

Workers' Compensation Appeal Tribunal

Decision # 35

Reopen and Vary Decision #2

Claim No.: 92-1177

Date of Notice of Appeal: January 30, 2002

Dates of Hearing by appeal committee: March 21, 22 and April 17, 2002

Due Date of Decision extended from June 20 to June 30, 2002 pursuant to ss.18.(4)(5) of the *Workers' Compensation Act*

Date of Decision: June 25, 2002

Appeal Committee Members appointed under s. 18.3(1) of the *Workers' Compensation Act*

Presiding Officer:	Heather MacFadgen
Member representative of employers:	Donald Inverarity
Member representative of workers:	Karen Waroway

In attendance: The Worker
Reporter/Recorder – Doug Ayers

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

Summary for the Reader

Decision under review: The Hearing Officer's decision of January 28, 2002.

Sections of Act considered or applied by the Hearing Officer: ss. 11 and 17 of the current *Act* and s. 1 and 42 of the *Workers' Compensation Act 1987*

Policies considered or applied by the Hearing Officer: none; however, Board Order 1987/03 is applied.

Issue addressed by the Hearing Officer: "Whether the percent of physical impairment sustained by the worker should be increased to 100%."

Decision made by the Hearing Officer: "There is no evidence to support an increase in the worker's impairment rating. The adjudicator's decision is confirmed."

Sections of the Act considered or applied by appeal committee: ss. 1(1)(f), 14(2), 42(1) and (2) of the *Workers' Compensation Act R.S.Y. 1986* as amended to September 25, 1992; and ss. 18.3(4), 18.4(1), 18.4(6), 19.5 ("merits and justice"); 90.(1)(b); and 90.(1.2) of the current *Act*.

Policies applied or considered by appeal committee: Policy No. 24, "Permanent Physical Impairment"; Policy CL-46, "Permanent Impairment"; (also Board Order 1987/03).

Issues addressed by appeal committee:

1. Did the hearing officer err in denying the worker's appeal on the basis that there was no evidence to support an increase in the worker's impairment rating?
2. Does the worker have a "permanent total disability" consisting of an "injury to the skull resulting in an incurable incapacitating mental disorder" as defined in Section 1(1)(f) of the *Worker's Compensation Act* (the "*Act*") as it stood on the date of his workplace accident?
3. Is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Decisions made by appeal committee: The worker's appeal is allowed. The decision of the hearing officer is reversed and varied as follows:

1. The hearing officer denied the worker's appeal on the basis that there was no increase in impairment without determining (1) whether the worker was permanently totally disabled within the meaning of "s. 1(1)(f)" and (2) whether he was entitled to a total disability award under s. 42 (1) of the *Act*. It was an error to do so. The worker's

notice of review asks that he be found permanently totally disabled under s. 1(1)(f) of the *Act* and states that he should therefore “qualify” for “full remuneration” [i.e. compensation] at 100%. It is clear from the adjudicator’s decision which the hearing officer reviews that the compensation at issue is for an award under s. 42, which must be for “disability” not “impairment”.

2. The worker has a permanent total disability because he has “an injury to the skull resulting in an incurable incapacitating mental disorder” as set out in s. 1(1)(f). He does not have a partial disability.
3. The worker is therefore entitled to full compensation for this total disability under s. 42 (1) because it resulted from a workplace accident which is a disablement arising out of and in the course of employment.
4. Nothing in Policy #24 prevents the board from fully compensating this worker in accordance with s. 42(1).
5. Decision #2 is reopened and varied, changing the final sentence of the conclusion on page 22 to correct an error of law and clarify that (1) the worker’s award under s. 42(1) must be for disability, not impairment, and that (2) the disability determination must take into account the s. 1(1)(f) definition of permanent total disability as analysed in para. 73 to 93 of this decision. Specifically, Decision #2 is varied by changing the final sentence of the conclusion on page 22 to read: “Therefore, the decision of the hearing officer is varied or changed and the worker’s permanent disability award must be adjusted to reflect the fact that he is permanently totally disabled, not partially disabled.”

Introduction

The worker on this appeal makes a statutory interpretation argument. Our decision turns on the difference between the word “impairment” and the word “disability” and on a careful analysis of how these two words are used in legislation and policy we must apply.

- (1) On September 25, 1992, the worker sustained multiple injuries to his head and upper body when he was struck at work by a large post while it was being moved with a loader and chain.
- (2) The worker was previously before the appeal tribunal on June 23, 2000 appealing the decision of the Workers’ Compensation Health and Safety Board (“board”) hearing officer dated April 3, 2000. In that decision, the hearing officer upheld the decision of a board adjudicator who assessed the worker’s permanent partial impairment due to his 1992 work-related injury as a 40% impairment of the whole person. The adjudicator’s decision stated it was made under Board Policy No. 24 “Permanent Physical Impairment” and under the authority of section 42 of the *Workers’ Compensation Act* (“Act”), R.S.Y. 1986.

On July 27, 2000 an appeal committee of the tribunal allowed the worker’s appeal and concluded: “the worker’s impairment of the whole person due to his work-related 1992 head injury is 70%, not 40%. Therefore, the decision of the hearing officer is varied or changed and the worker’s permanent partial impairment award must be adjusted to reflect the new percentage.”

On January 7, 2002 an adjudicator decided she would not award 100% disability under the *Act* after the worker requested she review his entitlement, taking into consideration s. 1(1)(f) of the *Act*.

- (3) The worker filed an appeal to another hearing officer on November 14, 2001 stating his reason for review as follows: “according to the *Workers’ Compensation Act* 1987, page 3, under interpretation 1, ‘permanent total disability’ includes (f) any injury to the skull resulting in an incurable incapacitating mental disorder. This qualifies me at 100% eligible for full remuneration.” In other words, the worker was saying his particular disability comes within the definition of permanent total disability in subsection 1(1)(f) and therefore he is entitled to further compensation beyond that already provided for a partial “impairment” under s. 42 (1).

On January 28, 2002, the hearing officer decided that there was no evidence to support an increase in the worker’s permanent impairment rating and therefore she confirmed the adjudicator’s decision.

- (4) Under section 18.3 (4) of the *Workers' Compensation Act* (the "Act"), the board's hearing officer provided Board Policy CL-46 entitled "Permanent Impairment", (effective March 8, 1994) to the tribunal as relevant to this appeal.
- (5) The worker represented himself in the hearing which was scheduled over three separate days to accommodate the worker's special needs with respect to his disability. He gave evidence under oath.
- (6) The employer was notified but declined to participate.
- (7) The appeal committee considered all of the worker's record as provided by the board as well as Policy CL-46 entitled "Permanent Impairment" effective March 8, 1994 which was also provided by the board as relevant to this appeal.
- (8) During and prior to the hearing, the worker provided the following information for the appeal committee's consideration (some already contained in the record):
 - Letter to the worker from the adjudicator dated January 7, 2002 [should be 2002] accompanied by 2 pages from Black's Law Dictionary;
 - Letter from the worker to the adjudicator dated January 10, 2002;
 - Letter from the worker to the adjudicator dated January 14, 2002;
 - Letter from the Chair, YWCHSB, dated January 29, 2002;
 - Letter from Board General Counsel to the worker dated February 11, 2002;
 - Memorandum from the President & CEO, YWCHSB to the Board Members dated August 11, 2000
 - Board Policy CL-40, Disability, effective date 93-11-10;
 - Board Order 1987/03;
 - Board Policy No. 24, Permanent Physical Impairment;
 - Handwritten document with definitions;
 - Page 158, *Community Health Indicators, Definitions and Interpretations*;
 - Chapter 8, "Neurological Injuries, [no author provided];
 - Chapter 1, 4th Edition, 1993, "Impairment Evaluation", [no author provided];
 - Board Order 1982/02 with *YWCB Physical Impairment Rating Schedule Applicable to All Claims Reported after January 1983 for Publication*; and,
 - Excerpts from *Injury Evaluation Medicolegal Principles*, 1991, by E. Lyle Gross, M.D.

The appeal committee entered as Exhibit 1 a letter to the worker (dated September 21, 1999 from neuropsychologist Dr. S.), on which the worker had highlighted certain portions for the appeal committee's consideration. The worker also submitted during the hearing copies of excerpts from several editions of the American Medical Association's Guide to the Evaluation of Permanent Impairment [AMA Guides] as follows:

- 5th ed. Chapter 1, pp. 1-16 “Philosophy, Purpose and Appropriate Use of the Guides”
 Chapter 2, pp. 17-24 “Practical Application of the Guides”
 Chapter 13, pp. 2/7- 2/12, “Records and Reports”
 Chapter 14, pp. 357-372, “Mental and Behaviourial Disorders”
- 4th ed. Chapter 1, Section 1.5 to 1.7
 Chapter 2, pp.2/7-2/12, “Records and Reports”
 Chapter 14, pp. 14/291 – 14/302, “Mental and Behaviourial Disorders”
- 3rd ed. Chapter 1, pp.1-10, “Concepts of Impairment Evaluation”

We have reviewed all of these documents.

Jurisdiction

- (9) The worker submitted his notice of appeal on January 30, 2002. The transition provision in the current *Act* says at section 90.(1.2): “where a worker . . . has commenced an appeal . . . on March 31, 2000 or earlier, the appeal shall be determined pursuant to predecessor legislation as it was in force before April 1, 2000.” Since the worker began his appeal after March 31, 2000, the current legislation should be used for his appeal: in other words, the appeal tribunal is the appropriate body to hear his appeal.
- (10) The appeal committee has decided that it has jurisdiction under Section 18.4(1) of the current *Act* to hear this appeal.

Entitlement

- (11) A threshold issue on any appeal is determining the appropriate legislation and policy for deciding the issues of entitlement. Again, the transition provision of the current *Act* provides the answer. It says at s. 90.(2) that “where a worker is entitled to compensation as a result of a disability caused in 1992 or earlier, the worker’s entitlement to compensation shall be determined according to legislation as it was in force before January 1, 1993.” The worker was injured in his workplace on September 29, 1992: therefore, it is the legislation in force on that date, prior to January 1, 1993 that must be used to decide any entitlement to compensation under the *Act*.

In addition, as the tribunal has decided in many decisions from #5 forward, it is generally the policies dealing with entitlement in place at the time of the worker's injury that must be applied to his or her case.

Issues

1. Did the hearing officer err in denying the worker's appeal on the basis that there was no evidence to support an increase in the worker's impairment rating?
2. Does the worker have a "permanent total disability" consisting of an "injury to the skull resulting in an incurable incapacitating mental disorder" as defined in Section 1(1)(f) of the *Worker's Compensation Act* (the "*Act*") as it stood on the date of his workplace accident?
3. Is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Evidence from the Record

- (12) On September 29, 1992 the worker was helping to remove a 16-foot signpost with a loader and chain, when the signpost swung around and hit him on the back, knocking him to the ground.
- (13) Shortly after the accident, the worker is admitted to hospital by ambulance with an admission diagnosis of head injury with loss of consciousness. He is treated by a number of physicians and then followed up by his treating physician, Dr. W. The worker is discharged on October 6, 1992 with a discharge diagnosis of head injury with loss of consciousness, as well as other injuries.
- (14) On November 3, 1992 the medical consultant examines the worker, at his request. The medical consultant's report dated November 5, 1992, says, "[the worker] has noted some loss of memory since the accident." Under "Impression" the report says the worker "did suffer loss of consciousness after the injury. There is no evidence of persisting neurologic defect. . . . I anticipate a full recovery with no permanent impairment of function."
- (15) The worker returns to work with his pre-injury employer on March 29, 1993 in a modified work position but is laid off in September 1993.
- (16) Initial and ongoing treatment focuses on the worker's back pain and thoracic vertebral injury. The medical consultant's report dated November 30, 1993, determines that this physical injury resulted in a 5% impairment of the whole

person and on December 20, 1993 an award under s. 42 is made. [This award is not the subject of this appeal.]

- (17) In a note to file dated April 7, 1994 the rehabilitation counsellor contacts the office of Dr. S. a neuropsychologist “regarding a neuropsych assessment. This is in consideration of the fact that the worker did experience LOC [loss of consciousness] in his accident. The possible impact of this has not been addressed to date.”

Psychiatrist’s Medical Report in 1994 of “Compromised Employability”

- (18) Dr. G. of the Department of Psychiatry, Faculty of Medicine, University of Alberta assesses the worker on January 19 and March 7, 1994 and reports in a letter dated May 31, 1994, stating that the worker “has developed a major psychiatric condition subsequent to the head injuries that he has sustained . . . these will be ongoing difficulties which may certainly compromise his employability because of his mood instability and subsequent cognitive difficulties which he may develop.” [Emphasis added.]
- (19) On April 15, 1994, at the Lyle Gross Rehabilitation Centre, the worker has a Functional Capacity Evaluation (FCE). Although it deals primarily with physical capacities, the report notes, “[the worker] reported that he is very depressed and that this affects his concentration” and “recommendations are made in the context of [the worker’s] medical restrictions; given the previous closed head injury and now compression injury of the thoracic spine.”

Second Specialist’s Report - - disability precluding employability

- (20) Dr. S. provides his neuropsychological assessment report to WCB on September 18, 1994. Dr. S. is a clinical neuropsychologist. His report states in part that the worker “is disabled with reference to motor skill, complex, integrated cerebral function, and emotional regulation. Of these disabilities, that involving motor skills is the least disabling for doing activities of daily living and doing his prior work. His emotional disturbance under the present circumstances of mild-to-moderate stress is of severe degree and consequently represents an estimated 70 percent impairment of the whole person. With appropriate treatment and a normalization of stress I would predict a reduction in the degree of emotional disturbance to a mild-to-moderate level (30 – 40% impairment) depending on some improvement in complex, integrated cerebral functions. The latter, which in part may be interactively associated with his emotional disturbance, is more prominent than before the 1992 accident and represents a disability which could preclude or limit future employment. With appropriate treatment and improved emotional modulation it is hoped that there will be some gains in complex,

integrated cerebral functions, gains which should be documented by re-examination in about two years. At present I would estimate this disability to be of minimal significance with reference to activities of daily living but moderately impairing (40%) with reference to competitive employment at a level he is capable of." [Emphasis added.]

- (21) On December 12, 1994 another neuropsychologist, Dr. Sch., at the board's request, reports on his review of test results and assessments of the worker done in 1980 and 1982 following a head injury due to a previous motorcycle accident as well as the results of Dr. S.'s 1994 assessment, the report of Dr. G., a psychiatrist, and the 1994 FCE report. Dr. Sch. does not examine or interview the worker. His report concludes "I find nothing in Dr. S.'s report that would support the conclusion that the 1992 accident caused or exacerbated [the worker's] problems. I must of course point out that I can likewise not conclude that the 1992 accident did not cause or exacerbate them. However, given the presence of a previous severe head injury as well as ongoing history of psychiatric disorder and substance abuse, in my opinion, the cause of [the worker's] neurological disorder at this time, to the extent that he has one, cannot be determined on the basis of available of test results."
- (22) A memo from the rehabilitation counsellor to the worker's adjudicator dated December 22, 1994 after the counsellor reviews the claim file including the reports of Dr. Sch. and Dr. S. says "the problem seems to be that one cannot conclusively rule out that [the worker's] 1992 accident did not contribute to the neurological deficits that he is currently experiencing."

Lack of Timely Treatment

- (23) On May 3, 1999, another rehabilitation counsellor writes a memo to the Director of Claimant Services which states, in part, as follows:

Dr. G. and Dr. S. both stressed that intensive treatment was required in 1994. [The worker's] treatment for his for his psychological/psychiatric condition amounted to ten appointments with a local psychologist and some work with the OT [occupational therapist] at the POWER Program 4 years post-injury. The lengthy process of investigation and the appeal process likely caused the delay. [The worker's] treatment related to his head injury may have been a case of 'too little, too late' to have any real effect

Recommendations

I recommend that [the worker] be referred to a facility that can determine his current physical and psychological status and make recommendations about

treatment options and employability. Specialized testing and treatment required is not available in the Yukon and a facility in Alberta or B.C. is recommended. A new vocational rehabilitation plan will be developed in light of the test results. [The worker] will be consulted in the development of the plan. The focus of the plan should be on assisting [the worker] to secure employment consistent with his physical and psychological status. [Emphasis added.]

Specialist's Reassessment in 1999 – preclusion of most or all types of competitive work/recommendation of MRI

- (24) At the board's request Dr. S. provides a reassessment of the worker on August 30, 1999. He finds minimal change in the worker's level of neuropsychological functioning in comparison to the 1994 assessment results. Dr. S. reports memory impairment resulting in limitations on learning new information, including information that would be part of training for a new job or occupation. He also reports problems with sustained attention (on a test to measure this, the worker performs at a lower level in 1999 than in 1994 but there is improvement on another test). Dr. S. says the worker becomes overwhelmed with multiple sources of information and becomes very angry when he makes mistakes, requiring about a half an hour to regain equilibrium. In addition Dr. S. says the worker's primary obstacle in returning to work in some capacity is his psychiatric disturbance. Dr. S. recommends further investigation including MRI to better understand the worker's cognitive deficits and psychiatric disturbance. Lastly, he says the worker "at present ... is cognitively capable of doing a variety of jobs; however his social discomfort, preoccupied thought process, and vulnerability to stress and information overload preclude most if not all types of competitive work." [Emphasis added.]

- (25) The worker's adjudicator asks the medical consultant to determine if the worker has a permanent partial impairment attributable to his head injury. The consultant's September 24, 1999 report discusses the concept of "impairment" and the methodology in the A.M.A. Guides for determining levels of impairment. In particular he makes reference to the 4th and 2nd editions of the Guides.

As he notes, the AMA Guides suggest four areas for assessing the severity of mental impairment. They are:

- 1) limitations in activities of daily living,
- 2) social functioning,
- 3) concentration, persistence and pace, and

- 4) deterioration or decompensation in work or work like settings.

The medical consultant also points out that the Guides suggest that there are five classifications of impairments: Class 1 no impairment; Class 2 mild impairment in which the levels are compatible with most useful functioning; Class 3 moderate impairment where the levels are compatible with some but not all useful functioning; and Class 4 marked impairment where the condition significantly impedes useful functioning. Class 5 is an extreme impairment which precludes useful functioning.

After reviewing assessment reports, the medical consultant concludes that the worker “may be in a Class 3 moderate impairment of function”: he says that under the 2nd edition this range of impairment would be from 10% to 50% of the whole person; however, he does not choose an impairment percentage and he says the range is “open to interpretation”.

The medical consultant also finds there was an impairment before the 1992 injury which “might” have been a “mild to moderate impairment”.

- (26) On February 10, 2000 the adjudicator writes the worker advising him of her decision that he currently has a 50% impairment but that 10% is attributable to impairment which pre-existed his 1992 injury. Therefore, the adjudicator says the worker is entitled to an “award” of \$16,000 for a 40% permanent partial impairment. [Note the use of the term “impairment” rather than “disability”.]

Not Currently Fit for Suitable Work - 2000

- (27) Two return to work plans dated May 30 and August 30, 2000 state:

. . . [The worker] has researched and referred himself to a brain injury treatment program . . . The focus of the program is on managing cognitive deficits affected by the brain injury to improve life skills and assist in return to work.

. . . [The worker] is not currently fit for suitable work. [Emphasis added.]

- (28) It appears the treatment program in Edmonton is scheduled for November 2000. Notes to file by the rehabilitation counsellor dated July 17, 2000 and July 31, 2000 state:

July 17, 2000 - . . . [The worker] will have some difficulty being successful with treatment. The reason is that his brain injury and psychiatric conditions react in a way that limits his ability to be

self-aware and his psychological mindedness [as written].

July 31, 2000 - The worker asks about further neuropsych testing and “he indicated that his thoughts are towards deeming [rather] than trying to return to actual employment”.

No Final Decision on MRI

- (29) On August 25, 2000 the medical consultant recommends that a decision on whether to arrange MRI scanning “be left to a specialist in that field to determine whether or not this type of sophisticated testing would be helpful”. [There is no evidence in the file that this determination is then requested or made in 2000.] He suggests that the psychiatrist at the treatment program scheduled for September be asked for his opinion on the appropriate imaging diagnostics tests – MRI, etc.
- (30) Notes to file by the rehabilitation counsellor dated January 16, 2001 and January 17, 2001 indicate that while attending the Edmonton Brain Injury Relearning Society (“EBIRS”) rebuilding program, the worker has two mishaps: both involve leaving and forgetting pots on the stove or plugged-in appliances so that in one case there is smoke damage to the worker’s accommodations and in another case, a shattered coffee pot has to be replaced. The worker notifies the rehabilitation counsellor of these incidents “to ensure (WCB) know(s) that he is having difficulty with simple daily living activities as a result of his brain injury”.

MRI Recommended Again – January 2001

- (31) An Edmonton psychiatrist Dr. G. reports January 22, 2001 as follows:
- . . . As for my medical opinion, this individual has continued to show evidence of a persistent change in his cognition. . . . Unfortunately we are still unable to determine the relative severity of many closed head injuries when it comes to objective testing. . . . However, in saying that I think a complete neuropsychological evaluation is always warranted. This would include the neuropsychological testing that he has already had and also tests such as a CAT scan, MRI or SPECT analysis. [Emphasis added.]
- (32) An excerpt from the worker’s EBIRS report received April 9, 2001 states:
- . . . It has been observed that [the worker’s] strengths are in his punctuality, motivation and his ability to independently problem solve in order to adapt tasks. However, when [the worker] was assigned tasks that were more complex in nature

and placed a greater demand on his thinking skills, he was observed to experience increased levels of frustration which interfered with his ability to complete tasks.

- (33) May 10, 2001, the rehabilitation counsellor asks the psychiatrist, Dr. G., by letter whether or not the worker is employable in the competitive job market due to his head injury. The counsellor states that the worker's family physician has left him with the impression that the worker's ability to return to the competitive job market is very low.
- (34) A note to file by the rehabilitation counsellor dated May 10, 2001 states that when he spoke to the worker's family physician, the doctor reported that the worker is "low functioning and decompensates on a regular basis." [Emphasis added.]

Specialist Recommends MRI and concludes worker disabled from returning to competitive work

- (35) A note to file by the rehabilitation counsellor dated June 1, 2001 reports a voice mail message from Dr. G. saying: "Ideally it would be best [for the worker] to get an MRI, wherever possible . . ." Dr. G. also suggested follow-up neuropsych testing and states:

I am not certain that I could indicate that [the worker] has got the psychological or mental capacity to be back into the competitive workforce. I think that he is impaired to the point where he is likely disabled longstanding and not likely anything can be done psychologically or psycho-pharmacologically that will make a significant difference that will put him into the position that he is competent enough to return to a competitive work opportunity. [Emphasis added.]

The board's rehabilitation counsellor's subsequent notes state: "I understand this to mean that [the worker] is not capable of work now or in the future".

Results of June 2001 MRI

- (36) An MRI of the worker's brain is performed on June 27, 2001. A report dated September 21, 2001 by Dr. S. provides a plain language interpretation of the MRI report. This interpretation is reviewed and signed by Dr. A., a neuro-radiologist. It states as follows:

. . . This report indicates that [the worker's] brain has multiple

structural abnormalities that are consistent with the residual effects of injuries to the brain . . .

The damage that occurs with head injuries is of three types: bruising (contusions), tearing of nerve fibers (axonal injury), and cell death due to secondary causes like swelling and bleeding associated with increased pressure within the skull. [The worker] had all three types of injury to the brain. . . .

The damage to [the worker's] brain as visualized on this MRI would be expected to result in significant cognitive deficits as documented in prior neuropsychological assessments. The effects of the brain injuries in 1980 and 1992 could be expected to become more pronounced with progressive aging and the loss of nerve cells associated with aging.

Permanent Inability to Work

- (37) On July 18, 2001 the rehabilitation counsellor writes the adjudicator summarizing medical reports and recommending that the worker be “considered not employable and deemed capable for earning \$0. There is no intervention that can improve [the worker's] brain injury. His inability to work should be considered permanent”. [Emphasis added.]
- (38) On July 30, 2001, the adjudicator writes a memo to the medical consultant advising that the worker is requesting a review of his permanent partial impairment award. “He feels that because he has been deemed unfit for any form of employment, he should be considered 100% PPI”. [We note again the use of the term “impairment” rather than disability by the adjudicator.]
- (39) [We also note here that there is no indication in the record that the worker asked the adjudicator in 2001 (or subsequently the hearing officer or appeal committee) to increase his impairment rating.]

The Medical Consultant's Explanation of the Difference between Impairment and Disability

- (40) The medical consultant's report to the adjudicator provides a very helpful distinction between the terms “disability” and “impairment”; therefore, we set out an extensive excerpt from his report as follows:

. . . The Yukon board utilizes the *American Guides to the Evaluation of Permanent Impairment 4th Edition* in assessing levels of permanent impairment. The guides define **impairment** as “a deviation from normal in a body part or organ system and its functioning”. Impairment is assessed by medical means and is considered a medical issue. Impairments are defined as conditions that interfere with an individual’s “activities of daily living”. Activities of daily living include, but are not limited to, self-care and personal hygiene; eating and preparing food; communication, speaking, and writing; maintaining one’s posture, standing, and sitting; caring for the home and personal finances; walking, traveling, and moving about; recreational and social activities; and work activities.

In this definition, note that work activities are a relatively minor consideration in terms of an impairment.

Someone who is impaired is not necessarily disabled, as **disability** refers to an activity or task the individual cannot accomplish. As an example, a mechanic could lose his hand and be considered 100% disabled from performing his normal occupation. A bank president could suffer the same injury but still be capable of making the millions of dollars a year salary that he earned prior to the injury. For both, the AMA Guides would consider an amputation through the forearm to be 95% impairment of the upper extremities and 57% impairment of the whole person. The measurable functional impairment is identical although the disabilities can be quite different.

In the guides, a 95-100% of the whole person mental impairment implies a state like that of a coma, which is the most extreme impairment of the central nervous system functioning and consciousness. “Approaching 100% impairment of the whole person, according to the Guides, is considered to be approaching death”.

. . . My review of the information available suggests that the worker is not completely helpless and is able to carry out activities of daily living as described in the AMA Guides.

As the medical consultant to the board, I am required to use the AMA Guides for assessing impairments. The board has the authority to choose any disability rating that it thinks appropriate. However, as medical consultant, I cannot conclude that this worker has a 100% permanent impairment. [Emphasis added.]

We agree with the clear distinction the medical consultant makes between “impairment” and “disability”. The two terms cannot be used interchangeably: they refer to different concepts.

- (41) In the early fall of 2001, the worker has a number of appointments with his treating physician who notes his concerns about the MRI results. The doctor describes this as “weighing heavily on him” and he feels “he is not coping well.” As a result, the doctor prescribes what appears to be an anti-depressant [fluoxetine].

The physician, Dr. W., also notes that the worker tells him that Dr. S., the neuropsychologist, has told him the MRI results are “not good”, that is, that the worker “had permanent brain damage” and that his [resulting] dysfunction would progress with age.

- (42) On October 19, 2001, the rehabilitation counsellor emails the worker to advise that the medical consultant will review ongoing reports from the worker’s physician to determine if there should be further assessment of the level of permanent impairment due to any deterioration or changes in the worker’s condition.
- (43) A note to file by the rehabilitation counsellor dated November 9, 2001 says the worker has “concerns about his level of permanent impairment and wants clarification of the process to document his impairment as it deteriorates over time”.

Worker Asserts “100% Disabled” within definition of “Total Disability in the Act”

- (44) On December 21, 2001 the adjudicator asks the medical consultant by memo as follows: “the worker requested that his file be reviewed again, as it was his opinion that he was 100% disabled rather than 75% as previously assessed Please advise whether in your opinion, the worker’s disability remains as outlined in my letter dated August 21, 2001 or would section 1 (f) apply (permanent total disability)?” [Emphasis added: we note use of the term “disability” rather than impairment. We also note the adjudicator is asking the medical consultant for an opinion on a non-medical matter, that is, how to interpret and apply a section of the *Act*.]
- (45) On January 4, 2002, the medical consultant replies [appropriately, in our view] as follows:

. . . You have asked me to comment on a definition under the *Act*. I would suggest that legal definitions would be best addressed by a legal consultant rather than a medical consultant. In particular, the definition of incapacitating would need to be addressed.

Section 42 (1) of the 1996 *Act* addresses disability payment. This Section states “where a worker is entitled to compensation because of an accident occurring after 1982 that causes permanent disability he shall be paid, on account of the disability but not on account of any impairment of his earning capacity, a lump sum award in the amount calculated in accordance with Subsection (1).”

Subsection (2) states “the board shall by order establish a rating schedule for application in calculating the amount of awards made under subsection (1).”

Board Policy CL-46 addresses permanent impairment. The policy states “permanent impairment will be assessed according to the Guides to the Evaluation of Permanent Impairment set by the American Medical Association. The policy goes on to state “a medical consultant shall assess and provide a rating of the permanent impairment.”

. . . I am therefore required to utilize the AMA Guides for the evaluation of permanent impairment. As medical consultant, I am not allowed any discretion in determining other interpretations of impairment levels.

. . . Under Board Policy CL-46 I am unable to conclude that the worker has a 100% impairment of function. [Emphasis added: again we note the use of two different terms - - “disability” and “impairment”.]

- (46) Following the medical consultant’s report is a two-page document entitled “Impairment Ratings”. It is signed by the consultant. It again presents very useful information for making the distinction between the term “impairment” as opposed to “disability”. It also clarifies that work is not included in the medical consultant’s assessment of impairment percentages and, more importantly, that impairment evaluation is only one aspect of disability determination. We quote at length:

An impairment is defined by the American Medical Guides to the Evaluation of Permanent Impairment as “a loss, loss of use or derangement of any body part, organ system, or organ function.”

Impairment percentages or ratings were developed by medical specialists. The percentages estimate the severity of the medical condition and reflect the degree

to which the impairment decreases an individual's ability to perform common activities of daily living, excluding work

A disability is defined as "an alteration of an individual's capacity to meet personal, social or occupational demands because of an impairment" . . .

Work is not included in the impairment percentages for several reasons:

- 1) Work involves many simple and complex activities;
- 2) Work is highly individualized, making generalizations inaccurate;
- 3) Impairment percentages are unchanged for stable conditions, but work and occupations change;
- 4) Impairments interact with such other factors as age, education and prior work experience to determine the extent of work disability.

The AMA Guides consider that a 100% impairment indicates . . . a condition approaching death.

An impairment evaluation is only one aspect of disability determination. Disability determinations require information about skills, education, job history, age, adaptability and multiple other factors. As the board's medical consultant, I am mandated to use the American Medical Association Guides for determining levels of impairment. Disability determinations involve other members of the Workers' Compensation Health and Safety Board team.

[Emphasis added. We agree with the distinctions the medical consultant makes and with his explanation of the proper role for the doctor in assessing "impairment" as compared with the adjudicator (or hearing officer or appeal committee) in determining "disability" - - two different concepts with different factors and different expertise involved.]

- (47) The adjudicator's decision letter is dated January 7, 2002 (three days after the medical consultant's report). It says she will not award 100% disability under s. 42 (1) of the 1987 *Act*. No reasons are given with respect to this section. The adjudicator then sets out part of s. 1 (1)(f) of the *Act* - - "any injury to the skull resulting in an incurable incapacitating mental disorder". She then states that Black's Law Dictionary defines "incapacitated person" as one who is impaired to the extent that "personal decision-making is impossible". She then concludes that the evidence does not show that the worker fits this definition; and therefore, he is not 100% disabled.
- (48) The worker replies by letters dated January 10 and 14, 2002 that the definition of "incapacitated person" is not a definition of "incurable incapacitating mental disorder" [the words used in s. 1 (1)(f)]. He also says that another legal

dictionary (Oran's, 1983) defines "incapacity" as "an injury bad enough to prevent working" and that the Burton's Legal Thesaurus entry for "incapacity" lists as associated concepts "disability, legal incapacity, incapacity for work, mental incapacity, permanent incapacity, physical incapacity, total incapacity." [Emphasis added.] The worker also says that his award was never based on an amount of disability, rather always an impairment percentage, which is an infringement of section 42 (1) of the *Act* [which refers to disability].

- (49) On January 29, 2002 the Chair of the board writes the worker confirming they have met and that the worker told him the board was not correctly applying the 1983 *Act*. The Chair says he has asked the board's counsel to write the worker setting out his opinion on the interpretation of the *Act*, including board orders. He concludes by saying that he understands that the worker thinks the 1983 *Act* provides that he should be paid at 100% impairment. [Emphasis added. With respect, we note that the worker's January letters make it clear that his points are that "disability" must be addressed rather than only "impairment"; that the two should not be equated; and that s. 42 and s. 1(1)(f) both use the term "disability" rather than "impairment". The worker does not ask for 100% impairment in those letters.]
- (50) On February 11, 2002 the board's general counsel writes the worker stating "the position that you are taking is that you are entitled to 100% impairment of the whole person". [With respect, this does not appear to be the position the worker is taking in his letters to the board; however, board counsel was probably relying on the statement in the Chair's letter as to the worker's position.] He sets out section 1(1), and 42(1) and (2) without interpreting them other than to say that section 1(1) uses the term "includes" which means the definition is not exhaustive and that decision-makers can take other evidence of permanent total disability. He says that because of Board Order 1987/03, Policy #24 and s. 42(2), the AMA Guides will be "part of the basis for a decision." [Emphasis added.] He then says that the hearing officer has explained this issue in her January 28, 2002 decision and there is nothing further to add. [What the letter does not consider is the use of the word "disability" in the *Act* and how that term differs from the word "impairment" - - see the medical consultant's point at para. 46; nor does the letter explain what "parts" other than impairment assessments should form the basis of the decision on the appropriate award.]

The Hearing Officer's Decision under Appeal

- (51) The hearing officer characterizes the issue as "whether the percent of physical impairment sustained by the worker should be increased to 100%". [As we indicated earlier, there is nothing in the record to indicate that the worker

requested his percentage of impairment be increased, although the hearing officer states this is so by way of background in her decision.]

The hearing officer says that the definition of permanent total disability in s. 1(1)(f) does not qualify an injured worker for compensation, rather s. 42 (2) requires that “disability” awards be based on a “rating schedule”: in turn, Board Order 1987/03 says that the “physical impairment rating schedule” is the AMA Guide. She quotes the AMA Guide, 4th ed. as stating “a 100% whole person impairment is considered to represent almost total impairment, a state that is approaching death”. She then says there is no evidence that the worker approaches this level of impairment and therefore the adjudicator’s decision is confirmed. [We note again that no distinction is made between the terms “impairment” and “disability”.]

- (52) In his notice of appeal to the tribunal, the worker says “I want 100% disability by the Act. I want this tribunal to define disability and impairment. Because I am disabled 100%, I may not be 100% impaired. Read the AMA Guides.

The Worker’s Testimony and Submissions

- (53) The worker says that the hearing process is “mentally draining” and it takes several days to recover. He says he spent a long time thinking about how to present his case.
- (54) His presentation to us was in three parts: (1) information in his record on the nature of his brain injury; (2) submissions on the lack of recognition by the board of the nature of that injury; and (3) his interpretation of the relevant portions of the *Act* as well as references to the AMA Guides.
- (55) He says it is the 1986 *Act* [as amended to date of injury in 1992] that must be applied to his case - - in particular, the s. 1(1)(f) definition of “permanent total disability” is key.
- (56) He says he did not discuss this provision in his earlier appeal [see Decision #2] because he was not aware of it. He says he only became aware of it subsequently while he was helping another injured worker and “discovered” it.
- (57) He says he is not saying that his workplace injury caused all the brain damage shown on the MRI [June 2001] but he says the medical reports show that it is damage on top of damage that have caused all his problems.

- (58) He says that after his first injury [1980 motorcycle accident] he recovered: he completed college; he was in curling finals of a Grand Bonspiel and skipped a leading team; he raced motorcycles again; and he was self-employed.
- (59) He says the appeal tribunal has already found his 1980 injury had healed. [We note that the tribunal found in Decision #2 that the evidence did not support a finding of a pre-existing disabling condition due to the earlier head injury.]
- (60) He says the medical evidence shows that his brain injury is not going to get better. Therefore, he says he comes within the “incurable” part of the section 1(1)(f) of “permanent total disability”.
- (61) He also says that the medical evidence shows that his brain injury has left him with “significant cognitive deficits” as set out in the plain language explanation of his 2001 MRI and as documented in prior neurological assessments. He says that it is on the basis of this evidence that he comes within the part of the definition in section 1(1)(f) which refers to “incapacitating”.
- (62) He says that a comparison of his 1999 and 1994 test scores from his neurological assessments by Dr. S. show what he calculates to be a 20% decrease in functioning.
- (63) He says that just because he is “brain-injured” does not mean he is “brain dead”. He says he still has some mental capacity.
- (64) He says that because of the board’s reluctance to accept that there was “something wrong with my head” he did not have an MRI done until 2001. He says if this test had been done in 1994, his injury could have been dealt with by appropriate treatment and he would have known then the nature of the injury. He says that despite lack of an MRI, Dr. S. in 1994 and Dr. G. in early 2001 both identify the likelihood of frontal lobe injury which he says was confirmed by the subsequent MRI.
- (65) He says that the medical and assessment evidence in his record show the “incapacitating” nature of his injury in terms of his memory problems, social problems and cognitive problems. He also says the evidence shows that his brain injury is a complete barrier to a return to work in any “suitable occupation” in the competitive workforce. He agrees with the recommendation of his rehabilitation counsellor at the board who says “his inability to work should be considered permanent”. He also relies on Dr. G. and Dr. S.’s statements that nothing can be done to cure his injury [see para. 35 and 36] .

- (66) He says after his MRI was done, he saw Dr. S. who provided a plain language explanation of the results (signed by the neuroradiologist). He says Dr. S. told him “I have really sad news . . . I have nothing good to tell you . . . there is nothing you can do . . . to recover . . . all you can do is eat well, exercise and take vitamins to try and slow it [the deterioration with age] down because it is going to get worse”. He says this news was “pretty devastating to him”. He says Dr. G. gave him this analogy: suppose there are two apples and one of them drops on the floor. If you put them on the window sill within a week, the one dropped on the floor will be turning brown inside but not the other one which will still be juicy and white inside. In another week, the brown one will still be getting browner and that is what is happening to his brain.
- (67) He says throughout his record, there are repeated references to “impairment”. He says his adjudicator and the medical consultant both say 100% impairment refers to someone nearly dead. He says he is not requesting a review of his PPI [permanent partial impairment]. He says he doesn’t believe he is 100% impaired but he does think he is 100% disabled because he says he comes within the definition of “permanent total disability” in section 1(1)(f) - - that is, he says he has “an injury to the skull resulting in an incurable incapacitating mental disorder”. He says that “incapacitating” can include “an injury bad enough to prevent working” [in support he cites this definition of “incapacity” from Oran’s Law Dictionary, 1983]. He says that his workplace injury or accident prevents him from working.
- (68) He says Dr. S. suggested in his 1994 assessment that there would be a timeframe within which his neurological deficits could improve with appropriate treatment. The worker says he believes that because he did not receive timely or effective treatment, he went downhill and he says in this sense, his disability was “caused by WCB”.
- (69) The worker makes numerous references to the AMA Guides. [Essentially, these references support the distinction between “disability” and “impairment” as set out in the medical consultant’s report at para. 46.]
- (70) He reiterates that he is not requesting 100% impairment even though the hearing officer, the board’s lawyer and adjudicator all say he is requesting this. He says he accepts that impairment percentages are derived according to the AMA Guides’ criteria but that such percentages do not measure disability with respect to work. He says it is inappropriate to use the Guides’ criteria or ratings to make a direct estimate of work “disability” as required by s. 42(1).

Analysis of Issues

Issue #1: Did the hearing officer err in denying the worker’s appeal on the basis that there was no evidence to support an increase in the worker’s impairment rating?

Answer: Yes.

(71) In our view, the hearing officer misstated the issue. She said the issue was whether the percent of physical impairment should be increased to 100%. She then says that there is no evidence that the worker has a 100% whole person impairment (she uses the example of irreversible coma) due to his workplace injuries. We agree that the worker is not 100% impaired. There are many activities the worker can still do, albeit with modifications to adapt to his deficits. As he stated in his submissions, he is “brain injured” not “brain dead”. We find that the hearing officer did not go beyond the issue of impairment, as she should have, to the issue she is required to address under the *Act* - - that is, the determination of “disability”. The issue here is whether the worker is permanently totally disabled within the meaning of s. 1(1)(f) and if so, whether he has been compensated for that permanent total disability as required by s. 42 of the relevant *Act*.

Therefore, we must interpret and apply s.1.(1)(f) and 42 (1) and (2) to determine these questions, taking into account the evidence before us on this appeal.

Issue #2: Does the worker have a “permanent total disability” consisting of an “injury to the skull resulting in an incurable incapacitating mental disorder” as defined in section 1(1)(f) of the *Worker’s Compensation Act* (the “*Act*”) as it stood on the date of his workplace accident?

Answer: Yes, we find that the worker does come within the definition in the *Act* of permanent total disability as set out at s. 1(1)(f).

In our analysis we will deal with the evidence as it relates to each of the components of the s. 1(1)(f) definition. These components are: (1) injury to the skull (2) resulting in an “incurable” (3) “incapacitating” (4) mental disorder.

1. “Injury to the Skull”

(72) There is no dispute that the worker had an injury to the skull (a “head injury”) as a result of his workplace accident. This injury was identified very shortly after

the accident by the admitting physician at the hospital who writes that a utility pole fell and struck him on the head. As part of positive findings on admission, this doctor notes “contusion to the right parietal region” [part of the brain] and loss of consciousness. Therefore, the worker meets the first part of the s. 1(1)(f) definition.

2. “Incurable”

- (73) The latest medical evidence from specialists consulted by the board address the “incurable” aspect of the s. 1(1)(f) definition.
- (74) We find that the worker’s head injury is “incurable”. In coming to this conclusion, we rely on the evidence in the record from Dr. G. as noted earlier at para. 35. This psychiatrist states that the worker is “likely disabled longstanding” and it is unlikely anything can be done to make a significant difference in this disability.
- (75) In addition, the MRI results show significant brain damage which will get worse, not better, with age. Dr. S. says the damage is consistent with the cognitive deficits documented in his prior neuropsychological assessments [of 1994 and 1999].
- (76) The board’s rehabilitation counsellor, who reviews this evidence, says “there is no intervention that can improve [the worker’s] brain injury”.
- (77) Although it is true that earlier in 1994 (see para. 20), Dr. S. had said there could be some improvement of the worker’s disabilities, this could only occur with appropriate treatment and some improvement in the worker’s complex integrated cerebral functions.
- (78) In this regard, we agree again with the board’s rehabilitation counsellor, who in 1999 writes that the worker’s “treatment related to his head injury may have been a case of too little, too late to have any real effect”.
- (79) Therefore, in our view the worker meets the “incurable” part of the s. 1(1)(f) definition.

3. “Incapacitating”

- (80) The hearing officer does not address the wording of s. 1(1)(f), other than to note that the worker has raised it in his “Notice of Review” to say that it qualifies him

for 100% remuneration. However, the adjudicator does address this definition in her decision of January 7, 2002 (see para. 47). Her brief consideration of this section focuses on the word “incapacitating” and she interprets this word to be a reference to “personal decision-making”. She finds the worker does not fit the definition she gives to “incapacitating” because the evidence does not show that personal decision making is impossible for him. We agree that the evidence indicates the worker is able to make personal decisions. However, we find that the word “incapacitating” as used in s. 1(1)(f) should not be defined in the way the adjudicator has defined it.

- (81) The word “incapacitating” as used in the *Act* must be interpreted by considering this word in the context of the *Act* as a whole and taking into account the purpose of the *Act*.
- (82) For instance, “incapacity” is referenced in other parts of the *Act*. The definition of “invalid” in section 1(1) is “a person who is physically or mentally incapable of earning his living”. In other words, the focus here is not on capacity to make decisions but rather on capacity to earn a living.
- (83) Also, in section 1(1), the definition of “silicosis” says that it is a fibrotic condition of the lungs that results in a substantially lessened “capacity for work”. Again, the focus is not on capacity to make decisions.
- (84) In addition, the worker pointed out in his submissions to us and in his January 14, 2002 letter to his adjudicator, that “incapacity” is defined in some legal dictionaries as “incapacity to work”.
- (85) Lastly, we note that the 1986 *Act* is a bilingual text. The French version of the s. 1(1)(f) definition of permanent total disability refers to an incurable mental disorder, “qui empeche de travailler”. This translates into English as an incurable mental disorder which “prevents working” [see <http://www.freewarsite.com/cgi-bin/onldicfre.cgi> accessed for “empecher” and “travailler” on June 20, 2002]. So in the French version of s. 1(1)(f) the focus is on lack of capacity to work.
- (86) According to Peter Hogg’s *Constitutional Law of Canada* (1999 ed., pg. 1042) Canadian courts have held that the English and French versions of legislation are equally authoritative. There are also rules for resolving discrepancies between the French and English. The most useful one for our purposes is this: where one language version is doubtful or ambiguous (capable of two meanings) and the other version is clear, then the doubt or ambiguity is resolved by reference to the clearer version.

- (87) In our case, this means that where the word “incapacity” as used in the English version of s. 1(1)(f) may be capable of several meanings, and the French version is clearer and more specific; the French version should govern. In other words, the French version supports an interpretation of the word “incapacity” as relating to capacity to work. This interpretation should be preferred to the interpretation of incapacity as it relates to decision-making, which is not supported by the French version.
- (88) Therefore, we find that the word “incapacity” in s. 1(1)(f) must be interpreted to refer to “capacity for work”.
- (89) There is clear evidence on the worker’s incapacity for work. In 1994, Dr. S., after extensive neuropsychological tests, says that the worker is disabled with respect to complex, integrated cerebral function and notes that this could preclude or limit future employment. In this same year, Dr. G., the psychiatrist notes that the worker’s head injuries may compromise his employability.
- (90) The most recent medical evidence with respect to capacity for work is not equivocal. As noted earlier, Dr. G. in June 2001 says that there is not anything that can be done to make the worker competent to return to competitive work. The board rehabilitation counsellor on the basis of this opinion (as well as the comments of the worker’s treating physician) says that the worker is not capable of work now or in the future. On June 18, 2001 the counsellor says the worker’s inability to work is permanent.
- (91) On the basis of this evidence, we find that this worker meets the part of the s. 1(1)(f) definition which refers to “incapacitating” because he is no longer capable of work due to his workplace brain injury.

4. “Mental Disorder”

- (92) The last part of the definition that the worker must meet is that of having a “mental disorder” resulting from the injury to his skull. There is ample evidence in the record of the worker’s cognitive deficits and mental problems relating to emotional regulation, memory, and attention. (See for examples para. 18, 20, 24, 31, and 36.) We find he does have a mental disorder as a result of the injury to his skull.
- (93) Therefore, the worker meets all the components required to fulfill the *Act’s* s. 1(1)(f) definition of “permanent total disability”.

Issue#3: If so, is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Answer: Yes.

(94) The worker's entitlement to compensation in the decision under review is governed by section 42.

(95) This section states:

Disability payment

42.(1) Where a worker is entitled to compensation because of an accident occurring after 1982 that causes permanent disability he shall be paid, on account of the disability but not on account of any impairment of his earning capacity, a lump sum award in an amount calculated in accordance with subsection (2).

(2) The board shall by order establish a rating schedule for application in calculating the amounts of awards made under subsection (1).

(96) As section 42.(1) clearly states, compensation shall be paid for the disability, not for impairment and in particular not for impairment of earning capacity. This section also says the disability must be permanent before an award can be made. In our view, the words "permanent disability" in section 42 include both partial and total disability. Therefore, the definition of permanent total disability in s. 1(1)(f) which we have found the worker meets is one of the types of disability that can be compensated under s. 42(1).

(97) We also point out that impairment of earning capacity is not the same concept as capacity to work. The question of whether or not someone can work is separate from the question of whether or not someone's earning capacity has been impaired.

(98) Section 42(1) also says that the amount of an award must be calculated in accordance with s. 42(2).

(99) Section 42 (2) in turn refers to a rating schedule established by board order for application in calculating the amount of award under s. 42 (1). Board Order 1987/03 in effect at the time of the worker's accident makes it clear that the rating schedule for "determination of the percentage of physical impairment" shall be the AMA Guides. We note that this board order uses the term "impairment" not "disability" as set out in s. 42 (1). It also appears to reference the wrong section of the *Act*, s. 38 instead of s. 42.

- (100) In our view, determining the percentage of physical impairment must be part of calculating an award for disability. As board counsel put it (see para. 47), the percentage of impairment should form “part of the basis for a decision” on entitlement for compensation for a disability. However, as the medical consultant sets out in his information to the adjudicator, the AMA Guides themselves make a clear distinction between the two terms, “disability” and “impairment”. They are not interchangeable. As he notes, a medical doctor using the Guides can assess impairment but determining disability involves more than simply taking the percentage of impairment, without considering other factors.
- (101) In our view, section 14(2) of the *Act* in place at the time of the worker’s accident makes this clear. It states:
- Where a permanent disability results from an accident, the evaluation of the worker’s disability shall be made on behalf of the board by one medical and one non-medical person selected by the board.
- (102) Normally, the medical person is the medical consultant whose role is to provide the impairment assessment. The non-medical person is the adjudicator who must take into account the medical consultant’s assessment of impairment when deciding what a worker shall be paid on account of his disability under s. 42 and other sections of the *Act*.
- (103) In our view, the medical consultant is correct when he notes that disability determination involves more factors than just percentage of impairment. He says what some of these factors are: age, skill, education, etc. For this reason, someone who is not 100% impaired, can still be 100% disabled, in particular if that person can no longer work, as our interpretation of the s. 1(1)(f) definition makes clear.
- (104) Therefore, we find that this worker is totally permanently disabled, or as he puts it “100% disabled,” and this finding of fact should be reflected in the board’s calculation of an award under s. 42(1).
- (105) It appears from the record that his award under s. 42(1) was calculated on the basis of partial rather than total impairment and this is an error for reasons set out earlier.

Decision #2: Reopen and Vary

- (106) The worker’s award under s. 42(1) was based in part on the order of this tribunal set out in Decision #2. This decision finds at page 19 that “the worker’s condition as a result of the 1992 compensable injury comes with the definition [of s. 1(1)(f)]”. Unfortunately, there is no analysis of s. 1(1)(f) in relation to any of the medical evidence in Decision #2. This decision also appears to use the terms “impairment” and “disability” interchangeably. Decision #2 concludes at page 22 that the worker’s permanent partial impairment award must be adjusted to reflect the new percentage of impairment [70% not 40%]. But as we have found, s. 42(1) provides for a disability award, not an impairment award as Decision #2 states. In our view, Decision #2 cannot order an award that is not available under the relevant legislation [s. 42(1)]. To do so is an error of law.
- (107) Under s.18.4(6) the tribunal may reopen and rehear any matter that it has dealt with previously and may rescind or vary any decision or order previously made by it. In addition, a decision of an appeal committee is a decision of the tribunal [s. 18.3(6)] and a decision of an appeal committee requires two agreeing votes [s. 18.3(5)].
- (108) The tribunal has exercised its discretion to reopen under s. 18.4(6) three times: once at the request of a worker due to an error of law whereby the tribunal failed to order interest as required by a mandatory provision of the *Act*; once at the request of the board to clarify the terms of an order by including a reference to the statutory provision authorizing that order; and once on its own motion to correct typographical errors in three key paragraphs of a decision. To date, the tribunal has exercised its s. 18.4(6) power on a case-by-case basis.
- (109) We think the *Act* makes it clear that the finality of tribunal decisions is an important value. Section 18.4(3) says that the decisions of the tribunal within its jurisdiction are “final and conclusive”. Therefore, tribunal decisions should not be lightly interfered with, if they are within jurisdiction. There is case law from other jurisdictions which has considered the standard of review when exercising a reconsideration [reopening] power where the statute also contains a clause which says appeal decisions are final (sometimes called a “privative clause”).
- (110) For instance, Decision No. 2001-1794 of the B.C. Workers’ Compensation Board Appeal Division says at page 456:

The test for setting aside appeal division decisions is strict because these decisions are protected by a privative clause. According to Section 96.1 of the *Act*, they are “final and conclusive”. To set aside a decision on the basis that there is a preferable application of a statutory provision than the decision’s own application of the provision would undermine the finality of appeal division decisions as entrenched in the

legislation . . . in other words, I am not at liberty to set aside a decision simply because I disagree with the panel's conclusion.

- (111) We find that the Decision #2 conclusion that there is entitlement to an (increased) award for impairment, when the statute provides for a different award - - an award for disability - - is an error of law going to jurisdiction. It is on this basis, that we reopen Decision #2. (We also acknowledge that Decision #2 was the second appeal decided by a new tribunal and reflects the many references throughout the claim file to "PPI" and permanent partial impairment award, instead of disability award.)
- (112) We therefore reopen and vary Decision #2, changing the final sentence of the conclusion on page 22 to correct an error of law and clarify that (1) the worker's award under s. 42(1) must be for disability, not impairment, and that (2) the disability determination must take into account the s. 1(1)(f) definition of permanent total disability as analysed in para. 72 to 93 of this decision. Specifically, Decision #2 is varied by changing the final sentence of the conclusion on page 22 to read: "Therefore, the decision of the hearing officer is varied or changed and the worker's permanent disability award must be adjusted to reflect the fact that he is permanently totally disabled, not partially disabled."

Policy No. 24

- (113) We are aware that Board Policy #24 says that "after an injury has been measured as compensable and an impairment level set, no further award is payable unless there is an increase in the original level of impairment". This policy was in effect at the time of the worker's accident. It is not discussed by either the adjudicator or hearing officer. Since Decision #2, there has been no increase in the original level of impairment as assessed by the medical consultant. In the medical consultant's opinion of January 4, 2002, the worker is not 100% impaired.
- (114) Unfortunately, Policy #24 also appears to confuse the terms "impairment" and "disability": the policy refers several times to s. 42 which it says provides awards for permanent physical "impairment". In fact s. 42 refers to awards for "disability". Policy #24 is entitled "Permanent Physical Impairment". In these circumstances, we find that the part of the policy which allows an increased award only if the level of impairment increases should not be applied in a case where the award was improperly calculated on the basis of impairment rather than disability.
- (115) In other words, if an injury has never been accurately measured as compensable using the concept of disability rather than impairment as s. 42 (1) requires, then in

our view and based on the merits and justice of this case, a further award can be payable without an increase in the level of impairment.

- (116) Lastly, Policy CL-46 should not apply to this worker because it was not in effect at the time of his accident and it clearly makes reference to ss. 20 and 101 of a subsequent *Act*. It also uses the term “impairment award” which is different from the terminology of s. 42 which refers to an award for disability.

Conclusion

The worker's appeal is allowed. The decision of the hearing officer is reversed and varied as follows:

1. The hearing officer denied the worker's appeal on the basis that there was no increase in impairment without determining (1) whether the worker was permanently totally disabled within the meaning of "s. 1(1)(f)" and (2) whether he was entitled to a total disability award under s. 42 (1) of the *Act*. It was an error to do so. The worker's notice of review asks that he be found permanently totally disabled under s. 1(1)(f) of the *Act* and states that he should therefore "qualify" for "full remuneration" [i.e. compensation] at 100%. It is clear from the adjudicator's decision which the hearing officer reviews that the compensation at issue is for an award under s. 42, which must be for "disability" not "impairment".
2. The worker has a permanent total disability because he has "an injury to the skull resulting in an incurable incapacitating mental disorder" as set out in s. 1(1)(f). He does not have a partial disability.
3. The worker is therefore entitled to full compensation for this total disability under s. 42 (1) because it resulted from a workplace accident which is a disablement arising out of and in the course of employment.
4. Nothing in Policy #24 prevents the board from fully compensating this worker in accordance with s. 42(1).
5. Decision #2 is reopened and varied, changing the final sentence of the conclusion on page 22 to correct an error of law and clarify that (1) the worker's award under s. 42(1) must be for disability, not impairment, and that (2) the disability determination must take into account the s. 1(1)(f) definition of permanent total disability as analysed in para. 72 to 93 of this decision. Specifically, Decision #2 is varied by changing the final sentence of the conclusion on page 22 to read: "Therefore, the decision of the hearing officer is varied or changed and the worker's permanent disability award must be adjusted to reflect the fact that he is permanently totally disabled, not partially disabled."

Dated this **25th day of June, 2002** in the City of Whitehorse, in the Yukon Territory.

Donald Inverarity, Member

Heather MacFadgen, Presiding Officer

Karen Waroway, Member