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Impairment Assessment
Using the AMA Guides to the Evaluation of Permanent Impairment 4th Edition and other prescribed methods, as applied to relevant Victorian legislation.

AMA4 Impairment Assessment Training E-Newsletter
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CHAIRMAN'S MESSAGE

One of the important functions of the newsletter is to inform impairment assessors of relevant recent legal developments.

There is a recent Supreme Court decision which will have an impact on impairment assessments, especially relating to apportionment. In the case Alcoa and De Haas, the decision of Forrest J confirms previous decisions which indicate that:

- The Guides must be interpreted and followed strictly as written, even if the result seems unfair, and
- In accordance with the instructions in the Guides, where possible, based on verifiable medical information, the impairment must be apportioned taking into account pre-existing impairments of the same region or body part.

These points are perfectly consistent with the teaching in the training course.

However, the decision also confirms that the legislation takes precedence over the Guides, specifically the sentence in the Accident Compensation Act 1985 and Wrongs Act 1958 which states: *"impairments from unrelated injuries or causes are to be disregarded in making an assessment."* The implication is that an attempt to assess the level of pre-existing impairment is required even if there is insufficient information to allow this to be done strictly under Guides methodology.

While the exact consequences of this decision in the three jurisdictions (TAC, WorkSafe and Wrongs Act) may differ somewhat, it is apparent that assessors will need to have a clear appreciation of the presence and severity of relevant conditions that might have led to pre-injury impairments. This emphasises the need for detailed history taking and careful review of documentation.

The Training Course Management Committee is planning to produce a document to assist impairment assessors in their approach to cases in which there is a potential contribution to impairment from "unrelated injuries or causes". We hope to circulate this as part of a newsletter in the near future.

Associate Professor Richard Stark
Chair, AMA4 Guides Impairment Assessment Training Program

AMA4 NEWS

Summary of *Clarchet Pty Ltd & Anor v Demediuk & Ors [2011] VSC 22 (8 February 2011*)

WorkSafe (in the name of the employer, Clarchet P/L) sought judicial review of a Medical Panel opinion, which related to assessment of impairment. In its liability decision, the WorkSafe's Agent had adopted the decision of an earlier Medical Panel, that the worker's neck injury was "a soft tissue injury of the neck now resolved with no effect on the underlying disc degenerative condition of the cervical spine." By contrast, the Medical Panel assessed the totality of the worker's neck condition. In doing so WorkSafe asserted that the Panel had:

- failed to disregard (or apportion for) unrelated injury (i.e. the pre-existing injury), contrary to both the Accident Compensation Act and directions in the AMA4 Guides:
- not assessed the injury for which liability had been accepted, but had assessed a broader injury (i.e. had misunderstood its jurisdiction);
- failed to adopt the opinion of an earlier Panel, which it was obliged to do (by s68(4) of the Accident Compensation Act).

The Application was heard by Justice Macaulay on 30 September 2010. Judgment was delivered 8 February 2011. The court upheld WorkSafe's Application, and the matter has been remitted to a differently constituted Medical Panel.

Impairment Assessment Training Management Committee

Summary of Gamble v Emerald Hill Electrical Pty Ltd & Ors [2010] VSC 611 (22 December 2010) in respect of the assessment of impairment for skin disorders in accordance with the AMA Guides

The substantive issue of this matter was about the Medical Panel's authority to use consultants to assist a Panel. The worker also challenged the assessment of impairment (0%) given by the Panel for a scarring disorder of the skin as it was at variance with an assessment (3%) given by an

independent impairment assessor on behalf of the worker. The worker was unsuccessful in convincing the Court that the Panel had made any error.

This decision is being appealed in the Court of Appeal and is unlikely to be heard until 2012. In the meantime the decision provides guiding and valid interpretation of the relevant law.

The judgement has provided useful commentary on the application of AMA 4 in respect of scarring. Importantly it confirms that giving a rating for scars under chapter 13 of the AMA Guides:

- solely upon cosmetic grounds
- or by adding up percentages for individual scars

is not in accordance with the AMA Guides.

Judge Ross sets out the approach which should be used when applying chapter 13 of the AMA Guides. Paragraph 21

"It is apparent from Table 2 that the impairment class into which a particular individual falls is dependent on the combination of three things:
(i) presence of signs and symptoms of skin disorders;
(ii) the extent of limitation on the performance of daily living; and
(iii) the frequency of treatment required."

Paragraphs 22, 23, 24 and 25 explain how the Panel used those finding to correctly assess the level of impairment noting the result was also supported by the examples given in the Guides.

"In this case the Panel made two relevant findings of fact: 'there are no limitations of daily living attributable to the scars and no treatment required for them'.

These findings effectively required the Panel to assess impairment under Class 1 of Table 2. Class 1 permitted the Panel to determine an assessment in the range of 0% to 9%. The determination of where within that range the Plaintiff's scarring fell was a matter which called for the exercise of professional judgment by the Panel. The determination of a level of impairment is a question of fact.
Ground 4(b) was not the subject of much elaboration in the Plaintiff's written or oral submissions. To the extent that the ground contends that the Panel misstated the requirements for a class 1 impairment it is misconceived. In terms of the impact on the performance of the activities of daily living, class 1 of Table 2 provides that if there is either no limitation or a limitation in respect of few activities then that would bring the worker within class 1. In this case, the Panel found that there were no limitations of daily living attributed to the Plaintiff's scars. That finding, and the finding that no treatment was required, placed the Plaintiff into class 1 in Table 2. I am not persuaded that this ground is made out.

For completeness I also note that the Panel's assessment is supported by the examples given in the AMA Guides (see Examples 1 and 4 under Class 1 on p13/281)."

In addition Judge Ross continued to analyse the assessment arranged with an independent impairment assessor on behalf of the worker and explain why it was inconsistent with the AMA Guides and justifiably not adopted by the Medical Panel. Paragraph 33

"It is also relevant to observe that Mr Behan's assessment appears to have been based solely upon cosmetic irregularity and hence was not done in accordance with the AMA Guides. As I indicated earlier the AMA Guides say that 'the actual functional loss should be the prime consideration, although the extent of cosmetic involvement also may be important' (at p13/278). Mr Behan also assessed the two scars separately, with a separate impairment assessment for each. He then aggregated the individual assessments. Such an approach is inconsistent with the AMA Guides as a single overall impairment is to be assessed for multiple scars. Under the AMA Guides 'the skin' is assessed as a single entity. In the circumstances the Panel's decision not to adopt Mr Behan's assessment is entirely explicable."

It appears that this decision supports the current instruction provided by the IAT course teaching and highlights the need to conform to the approach set out by the AMA Guides. It also highlights that an impairment percentage cannot be provided for factors other than that stipulated by the Guides.

Impairment Assessment Training Management Committee

The *Civil Procedure Act 2010* (Vic)

The *Civil Procedure Act 2010* (Vic) ("the Act"), which came into operation on 1 January 2011, has significantly reformed Victoria's civil procedure laws and introduced new obligations for medical practitioners involved in civil proceedings. Medical practitioners should be aware of these obligations and how they will impact on the conduct of litigation in health related matters.

One of the main purposes of the Act is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. This is referred to as the *'overarching purpose'.*

To assist the Court in achieving the overarching purpose, the Act provides for *'overarching obligations'* for all participants in civil proceedings. These obligations are intended to improve the standards of conduct in litigation and set out certain steps which must be taken by medical practitioners involved in legal proceedings either as a litigant or expert witness.

In accordance with the overarching obligations litigants and expert witnesses now have a paramount duty to the Court to further the administration of justice.

Other overarching obligations include:

- acting honestly;
- not making any claim or response that is frivolous, vexatious, an abuse of process or does not have any proper basis;
- only taking steps to resolve the dispute;
- cooperating in the conduct of the proceeding;
- narrowing the issues in dispute;
- not misleading or deceiving; and
- using reasonable endeavours to resolve the dispute.

While witnesses in civil proceedings have always had obligations to the court, traditionally only legal representatives of the parties had an express obligation to further the administration of justice.

In the event that a medical practitioner does not comply with the overarching obligations, the court may make an adverse order for costs, or any other order that it deems appropriate in the interests of justice.

With the introduction of the civil litigation reforms, medical practitioners should now be apprised of the new obligations under the Act.

AMA Victoria Legal Services

Changes to WorkSafe legislation affecting the impairment assessment of hearing loss

The *Transport Accident and Accident Compensation Legislation Amendment Act 2010 (Amendment Act)* has made amendments to the *Accident Compensation Act 1985* (the Act) pertaining to hearing loss. These changes apply to impairment assessments on or after 20 October 2010.

The Amendment Act replaces the general term "hearing loss" with "diminution of hearing" which is intended to be a generic reference for hearing loss of any kind. Importantly, the amendments confirm that any "diminution of hearing" must be assessed as a binaural loss of hearing.

Amendments to section 88 of the Act clarify the deemed date of injury for industrial deafness, being the last day of a worker's employment out of or in the course of which the industrial deafness arose or the date of the claim if the worker is still employed in that employment.

Existing provisions in section 88(1) and (3) have been replicated in section 91. The insertion of section 91(3AAA) requires the exclusion of hearing loss arising from any;

- work related noise exposure whilst the injured person is self employed
- work related noise exposure whilst the injured person has been employed by an overseas, interstate or commonwealth employer

- non work-related noise exposure.

This means that the assessment of the binaural loss of hearing determined in accordance with the Improved Procedure for Determination of Percentage Loss of Hearing must reflect the exclusion of industrial deafness where no liability exists to pay compensation under the Accident Compensation Act.

The insertion of 91(3AAB) confirms that any assessed deafness is deemed to have occurred at a constant rate within the total number of years exposed to industrial deafness for the purpose of calculating the above exclusion of hearing loss.

MODULES IN DETAIL

Review the 2011 module program here.

DISCLAIMER:

This Newsletter forms part of the material in the application of those Guides or methods as part of the Ministerially approved course for the Victorian WorkCover Authority (VWA) and Transport Accident Commission (TAC) under Section 91(1)(b) of the Accident Compensation Act 1985 and Section 46A(2)(b) of the Transport Accident Act 1986 and for the purposes of Part VBA of the Wrongs Act 1958 (personal injury).