

Workers' Compensation Appeal Tribunal

Decision # 15 – Board Direction to Rehear

Claim No.: 82-0195

Reasons for Review: Received from the Board February 5, 2001-05-17

Date of Documentary Review: April 30, May 3, May 9, 2001
(Last document received on April 19, 2001)

Date of Decision: June 18, 2001

Appeal Committee Members

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Jan Stick
Member representative of workers:	Karen Waroway

Documentary Review

Location: Boardroom 2A, 419 Range Road
Whitehorse, Yukon Territory

Summary for the Reader

Decision under review: Internal Review Committee decision dated February 18, 1998

Appeal Committee decision summary: This is a rehearing of an appeal originally decided by the appeal committee on December 12, 2000 (Decision #6). The Board under section 18.3 (8) of the *Act* directed that the appeal committee rehear the appeal because the Board decided that the appeal committee had not properly applied the provisions of the *Act* and policies of the Board. However, before this appeal was originally heard in December, an appeal panel had heard the appeal but was unable to reach a decision. Section 97(4) requires the Chair of the appeal panel (unable to reach decision) to direct a new panel. In other words, the *Act* requires that once an appeal panel undertakes an appeal, as here, it will continue as the decision-maker. Therefore, the tribunal has no authority to hear this appeal.

Sections of the Act considered or applied by appeal committee: 97(4)

Policies decisively applied by appeal committee: none

Issue addressed by appeal committee: Does the appeal tribunal have the authority to hear or rehear an appeal where an appeal panel of the board was unable to come to a decision under s. 97(4) of the *Act*?

Decision made by appeal committee:

1. The tribunal has no authority to hear a matter where an appeal panel was unable, as here, to come to a decision under s. 97(4) of the *Act*.
2. Because the tribunal had no authority to originally hear the appeal (and yet it did so), it cannot thereby gain authority to rehear this matter.

Sections of Act considered or applied by internal review committee: 7(1),17(1), 18.4(1),18.3(8), 90, 97.(6), of the *Worker's Compensation Act*, 1992, as amended by SY 1999, c.23, s.11 (the "*Act*"); s. 14(1) of the 1992 *Workers' Compensation Act*; s. 25 of the *Workmens' Compensation Ordinance R.O.Y.T.*, c.W-5 (as amended to July 1982).

Policies considered or applied by internal review committee: CL-30, Suspension, Reduction and Termination of Compensation

Issues addressed by internal review committee:

Does an adjudicator have the authority to vary an award made by an Appeal Panel of the Board when new evidence is presented?

Decisions made by internal review committee:

The adjudicator has the authority to ask for further medical investigation and the authority to act upon that information. It is not relevant whether or not the decision was to increase or decrease the amount of compensation paid to the work.

Introduction

This is a rehearing of an appeal originally decided by this appeal committee on December 12, 2000 [Decision #6].

The members of the Board stayed this decision effective January 16, 2001 under sections 18.3(8) and 18.3(10) of the *Workers' Compensation Act*, 1992 as amended by SY 1999, s. 23, s. 11, (the "Act") and notified the tribunal in a letter dated January 30, 2001 (Notice of Stay signed 31 of January 2001).

On February 5, 2001 the members of the Board set out their reasons under section 18.3(9) for their direction that the appeal committee rehear the appeal.

On February 27, 2001 the appeal committee confirmed that the workers' advocate (on behalf of the worker) was willing to proceed with the appeal by way of documentary review and written submissions in response to the board's written reasons. The workers' advocate provided his written submissions on March 15, 2001.

In addition, on March 14, 2001 the board's hearing officer wrote the tribunal providing an "expanded" list of policies to be relevant to the appeal as follows:

1. GC-09, Transitional Clause
2. GC-07, Role of the Medical Consultant
3. CL-26, Hearing Loss
4. Board Policy No. 42, Previous Hearing Loss
5. CL-30, Suspension, Reduction, Termination of Compensation
6. CL-46, Permanent Impairment

However, since this direction to rehear comes from the Board with respect to compliance with the *Act*, and Board policies, we will confine our consideration of policies (where different from those set out by the hearing officer) to those identified by the board in its February 5, 2001 letter.

On March 19, 2001 the appeal committee met to begin its rehearing by way of documentary review and to consider the Board's reasons as well as the response of the workers' advocate to those reasons.

A number of questions arose from those submissions and so on March 21, 2001 the Chair of the appeal committee wrote to the workers' advocate asking these questions and requiring a response by March 26, 2001. Also, on March 21, 2001 the Chair of the appeal committee wrote to the Chair of the Board asking for further reasons and for answers to several questions by March 26, 2001. The Board responded by letter on April 11, 2001, received by the tribunal April 19, 2001. Its response was also sent to the workers' advocate.

For the record, on June 8, 2000 the worker originally appealed the decision of the Yukon Workers' Compensation Health and Safety Board (the "board") Internal Review Committee (the "IRC") dated February 18, 1998.

As this is a rehearing, the members of the appeal committee have reviewed again and considered afresh the worker's entire record and the IRC decision under appeal.

Jurisdiction

- (1) Although jurisdiction was not an issue addressed by the Board or the appeal committee in the original appeal hearing, as a result of recent decisions by the tribunal and a pending court case, we have decided to deal with jurisdiction as it arises on the facts of this case in this rehearing. We will also address the reasons for rehearing provided by the Board; however, because of our decision on jurisdiction it is not necessary we do so and what we say on the merits is not binding on the board. Our views on the merits are offered only to help the board and the parties.

Issue #1: Does the appeal tribunal have the authority (jurisdiction) to hear or rehear an appeal where an appeal panel of the board was unable to come to a decision under s. 97(4) of the *Act*?

Answer: No

- (2) The tribunal has been operating under new legislation for a little over a year now. As noted in Decision #6, this appeal was originally made to an appeal panel of the board. The Chair of that appeal panel wrote the worker on May 15, 2000 to advise that "pursuant to section 97, the appeal panel, at the conclusion of your hearing has met on several occasions to reach two agreeing votes. Section 97(4) of the *Workers' Compensation Act* states "a decision of the appeal panel requires two agreeing votes and where there is no decision, the Chair shall direct a new hearing before a new panel."
- (3) It is important to emphasize the distinction under the *Act* between two different appeal bodies:
 - (1) "appeal committees" which are established from members of the appeal tribunal created by legislative amendments known as "Bill 83"; and,
 - (2) "appeal panels" which are formed from members of the Board - - these panels pre-existed the Bill 83 amendments and continue in the current *Act* with some changes as a result of Bill 83.
- (4) It is also important to note that under section 97(4), as quoted above, when an appeal panel cannot reach a decision the Chair shall direct a new hearing before a

new panel. (In other words, the *Act* contemplates that once an appeal panel undertakes an appeal, it will continue as the decision-maker.) This section of the *Act* does not say that the Chair may direct a new hearing before a new appeal committee.

- (5) However in this case, the Chair of the appeal panel did not direct a new hearing before a new panel as section 97(4) requires. Instead, she referred the worker to the appeal tribunal.
- (6) Accordingly, the worker filed his Notice of Appeal with the tribunal (June 8, 2000). Prior to June 8, 2000 the tribunal had received verbal legal advice that the question of jurisdiction - - who has authority to hear appeals - - is a matter of procedure, not substance; as such, procedural amendments can operate “retroactively”. In other words, legislation creating the new appeal tribunal could be used to give the tribunal jurisdiction over cases already underway and within the former jurisdiction of an appeal panel. (During the fall of 2000, the tribunal received a written legal opinion to the same effect.)
- (7) Accordingly, the tribunal assumed jurisdiction over the worker’s appeal and this was not disputed. There were no submissions on jurisdiction and it appears that the board and the workers’ advocate (who represented the worker in this case) all assumed the tribunal had jurisdiction.
- (8) However, subsequently, the tribunal has heard arguments and analyzed and ruled on the issue of jurisdiction [see for example, Decision #11]. It has reviewed and relied on a leading case from the Supreme Court of Canada in a number of recent decisions dealing with jurisdiction under our new legislation [see Decision #12 and #14].
- (9) That case is *Royal Bank of Canada v. Concrete Column Clamps (1960) Ltd.* [1971] S.C.R.1038. It says very clearly that jurisdiction is a matter of substance not procedure. The court said, “retrospective operation must not be given to legislation conferring a new jurisdiction.”

Therefore, we find that on the authority of this case and our interpretation of the plain wording of section 97(4) that the tribunal does not have jurisdiction to rehear this appeal. We are sorry to come to this conclusion as we are of the view that the worker is entitled to the reinstatement of his pension. But without jurisdiction we cannot so decide. However, in order to help the parties and the Board, we offer our analysis of the issues in this matter, although what follows is not binding.

- (10) As we explained, currently the issue of jurisdiction in the workers’ compensation context is before the courts in the Yukon by way of a petition brought by a worker and the workers’ advocate. That case was set for hearing on June 8, 2001 but was adjourned. According to court documents, it involves section 97(4) of the *Act*: the worker/petitioner was advised in May, 2000 by the Chair of the appeal panel

hearing his appeal that the appeal panel was unable to come to a decision. The Chair also advised the worker to refer the matter to the newly established appeal tribunal.

- (11) It is likely that the Court in this case, if the petition goes ahead will determine the jurisdiction question with respect to section 97(4). Should the Court come to a different conclusion on jurisdiction than we do in this decision, the appeal tribunal, under section 18.4(6) of the *Act*, can reopen this decision and may rescind or vary it.

[We also point out that on June 1, 2001 we provided our draft reasons on jurisdiction to the workers' advocate and the board, offering an opportunity to make submissions on those reasons by June 14, 2001. The workers' advocate had no further submissions and the board responded that they were in agreement with the appeal committee's draft reasons.]

Fair and Reasonable Consideration

As we stated earlier, we have found that we have no jurisdiction to decide this case. However, what follows are our views on the merits which we offer to help the parties, the board, and the decision-makers who must ultimately decide this case. None of what follows is binding: in other words, we have no power to decide whether or not the worker's pension should be reinstated and so what we say below is not part of our reasons for decision.

- (12) Under section 18.3 (8), we are required to give fair and reasonable consideration to board policies and *Act* provisions as set out in the written reasons of the members of the board (the "Board").

Accordingly, we set out the Board's reasons in this regard. In order to understand those reasons, we briefly set out here the decision which led to the Board's direction to rehear as well as some background to the case.

Background to the Rehearing

(a) From the worker's record

- The worker worked underground as a miner at various times since 1961, including 1970-1, 1976 and from 1977 to 1982 in a mine in the Yukon.

- In February 1982, the worker reported to WCB that he had "gradual loss of hearing" which he attributed to noise exposure due to his occupation as a miner.

- On April 8, 1982 the “Referee” under the Ordinance at the time found the worker had a permanent partial disability [“PPD”] of 11%. [This award was based on an audiogram on February 5, 1982 which showed a sensory neural hearing loss to 50 decibels which an otolaryngologist diagnosed as “noise induced hearing loss (with a lot of noise exposure in the Yukon)”].]
- In June 1982, the worker again saw 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 showed “bilateral moderately severe neural hearing loss” now “averaging 60 decibels” and the specialist reported the “patient is very deaf, making communication very difficult.”
- In July 1982 the worker’s union representative asked 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 changed his assessment of PPD to 16.8%. The worker requested a lump sum payment instead of monthly pension benefits and received \$39,935.50.
- In July 1990, further audiometric tests showed a profound change in hearing with at least **80 decibel** hearing loss in both ears. The medical consultant said the worker should therefore be considered “completely deaf” and suggested a “permanent partial impairment of function of 30%.” The medical consultant also stated that since it was the maximum rate for hearing loss, there was “no need for repeat testing” as there was 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 recommended checking the calibration of audiogram equipment before action was taken on the claims. That was done and the board’s medical officer reported that the audiogram equipment was in perfect working order.)
- The record indicated that worker continued to report tinnitus and the medical officer questioned whether the worker’s high dosage of ASA [commonly known as “aspirin”] for the worker’s osteoarthritis may have contributed to the tinnitus.
- In October 1990 the board referred 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 increased the PPD by an additional 13.2% based on the latest hearing tests. The worker's adjudicator calculated a monthly pension benefit of \$281.45 effective September 1990 to implement the new PPD decision.

- In October 1996 an adjudicator reported 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]."

- 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, and bears closer examination which we will not be able to do here.

- 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 occurred at 40 to 50 decibels. However, at higher frequencies (2000 - 1000 Hz) the hearing level in decibels appeared to drop for both ears from approximately 55 to **80 decibels.**" [See #6 above re **80 decibels**].

- 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) informed the worker by letter that after a temporary adjustment period of 90 days, the worker would no longer be eligible for further monthly pension benefits because she now assessed his PPD at 15% - - a decrease from the previous 30%. She also wrote, "as hearing loss is a permanent disability, the most accurate audiogram must be used in calculating compensation." She also explained 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]."

- 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.

It appears 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.

[Chapter 82 of *The Merck Manual* (17th edition) at page 662 states, "auditory brain stem response [that is, ABR] testing cannot be performed on patients with severe hearing loss" - - comment unexplained. In addition, without further information it is unclear whether or not the worker's tinnitus might have affected ABR tests and could be responsible for the variability in results.]

- 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 stated his disagreement with the decision and asked how the Claims Department could overturn the prior [that is, 1990] decision of the appeal panel which is not subject to interpretation or reversal. The advocate also asked for any legal opinion on file in this regard. Finally, he asked that if the Claims Department decision is not altered, the matter be forwarded to the IRC for a hearing.
- 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 asked 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. (See discussion in Issue #7).

(b) The original hearing before the tribunal

The original appeal was from an IRC decision which confirmed an adjudicator's decision. The adjudicator terminated the worker's monthly pension benefit because of a new hearing test that she and the medical consultant interpreted as indicating a better level of hearing than that of earlier tests: therefore, the worker was "now assessed as having a 15% Permanent Partial Disability . . . decreased from the previous 30%." The "previous 30%" refers to a 1990 PPD award made by three members of the Board by "further review under section 15(1) of the *Ordinance*." The IRC decided that the adjudicator had the authority to terminate or vary [by decreasing] the compensation paid to the worker. The appeal tribunal on the original appeal found the adjudicator did not have the authority to decrease or reverse the Board's 1990 PPD award and reversed the IRC's decision.

Issue #2: The members of the Board say that the appeal tribunal did not correctly apply Policy GC-09.

(a) The Board's Reasons

- (13) Policy GC-09 is entitled, "Transitional Clause". It was approved and effective from 95-03-07 and relates to the former s. 90 transitional clause, before Bill 83 amendments. The Board points out that nowhere in the original decision does the appeal committee consider this policy. The Board points out that Part C of this policy states:

All processes, procedures and administration related to all aspects of a claim shall be pursuant to the *Workers' Compensation Act 1992* regardless of the year in which the claim/disability arose. Examples of such process, procedure or administration are the 'appeal process' or 'access to file'.

- (14) The Board reasons that it is a matter of "process" or "procedure" to determine which decision-maker has the authority to change a Permanent Partial Disability ("PPD") award on the basis of new evidence. The Board also points out that GC-09 deals with process not entitlement and therefore this policy does not come within s. 90(1) (a) of the current *Act* which deals with "entitlement". The Board also says that the tribunal found, in error, that it was only an appeal panel of the Board that could change the 1990 PPD decision.

(b) The Workers' Advocate Response

The workers' advocate says that nothing in Policy GC-09 gives an adjudicator the power to overturn a decision of an appeal panel.

Analysis of Issue #2:

Did the members of the tribunal fail to correctly apply Policy GC-09?

Answer: No, not in our opinion [not binding].

- (15) It is true that the appeal committee did not consider or apply this policy in its original decision. According to section 18.3(4) of the *Act*, the board is required to provide relevant policies that the appeal committee must then consider. GC-09 was not provided by the board for the first appeal (although three other policies were). In our view, this failure points to a lack of thoroughness in discharging the board's s. 18.3(4) duty in the first appeal or at least a lack of consistency.
- (16) The answer as to why Policy GC-09 should not be applied to this case is found in the Supreme Court of Canada's decision in *Royal Bank of Canada v. Concrete Column Clamps (1960) Ltd.* [1971] S.C.R.1038. That case clearly establishes that jurisdiction is not a matter of procedure. Therefore the reference to "procedure" in Policy GC-09 cannot include the matter of jurisdiction. In other words, board policy dealing with procedure in the context of a (former) transitional clause cannot be used to decide what decision-maker has the authority to change the 1990 PPD award. By this we mean Policy GC-09, in our opinion, is not relevant to the issue of jurisdiction in this case.

Before dealing with Issues 3, 4, 5, we wish to address a problem pointed out by the Workers' Advocate in his March 15, 2001 submission. He says that to date, the board has failed to disclose all of the worker's record. Leaving aside the matter of a legal memorandum to the board and minutes of the meeting relating to the Board's decision to stay Decision #6, we note that a written submission, signed by the board's lawyer and apparently made to the appeal panel originally hearing this appeal, was not provided to the tribunal as is required under s. 18.3(4). This submission deals with sections 11, 14, 18 and 93(g) of the *Act*. Had this document been provided as part of the record when we heard the appeal resulting in Decision #6, we could have dealt with these statutory arguments then. Instead, we are only now considering these arguments on a rehearing – the result of an incomplete record at the original hearing is unnecessary delay.

Issue #3: The members of the Board consider that the tribunal failed to comply with sections 11 and 14(1) of the *Act*.

(a) The Board's Reasons

(17) Section 11 of the *Act* states:

A claim for compensation shall be dealt with and determined in

the first instance on behalf of the board by an adjudicator employed by the board.

(18) Section 14(1) of the *Act* states:

The board may require a worker who may have suffered a work-related disability to submit to a medical examination or other evaluation.

- (19) The members of the Board say that in the 1990 PPD decision, the former Board was not acting as an appellate body because there is no evidence of an appeal to the Commissioner in 1982, or during 1990. In contrast, it appears that the members of the Board think that the Board was acting as adjudicator (referee) in 1982 and possibly in 1990.
- (20) The members of the Board state that in addition to “first instance” adjudication powers, the adjudicator can make further entitlement decisions based on new evidence and that an adjudicator must have authority to act when new medical or other information comes into his or her possession.
- (21) [We note that this appears to be what is called a “necessary implication” argument because neither s. 11 nor 14(1) expressly say that the adjudicator can do so when the effect of his or her further decision is to reverse a previous decision of the Board.]
- (22) Further, the members of the Board say that our original decision establishes the following principle: if there is new medical evidence obtained under s. 14, an adjudicator cannot rely on that new medical evidence to provide a variance **either upward** or downward. [As we will explain later, our decision did not state this principle.]

(b) The Workers’ Advocate Response

- (23) The advocate says that section 11 clearly gives the adjudicator power to make decisions on claims in the first instance; but this section of the *Act* does not give the adjudicator power to overturn a board decision. Also he says s. 14 clearly gives the adjudicator power to order a medical evaluation. The advocate notes that the Board’s 1990 decision is “final and conclusive” and therefore cannot be overturned by an adjudicator.

- (24) Importantly, the advocate submits that the adjudicator is not barred from adjudicating on new information in every case but only in those cases where the final decision-maker [i.e., the Board] has already made an entitlement determination and where the new information may indicate that that decision should be reversed.
- (25) The advocate points out that the adjudicator in this case had earlier referred new information indicating a further deterioration in hearing back to the board in 1990 for “further review” rather than making a new entitlement decision herself (see adjudicator’s letter dated October 22, 1990 to the Board Chair).

Analysis of Issue #3: Did the appeal committee fail to comply with sections 11 and 14 of the *Act*?

Answer: No, not in our opinion [not binding].

- (26) The first matter to clarify is this: nothing in Decision #6 hampers an adjudicator’s ability to make further entitlement decisions increasing the amount of a PPD award. As we said in that decision at paragraph 21, such a further entitlement decision by an adjudicator does not reverse or overturn a previous Board decision. It in fact “adds” further PPD award entitlement. Therefore, there is no problem with an adjudicator doing so.
- (27) It is easier to understand this point using an example. Let us say the Board awards a PPD in 1982 of 15% for work-related hearing loss. Then suppose new information in 1997 indicates a further deterioration in the worker’s hearing. It is open to the adjudicator to simply determine that there is a further PPD of 15% based on the new information, because nothing in her decision would have the effect of reversing or overturning the original 1982 PPD award made by the Board. And she would be acting on the new information (per section 14).
- (28) However, in this case, as the worker’s advocate points out, the adjudicator did not do so in 1990 – she in fact referred the new information with respect to deteriorated hearing back to the Board for further review. Most instances of new medical information would be of this type (evidence of further disability).
- (29) However, the new information at issue in this case is unusual and rarely occurs. In 1997, for a third time on the file, new testing information with respect to the worker’s hearing became available and the adjudicator and the Medical Consultant both interpreted this new information as indicating a better level of hearing than that in earlier tests. Instead of returning this matter to the Board to determine if the PPD award should be decreased, the adjudicator decided to reassess herself the worker’s PPD at 15% -- a decrease by half of the previous 30% PPD awarded by the Board in 1990. This decision of the adjudicator clearly

reverses or varies the 1990 decision of the Board. In our opinion, she is without jurisdiction to do so.

- (30) The IRC in its February 18, 1998 decision confirms the adjudicator's decision and decides that she had the authority to make the decision she did under section 14 and 25 of earlier versions of the *Act*. We will deal with the IRC decision later (see Issue #7).
- (31) Lastly, in our view the Board was not acting as a first instance adjudicator, when it made the 1990 PPD award. Under the legislation in 1990 (after the amendments effective January, 1983), "claims officers" dealt with applications for compensation "in the first instance". However, under the 1990 legislation in section 15.1(1) the Board also can make decisions as to entitlement, as occurred here. We think based on these provisions in the legislation as it stood in 1990 that the Board's PPD decision under section 15.1(1) is different from a section 15.(1) decision of a claims officer at first instance.
- (32) We also note that after the "first instance" entitlement decision of April 14, 1982 (11% PPD), the worker's union representative noted by letter on July 22, 1982 the same day a "further review" under section 15(1) and the representative indicated that if the Board's review did not provide a more accurate evaluation of disability, then the worker would take further steps under section 22 of the *Ordinance*. A handwritten note at the bottom of this letter says "hold action on section 2[?] pending the Board's review under s. 15 (1)." (Section 22 allows a worker to allege he has greater disability than that which he has been found to have and to request a medical examination for a certificate with respect to the extent of his permanent disability.) It appears that when the Board made its 1990 [third] decision, the Claims Adjudicator had referred it for "further review" under s. 15(1).
- (33) We also note that in the Board's second PPD decision in August 1982, the Board Chair states "the board therefore rescinds its previous findings of April 8, 1982." Those previous findings were a PPD of 11%. The term "rescind" is typically used in the legislation for a review where an earlier decision is reopened as opposed to a first instance decision.

Issue #4: The members of the Board consider that the tribunal failed to comply with sections 17(1), 18.4(1) and 93 (g) of the *Act*.

(a) The Board's Reasons

- (34) Section 17(1) provides:

Upon the written request of a worker, a dependent of a deceased worker, or an employer, a hearing officer or a panel of hearing

officers shall review any decision made regarding a claim for compensation under section 11.

(35) Section 18.4(1) provides:

The appeal tribunal has exclusive jurisdiction to examine, inquire into, hear and determine all matters arising in respect of an appeal from a decision of the board under subsection 7(1), from a decision of a hearing officer under subsection 17(1), or from a decision of the president under subsection 19(4) and it may confirm, reverse or vary the decision.

(36) Section 93(g) provides:

The members of the board shall

(g) examine, inquire into, hear and determine assessment matters, determinations under subsection 41(5) and appeals under the *Occupational Health and Safety Act*,

(37) The essence of the Board's argument appears to be that Decision #6, now stayed, deprived a worker of "processes" that should be available to him or her when there is new medical or other information available after a PPD award has been made.

(38) The members of the Board say that the tribunal found that only the Board could change the PPD award. This means that the worker cannot have a hearing officer review the Board's decision as hearing officers only review adjudicator decisions.

(39) With respect to s. 18.4(1), the members of the Board say that the tribunal has authority (jurisdiction) to reverse, confirm or vary a s.17 decision (Internal Review Committee or hearing officer) but that in its original decision the tribunal reversed the adjudicator's 1997 decision - - and the tribunal has no authority to reverse such a decision.

(40) In addition, the members of the Board say that our original decision made an order outside of our jurisdiction as follows:

Unless and until the 1990 decision is changed by the person with the authority to do so, the Board must continue to pay compensation to this worker in accordance with the Act and the 1990 decision.

(41) The members say this order is outside our jurisdiction because it is not varying, reversing or confirming the decision of the IRC.

- (42) With respect to s. 93(g), the Board says as a result of our original decision, the only way new medical evidence can be dealt with is by the Board, on its own motion, rehearing it under s.96.(5) or by a direction for a new hearing under s. 97(6). In other words, the new medical evidence cannot be the basis for a new entitlement decision by an adjudicator that can then be appealed to an IRC or hearing officer and then to an appeal panel of the board.

(b) The Workers' Advocate Response

- (43) The workers' advocate says s. 17 is not applicable as this is not an appeal of a s.11 decision and that jurisdiction issues were correctly addressed in the tribunal's Decision #6. The workers' advocate appears to be of the view that the referee's powers in the *Act* as it stood in 1982 at the beginning of the worker's claim were first transferred to the Board in subsequent legislation, then to appeal panels of the Board, and then to the tribunal in the current legislation.

Analysis of Issue # 4: Did the tribunal fail to comply with sections 17, 18.4(1) and 93(g) of the *Act*?

Answer: No, not in our opinion [not binding].

- (44) We agree with the members of the Board that Decision #6 means that once the Board has made a PPD award (as it did in this worker's case in 1990), then if new medical evidence indicates less hearing loss and therefore potentially less disability, then the only thing that the adjudicator can do is send it back to the Board to reopen proceedings. (Actually, the members of the Board indicated that reopening would be the only route for any new medical evidence of either an increase or decrease in hearing loss – but we make a distinction between these two scenarios.) This reopening could occur under either s. 96.(5) or 97(6) of the *Act*.
- (45) Therefore, in our opinion, sections 17, 18.4(1) and 93(g) do not apply to the circumstances of this case but that does not mean that we failed to comply with these sections. There is no need to comply with inapplicable sections of the *Act*.
- (46) The members of the Board also reasoned that the tribunal in Decision #6 reversed a s. 11 adjudicator's decision rather than a s. 17 IRC decision and therefore the tribunal is not in compliance with section 18.4(1) which states that the tribunal can reverse, vary, or confirm only s. 17 (hearing officer or IRC) decisions.
- (47) The IRC found that the adjudicator had the authority to make the decision that she did when she reversed the 1990 PPD award made by the Board and cancelled the worker's pension– the adjudicator's decision was appealed to the IRC. We in turn reversed the IRC decision and found that the adjudicator did not have the legal

authority to reverse the Board's award and cancel the worker's pension payments. Specifically, we said: "The 1990 PPD award made in the Board's decision still stands. The adjudicator's decision is null and void." In our opinion, this statement in our decision is our reversal or variance of the IRC decision. Also, in our view, we have the jurisdiction to make orders which logically and necessarily flow from our reversal an IRC decision. Therefore, we ordered that the board compensate the worker for pension benefits that were wrongly terminated by the adjudicator and we ordered the board to continue to pay these benefits in accordance with the 1990 decision. If we did not have the jurisdiction to so order in Decision #6, who did, once we reversed the IRC decision (leaving aside the jurisdiction problem)?

Issue #5: The members of the Board say that the tribunal is wrong to interpret the *Act* in a way that means "if there is new medical evidence pursuant to s.14(1) nothing will occur as there is no jurisdiction to send the matter back to a hearing officer, Board (Appeal Panel) or Appeal Tribunal." [Emphasis added.]

(a) The Board's reasons

- (48) The members of the Board say that the original decision means an adjudicator can never rely on new evidence to assist the worker with a reassessment of the claim.
- (49) They say that often, medical evidence will be of assistance to the worker. They interpret the original decision to mean that an adjudicator cannot reassess the claim in any case where there is new medical evidence and further that there is no jurisdiction to send the matter back to a Hearing Officer, Board (Appeal Panel) or Appeal Tribunal - - all that is available is a review under s.18.4(6), 96(5) or 97(6) of the *Act*.

(b) The Workers' Advocate Response

- (50) The workers' advocate says adjudicators are not barred from adjudicating on new information, rather they are barred from making a decision on a matter that has been decided finally and conclusively by a higher authority [i.e. the Board in this case].

Analysis on Issue #5: Did the tribunal interpret the *Act* in a way that means "if there is new medical evidence pursuant to s.14(1) nothing will occur as there is no jurisdiction to send the matter back to a hearing officer, Board (Appeal Panel) or Appeal Tribunal." [Emphasis added.]

Answer: No, not in our opinion [not binding].

(51) We have analyzed and answered this point earlier at paragraphs 26, 27, and 44 as well as in the Analysis of Issue #7.

Issue #6 The members of the Board say that the tribunal did not properly apply Policy 42 (Hearing Loss).

(a) The Board's Reasons

- (52) The members say Policy 42, adopted on October 23, 1986, should be applied to a noise-induced hearing loss claim. The members point out that section 3 of the policy sets out the role of the Medical Consultant in providing an opinion on the degree of impairment.
- (53) Interestingly, the members of the Board also point out that section 10 of that policy states: "if such hearing loss was present prior to January 1, 1983, the claim shall be referred to the Board for determination. If such hearing loss was evident only on or after January 1, 1983 the claim shall be adjudicated by the Claims Officer."
- (54) The members go on to reason that there is a conflict between Policy 42 and Policy GC-09 on the issue of whether the Board or adjudicator is the proper decision-maker. They reason that since Policy GC-09 is more recent, and deals with entitlement issues, it should govern and therefore the adjudicator is the proper decision-maker.

(b) The Workers' Advocate Response

- (55) In substance, the advocate says that Policy 42 cannot be applied retroactively to the worker's claim. In addition, he says this policy deals with hearing impairment not hearing disability - - a crucial distinction given the change to a dual award system after the worker's entitlement arose. And lastly, he says this policy has nothing to do with the issue of whether the adjudicator had the legal authority to overturn the 1990 PPD award made by the Board.

Analysis of Issue #6: Did the tribunal fail to correctly apply Policy 42 (Noise Induced Hearing Loss)?

Answer: No, not in our opinion [not binding].

- (56) The members of the Board acknowledge that if Policy 42 were to apply, it directs that the matter be sent to the Board, not the adjudicator, for decision. This is because of section 10 of the Policy which states that where hearing loss is present prior to January 1, 1982, the claim shall be referred to the Board for determination. In this case, the worker's hearing loss arose prior to January 1, 1983.
- (57) However, the members of the Board say that this provision of the policy should not be applied because it conflicts with their interpretation of GC-09 - - which they say requires the matter to be determined by the adjudicator. Further, they say that GC-09 is more recent and deals with "transition issues" and therefore should prevail.
- (58) We disagree. For the reasons stated in our analysis of Issue #2, GC-09 cannot be used to determine the jurisdiction question at the heart of this case and it does not apply.
- (59) We do not think Policy 42 should be applied to this case; however, if we are wrong in this, then it does provide that hearing loss claims must go to the Board for decision. However, in our opinion Policy 42 is of a rule-based character having statutory force. In their reasons in response to our questions, the members of the Board agree as follows: "we are of the opinion that a policy created by the board is of rule-based character with delegated statutory force." Accordingly, in our view, it comes within the term "legislation" as it is used in the current transition provision at s.90 (1)(a) as Policy 42 does deal with entitlement. Because it was passed in 1986 after the worker's entitlement arose in 1982, it should not apply. According to s. 90(1)(a), the predecessor legislation including subordinate legislation in the form of policy which was in place at the time the worker's entitlement arose applies.

Issue #7: Did the IRC err in its review of the adjudicator's decision to reduce the 1990 PPD Board award and to cancel the worker's pension benefits by finding that the adjudicator had the authority to do so a) by necessary implication due to the adjudicator's powers under s.14 (1) of the 1992 *Act* and 25(1) of the 1982 *Act* and b) by application of Board Policy CL-30?

Answer: No, not in our opinion [not binding]

Analysis of Issue #7

- (60) 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.
- (61) 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.
- (62) In our opinion 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."
- (63) In other words, an adjudicator could today make a new "first instance" decision based on new information indicating further or additional work-related disability.
- (64) 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 is whether or not an adjudicator has the authority to reverse an earlier Board decision on the basis of new evidence. In our opinion, the adjudicator does not have this authority.
- (65) 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].

- (66) First, 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.
- (67) 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.
- (68) Third, 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) of the *Ordinance*]. 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)].
- (69) 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? In our opinion, 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.
- (70) Next, we consider the IRC's reliance on Policy CL-30 in its decision. Policy CL-30 cannot 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 vice versa.
- (71) 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.
- (72) 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]
- (73) 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 provided our views on this question.

Conclusion/Decision

1. The tribunal has no authority to hear a matter where an appeal panel was unable, as here, to come to a decision under s. 97(4) of the *Act*.
2. Because the tribunal had no authority to originally hear the appeal (even though it did so), it cannot thereby gain authority to rehear this matter.

As noted earlier, we have given our views on the merits but they are not decisive: however, without jurisdiction our views are not binding, but are offered here to assist the parties and decision-makers that must hear this appeal.

Dated this **18th** day of **June, 2001** in the City of Whitehorse, in the Yukon Territory.

Jan Stick, Member

Heather MacFadgen, Presiding Officer

Karen Waroway, Member