



IMPAIRMENT ASSESSMENT TRAINING



IN THIS EDITION:

AMA 4 Guides Impairment Assessment Training E-Newsletter

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[Chairman's Message](#)

CHAIRMAN'S MESSAGE

AMA 4 News

The courts continue to make life interesting for us.

[NEW VCAT PRACTICE NOTE – CONTENT OF MEDICAL REPORT CONTAINING AN AMA ASSESSMENT OF IMPAIRMENT](#)

There has long been a tension between the rigid application of the Guides (which produces desirable consistency) and subjective impressions of “fairness”. It is generally acknowledged that in the Guides some conditions seem to be more generously dealt with than others. Nevertheless, we have taken the view that our job is simply to apply the legislation as it is written. The courts have, in general supported this view.

[IMPAIRMENT ASSESSMENT: APPORTIONMENT REVISITED](#)

There is now a Court of Appeal decision which takes the view that, in the specific matter of apportionment in *Accident Compensation Act* and *Wrongs Act* cases (but NOT the *Transport Accident Act*), the wording of the Act should be taken to modify the methods set out in the Guides in certain situations. In particular, if apportionment in accordance with the Guides for assessments under the *Accident Compensation Act* 1985 and the *Wrongs Act* 1958 cannot be done or results in an **irrational, arbitrary or capricious level of impairment**, the examiner must consider other methods.

MODULES IN DETAIL

The Court did not indicate a specific alternative method, nor did it indicate how a medical impairment assessor is to decide whether a result is irrational, arbitrary or capricious. What seems obvious is that a doctor who modifies the impairment rating on these grounds must make his/her reasoning crystal clear.

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It remains to be seen whether this decision will produce major practical difficulties. One can imagine that it might produce uncertainty, especially in the field of spinal impairment, where the range of disability within a single defined DRE category may be very wide: for example patients falling into DRE category II may be minimally symptomatic or severely disabled.

Meanwhile, a practical approach is required. The article on apportionment below aims to provide assistance in this regard.

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AMA 4 NEWS

[NEW VCAT PRACTICE NOTE – CONTENT OF MEDICAL REPORT CONTAINING AN AMA ASSESSMENT OF IMPAIRMENT](#)

Practitioners are aware that any decisions made by the Transport Accident Commission are reviewable in the Victorian Civil and Administrative Tribunal (VCAT).

The VCAT established the new Review and Regulation List on 15 Feb 2013. This list consolidated the former General List, Occupational and Business Regulation List and Taxation List. Transport accident reviews are now undertaken within this list.

A new Practice Note has been issued by the Tribunal and is applicable for all transport accident reviews lodged at the Tribunal.

Practitioners accredited to conduct Permanent Impairment assessments pursuant to the AMA Guide to Permanent Impairment 4th ed are advised to take notice of the Practice Note's new provision pertaining to the contents of medical reports to be relied upon in VCAT proceedings.

Paragraph 14 of the new Practice Note requires the medical practitioner conducting an impairment assessment to provide a statement declaring which module/s of the Ministerial Approved Training Course on the Application of the Guides the practitioner has successfully completed at the time of preparing the report.

The link to the new Practice Note is:

http://www.vcat.vic.gov.au/sites/default/files/practice_note_%20PNRR1-transport_accident_proceedings.pdf.

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IMPAIRMENT ASSESSMENT: APPORTIONMENT REVISITED

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
- Transport Accident Act
- Wrongs Act.

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.

Two previous Impairment Assessment Training Newsletters have provided discussion of apportionment. The previous Newsletters were from December 2008 and December 2011.

The previous Impairment Assessment Training Newsletter in [December 2011](#) provided an updated discussion of apportionment following the decision of Justice Forrest in the Supreme Court case of *Alcoa Holdings Ltd & Lowthian & ors and De Haas*.

Since then a Court of Appeal judgment, [Lingenberg v Gallichio & ORS \[2013\] VSCA 143](#), has been handed down which further adds to the interpretation to the relevant parts Accident Compensation Act and 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 and December 2011 regarding apportionment for the Accident Compensation Act & the Wrongs Act are no longer 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. For apportionment in TAC cases that is all that is required. Apportionment is performed according to the Guides for those injuries arising from the relevant accident. It may also be necessary to apportion for injuries arising from other unrelated accidents.

For Accident Compensation Act and Wrongs Act apportionment is also performed according to the Guides with however an additional step and consideration which is detailed following the description of the process of apportioning in accordance with the Guides.

The starting point for all three jurisdictions is now to consider what the Guides say about apportionment.

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:

- *The alleged factor could have caused or contributed to the impairment, which is a medical determination*
- *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:

1. 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
2. The percentage based on the previous findings (calculated in accordance with Guides criteria) would be subtracted from the percentage based on the current findings.

This approach is described again on page 10 of the AMA Guides as follows:

"For example, in apportioning as spine impairment, first the current spine impairment would be estimated, then impairment from any pre-existing spine problem would be estimated. The estimate for the pre-existing impairment would be subtracted from the present impairment to account for the effects of the former. Using this approach to apportionment would require accurate information and data on both impairments"

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.

Additional consideration required for both the Accident Compensation Act and Wrongs Act.

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"

The Court of Appeal in [Lingenberg v Gallichio & ORS \[2013\] VSCA 143](#) affirmed the approach established in [Alcoa Holdings Limited & Anor v Peter Lowthian & Ors](#) and has provided further guidance about the use of the approaches used in applying the Accident Compensation Act directive that "impairments from unrelated injuries or causes are to be disregarded in making an assessment".

There is an additional step that is required to be considered when an examiner is apportioning for the Accident Compensation Act (ACA) & Wrongs Act and this is detailed in the following explanation.

The Court of Appeal and 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 *Alcoa Holdings* affirmed by *Lingenberg* distinguishes the main difference between the treatment of apportionment by the Guides and the ACA and the Wrongs Act by emphasising that where the Guides allow discretion in the application of apportionment, the ACA and the Wrongs Act 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.

The *Alcoa Holdings* and *Lingenberg* judgments extend the approach to applying apportionment beyond the procedures set out in the Guides and requires the inclusion of estimates of unrelated impairment that will be apportioned,.

The Court of Appeal in *Lingenberg* found that:

"No doubt, in some cases a Medical Panel might properly take the view that application of s 3.3f(9) of the Guides is the method best calculated to produce an accurate evaluation of the degree of underlying impairment. In such cases, a Panel would be right to adopt that method. In other circumstances, however, slavish adherence to the s3.3f(9) methodology is capable of producing arbitrary, capricious or irrational results and in such cases, a Panel is bound to do its best to assess the degree of underlying impairment by employing different, more appropriate means."

The Court of Appeal agreed with Forrest J in *Alcoa Holdings* that the members of the Panel may well be aware of techniques of assessment which are more accurate and held that:

“The Panel must apply their collective knowledge and experience to produce the best result. Otherwise it may be that the Panel using its collective expertise and knowledge simply attributes an estimate of the compensable injury related impairment after taking into account (and disregarding) the non-related contribution to the impairment. The Panel’s reasons, of course, should reveal how it has approached the task.”

Further, the Court of Appeal found the Medical Panel “were required to apply their knowledge and experience in order to determine the extent to which impairment from unrelated injury or cause was causing or playing a part in the worker’s assessed level of impairment.”

It should be noted by examiners that that apportionment in accordance with the Guides results in consistency, satisfies a fundamental requirement that like cases should be treated alike and maintains a degree of objectivity of assessments.

Assessors should only deviate from that approach where the facts of the individual case produce arbitrary, capricious or irrational results when used in conjunction with the Guides approach.

The *Alcoa Holdings* 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.

It should be noted that in the *Alcoa* judgment the term impairment is used to describe what according to the Guides is disability.

Examples of relevant considerations, or appropriate evidence, in determining any unrelated impairment (disability) 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 which is unrelated.

Further assistance can be found in the judgment [Dr K S Chua -v- Dr Peter Lowthian & Ors \[September 2011\]](#) as it states 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.

2. 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. Using multiple sources of information, where possible, and attempting to ensure that the sources are objective can help eliminate bias and error introduced by selecting or encouraging one outcome over another.
3. Obtain details of any work restrictions (where applicable).
4. Consider accurately any information regarding pre-existing status. Assess the current impairment of the body part or region according to the Guides, and then
5. 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 for assessments under the Accident Compensation Act 1985 and the Wrongs Act 1958 cannot be done or results in an irrational, arbitrary or capricious level of impairment, the examiner must consider:

6. The presence of any permanent impairment or effect of any injury/condition of the same body part or region which previously existed, and /or

7. 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:

8. Establish the level of the injured person's *current impairment* which must be assessed in accordance with the AMA Guides (see *H J Heinz Company Australia Ltd & Anor v Kotzman & Ors [2009] VSC 311 (31 July 2009)*).

9. Provide reasons why the unrelated impairment:

- cannot be quantified using the process in the AMA Guides or,
- would result in an irrational, arbitrary or capricious level of impairment if assessed using the process in the AMA Guides. and,

10. Evaluate what proportion of the injured person's current impairment is related to the compensable injury on the basis of the information obtained including the medical data and examination findings.

Conclusion

For Assessments for the Accident Compensation Act and the Wrongs Act:

The recent Court of Appeal decision highlights the necessity for examiners undertaking impairment assessments to further consider a different approach to the AMA Guides method for apportionment when the application of that method results in an irrational, arbitrary or capricious level of impairment.

For Assessments for the Transport Accident Act:

The recent court decision does not affect assessments for the Transport Accident Act and the approach to apportionment remains that which is described in the text of the AMA Guides.

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MODULES IN DETAIL

2013 Module Program

Module dates for the 2013 program are available on the [IAT website](#)

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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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