains that “there are many reasons why hearing tests show hearing to be worse than it actually is on a permanent basis. Some examples would be illness, ear infections, or use may not be reliable due to outside noises or test equipment, which is not properly calibrated or 'finely tuned' [as written].”

- (13) We note that there is no indication in the record that the worker or his representative were given any opportunity, in advance of the adjudicator’s decision to terminate benefits, to review the new test results or to be heard on whether or not the 1990 PPD award should or could be reduced. If this opportunity was in fact not

provided, given this was an adjudicative decision which affected the worker's entitlement, we think failure to do so is unfair. Workers are entitled to procedural fairness whenever an adjudicative decision with respect to entitlement is made - - not only on appeals.

We also note that the new hearing test was requested by the board because the worker had asked that the board pay for his home to be rewired for a special type of telephone. The board had initially refused and explained that it wanted the new test "to provide a guide for decisions on appropriate services for the worker." In other words, there was no indication to the worker that this new test might affect his PPD.

Lastly, we note that in Chapter 82 of *The Merck Manual* (17th edition) at page 662 the authors state, "auditory brain stem response [that is, ABR] testing cannot be performed on patients with severe hearing loss." Unfortunately, this comment is not explained. In addition, without further information, we have no way of knowing whether or not the worker's tinnitus might affect ABR tests.

(14) It would appear that the worker learned of the decision to terminate his compensation before November 27, 1997 because in a letter dated November 20, 1997 the workers' advocate states his disagreement with the decision and asks how the Claims Department can overturn the prior [that is, 1990] decision of the appeal panel which is not subject to interpretation or reversal. The advocate also asks for any legal opinion on file in this regard. Finally, he asks that if the Claims Department decision is not altered, the matter should be forwarded to the IRC for a hearing.

(15) According to a letter from the Director of Claimant Services to a lawyer the day after the workers' advocate's letter (of November 21, 1999) to the board, the Claims Department asks for legal advice on the question of whether or not an adjudicator can alter a PPD award previously set by the board when the adjudicator receives new information about the worker's degree of impairment. We will discuss the legal opinion in our reasons.

Analysis of the Issues/Reasons

Issue #1: What legislation and policy should be used to calculate the worker's entitlement in this case?

- (16) The worker reported his “accident,” that is, his hearing loss, to the board in February 1982. His claim for PPD was accepted later that year but effective from February 1982.

Section 90 (a) of the current *Act*, the “transitional provision” states, “where a worker is entitled to compensation as a result of a disability caused in 1982 or earlier, the worker’s entitlement to compensation shall be determined pursuant to predecessor legislation as it was in force before January 1, 1983. [Emphasis added.]

The Legislation

- (17) Therefore, we find that the *Workmen’s Compensation Ordinance, 1973, R.O.Y.T. c. W-5* as amended to February 1982 (the “*Ordinance*”) is the legislation to be used to determine the issues of entitlement in this case. We find that the following sections of this legislation are relevant to our decision on this case.

Section 2 (1) - Definitions

“Board” means the Workers’ Compensation Board established pursuant to subsection 10 (1);

“Commissioner” means the Commissioner of the Yukon Territory or such other person that may be authorized by the Commissioner to act on his behalf, including the Workers’ Compensation Board;

“referee” means the person appointed as referee pursuant to section 10.

Sections 10 (1)

The Commissioner may designate a person to act as referee.

Section 11

- (1) Except as otherwise provided by this Ordinance, the referee has exclusive jurisdiction to examine, inquire into, hear and determine all matters and questions arising under this Ordinance and referred to him by the Commissioner, and the action or decision of the referee thereon is final and conclusive and is not open to question or review in any court, and no proceedings by or before the referee shall be restrained by injunction, prohibition or other process or proceedings in any court or be removed by *certiorari* or otherwise into any court, nor shall any action be maintained or brought against the referee in respect of any act or decision done or made by him in the honest belief that the same was within his jurisdiction.

- (2) Without restricting the generality of subsection (1), the exclusive jurisdiction of the referee extends to examining, inquiring into, hearing and determining
- (a) whether an accident is an accident within the meaning of this Ordinance;
 - (b) whether disability exists by reason of an accident and the degree of such disability;
 - (c) the duration of disability by reason of an accident;
 - (d) whether earnings capacity has been impaired by reason of an accident and the degree by which it has been impaired;
 - (e) the amount of average earnings; . . .
 - (k) whether a workman or a dependant is entitled to compensation under this Ordinance.
- (3) The referee has the power to examine, inquire into and hear any matter that has been dealt with by him previously and, on such examination, inquiry or hearing, has the power to rescind or vary any decision or order previously made by him. . . .
- (9) Every person aggrieved by a decision of the referee or any person administering this Ordinance may appeal to the Commissioner who may refer the matter to the referee or back to the referee.

Section 15 (1)

A claim for compensation in respect of a permanent disability or death **shall** be referred by the Commissioner to the referee and shall be determined by the referee.

Section 21

- (1) A workman who claims compensation or to whom compensation is payable under this Ordinance shall submit himself for medical examination or investigation in such manner and at such time as the commissioner or the referee may require.
- (2) **If** a workman does not submit himself for medical examination or investigation as required by the Commissioner or the referee, **or if** he in any way obstructs such examination or investigation
- (a) his right to compensation or, if he is in receipt of a periodical payment, his right thereto, is suspended until the examination or investigation has taken place, and
 - (b) the condition found upon such examination or investigation shall, unless the Commissioner or the referee otherwise directs, be deemed to have

been the condition of the workman in relation to his disability, at the time for which the examination or investigation was called.

Section 26

- (1) Where an amount is payable periodically to a workman as compensation, the payment thereof may be reviewed at any time by the referee at the request of the workman or the workman's employer and, on the review, the referee may
 - (a) reduce the amount of compensation payable,
 - (b) terminate the payment of compensation, or
 - (c) increase the amount of compensation payable to an amount not exceeding the maximum provided by this Ordinance.

Section 28

- (1) Where compensation is payable in respect of partial disability of a workman and the disability has not impaired by more than ten percent the work capacity enjoyed by the workman immediately before the accident, the Commissioner may pay to the workman a lump sum payment at the written request of the workman.
- (2) Where compensation is payable in respect of partial or total disability of a workman and the disability has impaired by more than ten percent the work capacity enjoyed by the workman immediately before the accident, periodic payments of compensation maybe commuted to a lump sum payment at the written request of the workman.

Section 39

- (1) Where a workman is entitled to compensation because of an accident that causes permanent partial disability, he shall be paid each week for so long as he lives a percentage of the amount to which he should have been entitled under section 38 had he suffered permanent total disability as a result of the accident, equal to the percentage impairment of his earning capacity as estimated by the referee in accordance with subsections (2) and (3).

All emphasis in the legislation set out above is added by the appeal committee.

The 1977 amendment with respect to the powers of the "referee" (see above) is set out in section 10.1 which says at subsection (1), (2), (3), and (8) as follows:

- (1) The board may administer this Ordinance on behalf of the Commissioner and the Commissioner shall delegate to the Board all administrative duties under this Ordinance.

- (2) The Board shall appoint a secretary and a staff of such other persons as it considers necessary for carrying out the provisions of this Ordinance and it may designate their duties.
- (3) The Board may delegate all or any of its powers of administration to such of the staff as it delegates.
- (8) The Commissioner shall designate the Board to act as referee, to have and exercise all powers, duties, responsibility and jurisdiction vested in the referee pursuant to this Ordinance.

Clearly the referee's powers are given to the Board, not the staff. We find that the referee's adjudicative power with respect to determining partial permanent disability is not a "power of administration." Even if it were, any delegation of such power to an adjudicator by the Board would have to be conferred and there is no indication in the record that this ever occurred.

Further, section 10 of the amending Ordinance provides as follows:

- (1) There is hereby established a body corporate, to be known as the Workers' Compensation Board consisting of four members appointed by the Commissioner as follows:
 - (a) one member shall be appointed from among representatives of industry in the Territory;
 - (b) one member shall be appointed from representatives of labour in the Territory;
 - (c) the remaining members shall be appointed from among representatives of the public-at-large in the Territory, one of whom shall be designated as Chairman . . .
- (4) Three members of the Board constitute a quorum and the Board may act on all matters and things required to be done by it on the decision of the quorum of the members.

After the date of the worker's 1982 "accident" there are further amendments to the legislation effective January 1, 1983, whereby the definitions of "referee" and "commissioner" are deleted and the section 11 power of the referee is given to the board. In addition, section 15 is amended as follows:

11. (1) The following sections are substituted for section 15:

15. (1) An application for compensation shall be dealt with an determined in the first instance on behalf of the Board by one of more claims officers.
 - (2) Where a permanent disability results from an accident, the evaluation of the workers' disability shall be made on behalf of the Board by one medical and one non-medical person selected by the Board.
- 15.1 (1) Where the Board makes a decision as to the entitlement of a worker or his dependent to compensation, it shall advise the worker and his employer as soon as practicable of the particulars of its decision, and upon request it shall provide him or his employer with a summary of the reasons for its decision, including medical reasons.
 - 15.2 (1) Upon the written request of a worker or his employer, the Board shall cause the record of the worker's claim for compensation to be reviewed by a review committee appointed by the Board, and the review committee may . . . (b) confirm, vary or reverse any decision made in respect of the claim . . .
 - (3) A decision of the review committee under subsection (1) may be appealed to the Board by the worker . . .

(In other parts of this amending legislation for accidents occurring after 1982, the compensation scheme is changed to what is often referred to as a "dual award system" - - but these changes do not affect the entitlement for this worker.)

Between the 1990 decision of the Board with respect to the "additional 13.2% pension entitlement" and the adjudicator's 1997 decision to terminate this pension, [i.e., to reverse the Board's decision] there are further amendments which give powers formerly exercised by the review committee to the IRC and which give powers formerly exercised by the Board to "appeal panels" of the Board.

Then subsequent to the adjudicator's 1997 decision, there are further amendments via Bill 83 whereby first level appeals now are heard by a Hearing Officer and second level appeals are heard by the appeal tribunal.

Policy

(18) Now we turn to the question of what policy is applicable in this case. During the hearing, the workers' advocate filed Board Policy No. 24, entitled, "Permanent Physical Impairment." It was his view that it did not apply to this claim. As we found in Decision #5, where policies are "of a rule-based character" having

"statutory force", they come within the term "legislation" as used in section 90 set out earlier. On our reading of this Policy it fits this description and therefore, we find this Policy does not apply to the worker's case, as it was passed after the date of his disability in February 1982. (The Policy states it was passed on December 16, 1982 and it also states it "applies to all accidents occurring after 1982.") For the same reason, we find that Policy CL -30, entitled, "Suspension, Reduction and Termination of Compensation," effective May 10, 1994; Policy GC-07, entitled, "Role of the Medical Consultant," effective dated January 26, 1995; and, Policy CL-46, entitled, "Permanent Impairment," effective date 94-03-08 do not apply to this worker's case. Nevertheless, we do discuss CL-30 later in these reasons.

Issue #2: Did the adjudicator have the power to reduce the award made in a 1990 decision of the Board when new evidence with respect to the worker's degree of hearing loss became available in 1997?

(19) This is the issue identified and addressed by the IRC in its decision. It is clear that in its analysis, the IRC relied on (a) the legal opinion provided to the board by letter dated December 2, 1997 and its analysis of section 25 of the 1982 legislation and section 14 (1) of the 1992 legislation as well as on (b) Policy CL-30 -Suspension, Reduction and Termination of Compensation.

(20) We will deal first with the legal opinion. It concludes that "new medical or other evidence when requested under s. 14 (1) of the 1992 Act [as was the case here] permits the adjudicator to alter the pension or other payments and the findings of the report do not require the matter to be returned to the Board It also does not matter whether the decision of the adjudicator is to increase or decrease the award." We disagree.

(21) We find there is a distinction between those cases where a PPD award is increased and those where it is decreased. Increases are not uncommon: some work-related conditions continue to deteriorate over time and evidence of this can lead to a decision that there is further or additional disability due to the change in circumstances. In such cases, in effect, the original award is not reversed -- it is "added to". For instance, in this case, the Board members in the 1990 decision say: "Prior to this latest hearing test, the worker was assessed as having a 16.8% permanent partial impairment of the whole person. The increase in PPI is 13.2%. The worker is entitled to an additional 13.2% pension."

In contrast, a decision to decrease an award, as happened here, in fact reverses the earlier decision and is done not because of a change in circumstances but rather because of new evidence. This is unusual. The question we must answer is whether

or not an adjudicator has the authority to reverse an earlier appellate body's decision on the basis of new evidence. We find that the adjudicator does not have this authority.

- (22) The legal opinion and the IRC both conclude that the adjudicator has such authority because if she did not, it would prevent the operation of section 25(1) of the 1982 legislation. We disagree. As set out earlier, section 25 (1) provides: " a worker who claims compensation or to whom compensation is payable under this Act shall subject himself for medical examination or investigation as required by the board. . . ." The legal opinion goes on to state "clearly the board through the adjudicator had the ability to request a further investigation including that of a hearing specialist." We agree. But the opinion continues: "the Board did not have the jurisdiction to prevent the operation of section 25(1) of the 1982 Act." It appears that the lawyer in his opinion and the IRC in its decision assumed that any requirement that the new evidence be returned to the Board (or an appeal panel) for determination somehow prevented the operation of section 25(1) [or the similar section 14(1) of the 1992 legislation].
- (23) First, we find that logically there is no reason to assume this. Whether or not the adjudicator or the Board (or Board appeal panel) or anyone else has the authority to change the decision does not affect the board's powers under section 25(1) [or s. 14.2]: these sections deal with the board's authority to require a worker to have a medical examination or investigation. The answer to the legal question of where evidence obtained under s. 25 or 14 then goes for determination or re-determination does not prevent the operation of either section.
- (24) Second, in our view, there is nothing in either s. 25 or s. 14 which expressly or by necessary implication gives authority (that is, jurisdiction) to an adjudicator to alter an award made by a referee, by the Board or by a Board appeal panel although it is clear that these bodies have the power to alter their own previous decisions. In this regard, we note that in Exhibit 1 the Chair of WCB in 1997, John Wright, at the annual information meeting took and answered the following question:

Mr. A: In section 97.5 of the 1992 Act, it states: a decision of the Appeal Panel is deemed to be a decision of the Board. How can a civil servant, such as a WCB adjudicator, overturn or overrule an Appeal Panel decision? Because it's happening.

My second question is, can a WCB adjudicator overturn or overrule an IRC decision?

The Chair: I can answer that. I can say that an adjudicator cannot overrule a decision by an Appeal Panel. And I can tell you that an adjudicator cannot

overrule a decision by an IRC . . . if it's happening, it's illegal . . . then it's an issue that should be brought to the Board's decision, because that kind of decision making is inconsistent with the Act.

We agree.

- (25) Third, and as pointed out by the workers' advocate in the hearing, the 1982 *Ordinance* clearly states in section 15: "permanent disability shall be determined by the referee." In addition, this "jurisdiction" is "exclusive" [see section 11(1) set out earlier]. And most importantly, the *Ordinance* makes it clear that "reconsiderations" or "reviews" of awards made by the referee go back to the referee [see sections 11(3) and 15(3) as set out earlier]. Of course, the referee no longer exists. By a series of amendments discussed earlier, the referee's powers have been exercised by the Board, then in turn by an appeal panel of the Board; and they could be exercised by the appeal tribunal, in certain circumstances.
- (26) The legal opinion also says that if an adjudicator has authority to require further medical examination, he or she must have the authority to "act" when new medical or other information comes into his or her possession. This makes sense. The question then is, what "action" is authorized? Our answer is that the adjudicator can "act" on the evidence by referring it back to the decision-maker authorized under the legislation to reopen and alter, if necessary, the previous decision.
- (27) Next, we consider the IRC's reliance on Policy CL-30 in its decision. As we said earlier in these reasons, with respect to issue #1, this policy should not have been applied. However, should we be wrong in this, we nonetheless do not think that Policy CL-30 can be interpreted to give jurisdiction to an adjudicator to change the Board's award decision where the *Act* does not. The policy must come within the terms of the *Act*, not the other way around.

In section B, the policy sets out 10 different circumstances which allow a *claims adjudicator* to suspend or reduce compensation: none apply here and this case involves termination of compensation, not suspension or reduction.

In section E, the policy sets out seven circumstances in which "a worker's compensation shall be terminated if it is determined that: 1. there is no disability. . . ." [first circumstance]

We note that unlike section B, this section does not state that the adjudicator can terminate compensation. And of course this section also requires a determination that there is no disability before compensation can be terminated -- which brings us full circle to the question of who is authorized to make this determination in

circumstances where there is already a decision on disability from the Board as here. We have already answered this question.

- Issue #3:**
- (a) If not, should monthly pension benefits be reinstated?
 - (b) Can, and if so, should, the tribunal re-open the 1990 decision of the board and deal with the new evidence and any other evidence it considers necessary in order to determine whether or not the 1990 decision should be varied?

(28) Our answer to (a) is yes. It follows that since the award has already been made by the Board (exercising the powers of the "referee") and since we have found that the adjudicator has no authority to reverse this award in the circumstances of this case, the worker's monthly pension benefits should be reinstated unless and until the award made by the Board is changed by the body with authority to do so.

(29) Strictly speaking, issue #2 is the only issue before us on an appeal from the IRC's decision. The hearing has closed and we have dealt with the issue arising from the IRC decision. However, the question arises [(b)] as to what to do about the 1997 test results.

We find that this evidence raises a number of questions. For instance, what role might the worker's tinnitus play in any variability in test results? Is the tinnitus work-related? Is it a condition that never goes away but that nevertheless waxes and wanes? Also, it appears from our review of the record that the worker has other work-related disabilities filed as separate claim(s) which we have not reviewed. What are they and do any of these interact in any way with hearing (for instance, due to prescribed medication as alluded to in the record, see paragraph 7)?

In the circumstances, we will not reopen the appeal panel's decision, assuming (without deciding) we have that authority, unless we are requested to do so.

Conclusion

The appeal is allowed. The decision of the IRC is reversed as follows:

1. The 1990 PPD award made in the Board's decision still stands. The adjudicator's 1997 decision is null and void.

2. The board must compensate the worker for pension benefits which were wrongly terminated by the adjudicator, beginning from the date of termination.
3. Unless and until the 1990 decision is changed by the person with authority to do so, the board must continue to pay compensation to this worker in accordance with the *Act* and the 1990 decision.
4. Interest shall be paid in accordance with section 19.4 (of the current *Act*) on compensation payable as a result of our decision.

Dated this **12th** day of **December, 2000** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Karen Waroway, Member