

Workers' Compensation Appeal Tribunal

Decision # 40 - Board Direction to Rehear

Claim No.: 92-1177

Reasons for Review: Received from the Board July 23, 2002 (dated July 17, 2002)

Date last document received: September 27, 2002

Date of Documentary Review: September 19, 23 and 30, 2002

Date of Decision: October 10, 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

Documentary Review

Location: Boardroom 1B Main, 419 Range Road
Whitehorse, Yukon Territory
(Karen Waroway participated via teleconference connection)

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(8) and (10), 18.4(6), 18.5 (1), 20, and 23 of the current *Act*.

Policies applied or considered by appeal committee: Policy No. 24, "Permanent Physical Impairment"; Board Order 1987/03.

Issues addressed by appeal committee:

1. Did the appeal committee fail to comply with section 42 (2) and Policy No. 24 (and Board Order 1987/03)?
2. 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?
3. 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?
4. Is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Decisions made by appeal committee:

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". Neither Board Order 1987/03 nor Policy No. 24 can be interpreted as changing the *Act's* requirement in section 42(1) that an award be for disability, not impairment. As well, neither the board order nor policy can be interpreted as overriding the *Act's* section 1 definition of permanent total disability.

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. Policy No. 24 should not be applied to this worker in a way that denies him full compensation for a permanent total disability in accordance with s. 42(1) and section 1(1) (f) of the *Act*. Nothing in section 42(2) of the *Act* gives the board authority to change the award from one for disability to one for impairment.
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. 55 to 76 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."

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Introduction

This is a rehearing of an appeal at the board's direction on a claim which is over a decade old.

Because the workplace "accident" giving rise to this worker's injuries and subsequent disability occurred in September 1992, the decisions on his claim dealing with his entitlement to compensation have been made using "predecessor legislation" - - that is, the *Workers' Compensation Act* as it stood at the time of his workplace accident in 1992. There is no dispute that the applicable law is R.S.Y. 1986 c. 180 as amended to 1992 (the "1986 Act") and not the *Act* as it exists today.

Terminology and the concepts to which they relate have changed from one *Act* to another. For instance, under the current legislation there are two types of financial compensation potentially available for injured workers: one is "loss of earnings" and the other is "payment" for work-related "permanent impairment". However, in the *Act* which applies to this claim, the two types of compensation are somewhat different: one is a lump sum "award" for "permanent disability" and the other is payment for "loss of earning capacity". We emphasize the difference in wording between the two *Acts* because the crux of the worker's appeal turns on the distinction he makes between the words "impairment" and "disability".

The Worker's Reasons for Appeal

This appeal deals with an award for disability rather than for the other type of compensation in the 1986 *Act* - - loss of earning capacity. At its simplest, the worker's argument on this appeal is twofold:

1. he says his award for his permanent disability was calculated in a way that contravenes the *Act* - - that is, it was calculated on the basis of "impairment" rather than on the basis of "disability" as he says that s. 42 (1) requires;
2. he says that his particular disability comes within the *Act's* s. 1(1)(f) definition of "permanent total disability" and therefore he is entitled to a total disability award rather than the partial lump sum award he received.

This rehearing proceeded as a documentary review and the employer, though notified, declined to participate.

The worker has a serious mental disability which makes participation in an oral hearing very difficult and stressful for him. In the original appeal he made extensive oral submissions. In the circumstances of this rehearing, and as an accommodation of this

worker's disability, the appeal committee has reviewed not only the entire record afresh but also the worker's submissions in the earlier appeal which resulted in Decision #35 - now stayed by the Board and the subject of this rehearing under s.18.3 (8) of the current *Act*.

The Board's Reasons for Directing a Rehearing

On July 17, 2002 the Board stayed Decision #35 under s. 18.3(10) of the *Act*. In addition, the board provided its reasons as to why this appeal must be reheard as required by s.

18.3 (8) of the *Act*. These reasons are:

1. the appeal committee did not properly apply section 42 (2) of the 1986 *Act*;
2. the appeal committee did not comply with Board Order 1987/03; and
3. the appeal committee failed to comply with Policy No. 24.

On this rehearing, we must give fair and reasonable consideration to Policy No. 24 and section 42(2). We will also deal with Board Order 1987/03.

Issues

1. Did the appeal committee fail to comply with section 42(2) and Policy No. 24 (and Board Order 1987/03)?
2. 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?
3. 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?
4. Is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Background and Evidence from the Claim Record

In this section, we set out extensive excerpts from the record's medical reports dealing with the worker's head injury: these are relevant to the issue of whether or not the worker comes within the s. 1 definition of permanent total disability. In addition, we include here from the record, the medical consultant's explanation of the difference between

“impairment” and “disability” because the use of these terms in the *Act* and policy is pivotal to the statutory interpretation required by the board’s reasons for rehearing.

- (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 Board’s 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 1986 *Act*. [Emphasis added - - note the use of term “impairment” rather than “disability”.]
- (3) 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.” [Emphasis added - - note the use of term “impairment” rather than “disability” again.]
- (4) On January 7, 2002 an adjudicator decided she would not award 100% disability under the *Act* after the worker requested she review his entitlement by taking into consideration s. 1(1)(f) of the *Act* (set out below).
- (5) 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 by the board for a partial “impairment”.
- (6) 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.

- (7) According to the record, 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.
- (8) 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."
- (9) 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.
- (10) 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.]
- (11) 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"

- (12) 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.]
- (13) 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

- (14) Dr. S. provides his neuropsychological assessment report to WCB on September 18, 1994, after two days of testing. 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.]
- (15) 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.

Lack of Timely Treatment

- (16) 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 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

- (17) 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.]

- (18) 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 AMA 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".

- (19) 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

- (20) 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.]

- (21) The worker attends a program in January 2001 through the Edmonton Brain Injury Relearning Society which reports on April 9, 2001 as follows:

. . . 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.

- (22) 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

- (23) 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

- (24) 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

- (25) 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.]
- (26) 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”. [PPI is an abbreviation for permanent partial impairment: we note again the use of the term “impairment” rather than disability by the adjudicator.]
- (27) [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, instead the record indicates the worker is saying he is 100% disabled rather than 100% impaired.]

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

- (28) 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.]

- (29) 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. We also note that the medical consultant understands the difference between his job - - “impairment assessment” under the AMA Guides - - and the board’s job in adjudicating the claim under s. 42 - - “choosing an appropriate disability rating”.
- (30) In this regard, we point out that s. 14(2) of the 1986 *Act* is very specific: it requires both medical and non-medical input on a claim for compensation for permanent disability. Section 14(2) says “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. One way to give effect to this provision would be for a medical consultant to provide an assessment of impairment that could then be part of the information used by the adjudicator (non-medical person) in deciding on a disability rating.
- (31) On December 21, 2001 the adjudicator writes the medical consultant asking the following question:

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*.]

- (32) 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”.]

- (33) 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.]

- (34) 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.
- (35) 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].

- (36) 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 *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.]
- (37) 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 No. 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. 32 and 33; 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

- (38) 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”.]

- (39) 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.”

Analysis of the Issues

Our consideration of the Board’s reasons for directing a rehearing

Analysis of Issue #1

Issue #1: Did the appeal committee fail to comply with section 42 (2) and Policy No. 24 (and Board Order 1987/03)?

Answer: No

- (40) At the outset, it is useful to recognize that where there is an inconsistency between the *Act* and a board policy (or a board order, for that matter) the *Act* prevails. The board cannot amend the *Act* by passing policy which changes the *Act* - only the legislature can amend the *Act*.
- (41) If the *Act* says an award is for one thing (in this case, permanent disability) a board policy cannot change the *Act* by saying this award will be for something else (such as, permanent impairment).
- (42) When we consider the current *Act* we see that provides for compensation for permanent “impairment” (s. 20) and that the corresponding policy CL-46 provides direction on assessing permanent “impairment”. No inconsistency.
- (43) However, when we look at the provision in the 1986 *Act* which applies to this worker’s appeal and the corresponding policy, we do find an inconsistency. Section 42 (1) provides for an award for permanent “disability” but the board order and Policy No. 24 both deal with the rating and assessment of physical

“impairment”. “Disability” and “impairment” are like apples and oranges - - related but not the same. A board policy cannot make what is supposed to be by law an award for disability (apple) into something else - an award for impairment (orange). In effect, the worker is saying he is entitled to an apple and the board gave him an orange.

(44) We agree with the Board that in our original decision, we found that the worker was not 100% impaired, as did the medical consultant. The Board says that when the appeal committee found the worker was permanently totally disabled under the definition of section 1(1) (f) of the *Act*, in our earlier decision, because he had an “injury to the skull resulting in an incurable incapacitating mental disorder”, that the committee could not use that definition to override the purpose of s. 42 (1) and (2) and could not thereby fail to comply with Board Order 1987/03 and Policy No. 24.

(45) The Board’s reasoning is as follows:

- a) s. 42 (2) says it is for the board to establish a rating schedule “for application in calculating the amounts of awards made under subsection (1).”
- b) Board Order 1987/03 does so and says that the physical impairment rating schedule for determination of the percentage of physical impairment shall be the AMA Guide and the dollar value for the percentage of physical impairment is up to \$40,000 for total physical impairment;
- c) Policy No. 24 also provides guidance on how an award for permanent physical impairment is made, again basing it on the AMA Guide;
- d) the AMA Guides are a manual for doctors to assess or evaluate impairment;
- e) the worker is not 100% impaired;
- f) because of the board order and policy it does not matter if the worker is permanently totally disabled, he can only receive the full \$40,000 award if he is totally impaired and he is not.

(46) The flaw in this logic is there is nothing in s. 42(2) which gives the board the power or jurisdiction to change the award for disability in s. 42(1) or the definition of “disability” in s.1(1)(f) into one for “impairment” rather than the *Act’s* specific and express provisions for “disability”. Rating schedules and board orders cannot be used to amend the *Act*. It is for the board to comply with s. 42(1) and 1(1)(f)

and not for the *Act* to be interpreted so as to comply with a board order and policy. Otherwise, board orders and policy can prevail over the *Act* contrary to administrative law.

- (47) The appeal committee has the option of applying to court under s. 18.5(1) for a determination of whether Policy No. 24 is consistent with the *Act*. The board has this option also. However, the tribunal does not choose to do so for two reasons: (1) the delay that would result on a case that has been subject to at least 24 adjudicative decisions over more than a decade; and (2) the likelihood that a court would find a policy on rating and awarding for “impairment” inconsistent with a legislation providing for a “disability” award - - especially where the rating instrument or schedule (the AMA Guide) makes a clear distinction between the terms “disability” and “impairment” and also makes it clear that the methodology of the AMA Guide involves measuring and evaluating “impairment” and not “disability”.
- (48) It is for this reason that the worker contends it is illegal to apply Policy No. 24 to him in such a way as to defeat the clear language of s. 1(1)(f) - - a definition of permanent total disability which he says he meets.
- (49) The second option is to interpret section 42(2), Board Order 1987/03, and Policy No. 24 in a way that is not inconsistent with the *Act*. Section 42(2) says that a rating schedule for application in calculating the amounts of awards under 42(1) (that is, awards for disability) must be established. Another section of the *Act* (s.1) says more specifically that certain disabilities are to be considered by law total disabilities. These are (a) total loss of eyesight in both eyes; (b) loss of both feet; (c) loss of both hands; (d) loss of one hand and foot; and, (e) an injury to the skull (the disability the worker says he has) resulting in an incurable incapacitating mental disorder. If the AMA Guides evaluation of permanent impairment relating to these four injuries rate them as less than 100% impairment, workers with these disabilities must nevertheless be compensated fully as totally disabled when calculating the amount of the disability award because section 1 of the *Act* cannot be ignored. The rating schedule which provides for impairment percentages must not be applied in a way that limits the *Act*'s definition of total disability or its provision for a permanent total disability award. In other words, the AMA Guides must not be applied in a way that makes a disability partial when the *Act* says it is total, simply because the AMA Guides evaluate the impairment as partial. To do so would contravene the *Act*.
- (50) Section 14(2) of the *Act* is of assistance here because as stated earlier it provides that there must be input from both a medical and non-medical person into the evaluation of a worker's disability. Policy No. 24 also says the award is based on the AMA Guides but is set by both a claims officer (what we now call an

adjudicator) and the medical consultant. It is clear that the medical consultant's role is to evaluate impairment. What then, is the claim officer's role? If all that the claims officer or adjudicator does is to adopt automatically the impairment rating made by the medical consultant, then he or she would not be performing the active evaluation role that section 14(2) of the *Act* requires him or her to exercise.

- (51) We think that the better view and interpretation is that the impairment rating can be part of what the disability award is based upon. But as the medical consultant says (see para. 33), other factors must come into play in determining disability as opposed to evaluating impairment. As he points out, a person can be less than 100% impaired but can still be 100% disabled. (See para. 28 example of hand amputation in two workers - - one a mechanic, the other a bank president: both have the same impairment but only the mechanic is 100% disabled from performing his previous job.)

In this case, if the worker meets the *Act*'s definition of total permanent disability, then by law he has a total or 100% disability, regardless of whether or not he has a 100% impairment.

- (52) Therefore, we must consider whether or not the worker meets the section 1(1) definition of permanent total disability as part of our consideration of the decision under appeal here.
- (53) For the reasons above as well as those in the analysis of the issues that follow, we do not find that the appeal committee failed to comply with the *Act* and relevant policy.

Analysis of Issue #2

Issue #2: 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.

- (54) 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 1986 *Act*.

Analysis of Issue #3

Issue #3: 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 *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”

(55) 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”

(56) The latest medical evidence from specialists consulted by the board address the “incurable” aspect of the s. 1(1)(f) definition.

(57) 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. 23. 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.
- (58) 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].
- (59) The board’s rehabilitation counsellor, who reviews this evidence, says “there is no intervention that can improve [the worker’s] brain injury”.
- (60) Although it is true that earlier in 1994 (see para. 14), 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.
- (61) 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”.
- (62) Therefore, in our view the worker meets the “incurable” part of the s. 1(1)(f) definition.

3. “Incapacitating”

- (63) The hearing officer in the decision under appeal 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. 34). 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.
- (64) 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* which is to compensate injured “workers” not “incapacitated persons”.

- (65) 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.
- (66) 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.
- (67) 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”.
- (68) 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.
- (69) 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.
- (70) 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.
- (71) Therefore, we find that the word “incapacity” in s. 1(1)(f) must be interpreted to refer to “capacity for work”.
- (72) 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.

- (73) 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.
- (74) 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"

- (75) 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. 12, 14, 17, 21, 22, 23, and 24.) We find he does have a mental disorder as a result of the injury to his skull.
- (76) Therefore, the worker meets all the components required to fulfill the *Act's* s. 1(1)(f) definition of "permanent total disability".

Analysis of Issue #4

Issue#4: If so, is he therefore entitled to further compensation under Section 42(1) of the *Act*?

Answer: Yes.

- (77) The worker's entitlement to compensation in the decision under review is governed by section 42.
- (78) This section #4 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).

- (79) 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).
- (80) Section 42(1) also says that the amount of an award must be calculated in accordance with s. 42(2).

Decision #2: Reopen and Vary

- (81) 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 (of Decision #2) 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.
- (82) 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.

- (83) 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. 37), 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.
- (84) 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.
- (85) 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*.
- (86) 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.
- (87) 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).
- (88) 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 because as we have found this worker has a total permanent disability and s. 42 (1) requires an award for disability not impairment.

- (89) 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.
- (90) 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 the failure to distinguish between “impairment” and “disability” reflects the many references throughout the claim file to “PPI” [permanent partial impairment award] instead of disability award.)
- (91) 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. 55 to 76 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.”

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”. Neither Board Order 1987/03 nor Policy No. 24 can be interpreted as changing the *Act’s* requirement in section 42(1) that an award be for disability, not impairment. As well, neither the board order nor policy can be interpreted as overriding the *Act’s* section 1 definition of permanent total disability.

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. Policy No. 24 should not be applied to this worker in a way that denies him full compensation for a permanent total disability in accordance with s. 42(1) and section 1(1) (f) of the *Act*. Nothing in section 42(2) of the Act gives the board authority to change the award from one for disability to one for impairment.
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. 55 to 76 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 **10th day of October, 2002** in the City of Whitehorse, in the Yukon Territory.

Donald Inverarity, Member

Heather MacFadgen, Presiding Officer

Karen Waroway, Member