



IMPAIRMENT ASSESSMENT TRAINING



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CHAIRMAN'S MESSAGE

I wish all who read these newsletters my best wishes for the festive season.

We have completed an interesting and eventful year. Training courses have been well attended, especially stream 2 sessions. This is very pleasing as it reflects the wish of experienced assessors to keep up to date. For those who present the sessions, stream 2 audiences always produce lively discussion and always raise new and interesting points: these stimulating sessions are always a highlight for us.

There have been a number of court decisions that have an impact on how the Guides are interpreted. These decisions are welcome: the Guides were written by well-meaning doctors, not by Parliamentary draftsmen, and inevitably there are areas of ambiguity. Sometimes what appears to have been the intention of the Guides' authors may be challenged by precise legal interpretation of the wording in the Guides or in the legislation.

One advantage of the system in Victoria is that the current edition of the Guides has been in force for a long time now, and this has allowed a series of legal decisions to clarify a number of areas which were previously ambiguous. This process continues. Important recent decisions relating to the issue of apportionment potentially have an impact on how impairments in some cases are assessed. Such developments emphasise the need for assessors to remain up to date. We believe that the newsletters and the Stream 2 sessions are excellent methods to help achieve this target.

The article which follows on apportionment is an attempt to provide some practical assistance in this changing environment. The Training Course Management Committee is very mindful that our job is not (nor is it within our capacity) to interpret the law, but simply to provide some guidance as to the application of the Guides. We hope assessors find the article helpful.

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

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AMA 4 NEWS

Impairment Assessment of Compensable Injuries

Apportionment refers to the process of disentangling what level of impairment can be attributed to a compensable injury or event, and what level of impairment can be attributed to factors other than a compensable injury or event.

An examiner who has completed the ministerially approved training is accredited to perform impairment assessments for claims in the following jurisdictions:

- Accident Compensation Act 1985 (Vic)
- Transport Accident Act 1986 (Vic)
- Wrongs Act 1958 (Vic)

An examiner may need to consider apportionment in all three jurisdictions, and the 4th Edition of the AMA Guides does provide some direction on how to approach the question of apportionment.

A previous Impairment Assessment Training Newsletter in December 2008 provided some discussion of apportionment; however some of the content of that newsletter is no longer accurate due to the outcome of a recent case in the Supreme Court of Victoria.

The recent judgement in the Supreme Court Case of *Alcoa Holdings Limited & Anor v Peter Lowthian & Ors* (referred to below as “de Haas”) has changed the previously accepted approach for apportionment for:

- The Accident Compensation Act
- Wrongs Act

The recent decision has not affected the approach for apportionment for assessments for the Transport Accident Act.

As such, the information in the Newsletter from December 2008 regarding apportionment for the Accident Compensation Act & the Wrongs Act is no longer valid.

For Transport Accident Act assessments, the approach described in the Newsletter of December 2008 is still valid.

For the Transport Accident Act, the assessor is required to assess the degree of impairment of a person who is injured as a result of a transport accident. This may also involve establishing that the impairment has arisen from the transport accident injuries. For TAC assessments, the text and example on page 10 of the Guides remains a useful reference when considering apportionment.

Both the Accident Compensation Act & the Wrongs Act (but not the Transport Accident Act) contain the following text:

“impairments from unrelated injuries or causes are to be disregarded in making an assessment”

There has been a previously accepted meaning about what those words mean for apportionment of impairment for claims under Accident Compensation Act & the Wrongs Act. The Newsletter from December 2008 provides a good summary of the previously accepted meaning of those words and how the apportionment process was previously accepted to work in those two jurisdictions.

The recent de Haas case has now provided guidance about the meaning of the phrase, “impairments from unrelated injuries or causes are to be disregarded in making an assessment”.

[A more recent decision of *Dr K S Chua -v- Dr Peter Lowthian & Ors* [September 2011] accepted and followed the decision in de Haas affirming that section 28LL(3) of the Wrongs Act 1958 is identical to section 91(7)(c) of the ACA and that impairment from unrelated injuries or causes

ought to be disregarded.]

The starting point for all three jurisdictions is now to consider what the Guides say about apportionment. The following text in this article attempts to provide some guidance to examiners about the process of apportioning impairment in accordance with the methodology of the Guides.

The article then goes further to describe additional steps that may be required when considering apportion for the Accident Compensation Act & Wrongs Act (but not the Transport Accident Act).

Apportionment in accordance with the Guides

Apportionment is defined in the Guides as follows-:

"This is an estimate of the degree to which each of various occupational or non-occupational factors may have caused or contributed to a particular impairment. For each alleged factor, two criteria must be met:

(a) The alleged factor could have caused or contributed to the impairment, which is a medical determination (b) In the case in question, the factor did cause or contribute to the impairment, which usually is a nonmedical determination. The physician's analysis or explanation of causation is significant".

On page 10 of the Guides, there is further explanation as to how this applies:

"If "apportionment" is needed, the analysis must consider the nature of the impairment and its possible relationship to each alleged factor, and it must provide an explanation of the medical basis for all conclusions and opinions".

The judgment emphasises the need to comply with the two requirements of the specific procedures and directions set out on pages 10 and 101 section 3.3f clause 9 of the Guides:

- From historical information and previously compiled medical data, determine if there was a pre-existing impairment. If the previously compiled data can be verified as being accurate, they may be used in apportionment (see Glossary); and
- The percentage based on the previous findings (calculated in accordance with Guides criteria) would be subtracted from the percentage based on the current findings.

Apportionment in accordance with the Accident Compensation Act 1985

The Supreme Court decisions confirm that the Guides are subordinate to the legislation and this applies to section 91(7)(c) of the ACA (and section 28LL(3) of the *Wrongs Act 1958*) which in part state:

"Impairments from unrelated injuries or causes are to be disregarded in making an assessment."

The judgment in *de Haas* distinguishes the main difference between the treatment of apportionment by the Guides and the ACA by emphasising that where the Guides allow discretion in the application of apportionment, the ACA does not. The examiner should not ignore the need to discount for pre-existing (or subsequent event) conditions or impairments of the same region or body part in accordance with the legislation. It also supports the view that in applying section 91(7)(c) to the assessment of impairment it

can be appropriate to apply the Guides' two-step approach to apportionment.

The judgment also extends the approach to applying apportionment beyond the procedures set out in the Guides and requires the inclusion of estimates of apportionable impairment, where supported by sufficient information of the unrelated impairment. However, for the purposes of consistency, the fundamental requirement that like cases should be treated alike and maintaining a degree of objectivity of assessments, it is suggested that the Guides approach be used for apportionment wherever possible.

The *de Haas* judgment is helpful as it sets out principles for assessors and decision makers to follow when applying the apportionment provisions. They are:

- *was there evidence of a pre-existing impairment due to an unrelated injury or cause?; and*
- *if yes, does the current impairment assessment disregard any contribution from the pre-existing impairment due to an unrelated injury or cause?*

The two principles closely reflect the two requirements of apportionment in the Guides albeit without the detail as to the application of the principles.

Suggested approach in applying apportionment

It is essential that the examiner appreciate that apportionment can only be considered if there is an unrelated impairment, and not just an unrelated medical condition which does not give rise to a permanent impairment. A medical condition could exist without any impairment.

The Guides define **impairment** as:

"the loss, loss of use, or derangement of any body part, system or function".

The Guides also define **a permanent impairment** as:

"impairment that has become static or well stabilized with or without medical treatment and is not likely to remit despite medical treatment" and which "is considered to be unlikely to change substantially and by more than 3% in the next year with or without medical treatment".

Therefore consideration needs to be given as to whether an unrelated medical condition is an unrelated impairment.

Examples of relevant considerations, or appropriate evidence, in determining any unrelated impairment includes (but is not limited to):

- Previous assessments of permanent impairment
- Details of any surgery
- A history of prior injury or pain – in which case an examiner will need to consider any past or persisting effect on activities of daily living, whether the symptoms resolved or continued, the amount of time taken for resolution of symptoms and the amount and types of treatment
- A history of prior X-rays or referral to specialists
- The history of any subsequent events
- A history of a prior claim
- A history of alternate duties – whether temporary or permanent

- leading up to the accepted / alleged injury
- Review of clinical records and assessments of condition or impairment – irrespective of the method of impairment assessment used

An examiner also needs to consider whether:

- X-ray findings alone indicate impairment – for example, degenerative joint or spine changes which can exist either with or without symptoms and “impairment”
- An unrelated “impairment” was permanent – in which case it must be disregarded – or, only temporary and settled – in which case there is nothing to disregard.

An examiner also needs to consider the details of the claim forms. For example:

- In ACA cases, the wording on the claim forms may also be relevant. For instance, whether the accepted injury is an event on a particular date or throughout the course of employment (i.e. over time).
- Injuries or events occurring before 12 November 1997 are unrelated.

The examiner must, after weighing up all the issues, come to a decision as to whether there is sufficient evidence to determine unrelated impairment to disregard, and if so what the % impairment is which is unrelated.

The judgment in *Chua* has also provided some guidance by stating that, in performing the task of assessing any unrelated impairment, the examiner must have an evidentiary basis on which it can be positively satisfied of a pre-existing (or subsequent) impairment which is to be disregarded.

The Court in *Chua* stated that an examiner should approach any task as follows:

1. If the evidence allows, the examiner must assess unrelated (pre-existing or subsequent) impairment to the extent necessary to perform that task; and
2. The tests contained in the Guides may or may not provide a satisfactory basis for assessment of unrelated impairment and, in circumstances of insufficient information, they are not to be regarded as the exclusive method for such assessment; and
3. Any assessment of unrelated impairment must be evidence based and determined on the balance of probabilities. It cannot simply be speculative. The examiner must have an evidentiary basis on which it can be positively satisfied of an unrelated impairment which it then disregards. The examiner must act on the basis of some sort of evidence. This can be by either applying the Guides or, if they do not provide a satisfactory basis for assessment, then by assessing impairment (which means permanent impairment) an examiner should do as best as it can having regard to a balance of the probabilities on the evidence available; and
4. In considering what is an ‘evidentiary basis’, an examiner should look at factors such as the ‘relevant considerations’ referred to above, including, but not limited to, the worker’s history regarding any previous symptoms, limitation of work activities and activities of daily living, previous radiological or other medical investigations, previous claims or previous injuries/conditions, and also, subsequent injuries and events, affecting the same body part.

Suggested process:

1. In WorkCover cases, determine whether the claimed injury arises from a single event injury or is a claim for injuries over the course of employment.

In Wrongs Act cases, the alleged injuries and incident should be described in the referral.

For TAC cases determine the injuries sustained in the accident which are then required to be assessed.

- Obtain very clear history regarding any injured person's previous symptoms, limitation of work activities and activities of daily living, previous investigations and previous claims or injuries/conditions.
- Obtain details of any work restrictions (where applicable).
- Consider accurately any information regarding pre-existing status. Assess the current impairment of the body part or region according to the Guides, and then
- Apportion in accordance with the Guides if there is verifiable medical information on the previous condition. This involves subtracting any apportioned amount from the current impairment assessed in 4. The text and example on page 10 of the Guides is a useful reference when considering apportionment

If apportionment in accordance with the Guides cannot be done, for assessments under the *Accident Compensation Act 1985* and the *Wrongs Act 1958*, the examiner must consider:

- The presence of any permanent impairment or effect of any injury/condition of the same body part or region which previously existed, and /or
- The presence of any permanent impairment or effect of any injury/condition of the same body part or region which has occurred since the accepted/alleged injury and is not related to the accepted/alleged injury.

Then:

- Provide reasons why the unrelated impairment cannot be quantified using the process in the AMA Guides and,
- Evaluate the assessable current impairment on the basis of the medical data and examination findings.

Conclusion

The recent Supreme Court decisions highlight the necessity for examiners undertaking impairment assessments to obtain thorough historical information, particularly where there is a history of presentation of previous symptoms, or a subsequent event, and the need to review all relevant clinical material.

Impairment Assessment Website Listing

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Check your details on the [Impairment Assessment Practitioners](#) listing by entering your surname into the search function. Check you are listed and that your practice details are correct, if not please forward your request to

be added to the website, or your updated practice information to iat@amavic.com.au

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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).

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