



POLICY REVIEW OF COMCARE'S PERMANENT IMPAIRMENT GUIDE

SUBMISSION OF

AUSTRALIAN COUNCIL OF TRADE UNIONS

24 APRIL 2009

Introduction

The ACTU is committed to ensuring the availability of equitable compensation to injured workers who have sustained impairments as a result of employment. The requirement for an equitable and adequate impairment payment scheme is critical particularly due to the changing injury profile of Comcare as a result of the growth of national self insurance.

The compensation payable for impairment is currently mediated by the combined effect of assessment methods for the determination of a level of impairment, the exclusionary thresholds and the rates of compensation which specific impairments attract.

Any review of the Comcare Permanent Impairment Guide must encompass not only assessment methods but the combined effect of all factors in the determination of the amount payable as compensation.

Any assessment of the adequacy of the Comcare guide and the resultant rates of compensation must involve a comparison of the amounts payable nationally for impairments. This assessment must not only have regard to the various maximal levels of compensation payable in each jurisdiction but to the general distribution of the level of impairment payments.

The ACTU considers that the only accurate basis upon which a comparison can be determined is to create a schedule of the most common impairments sustained by workers and to determine the comparative levels of compensation payable for those specific impairments in each Australian jurisdiction. This would require the development of the schedule of perhaps 20-30 most common pathologies giving rise to impairment. This in turn would enable comparative assessments to be undertaken using the first and second editions of the Comcare guide and the various additions of the AMA guides.

When a schedule of common impairments has been developed it would enable study of individual impairment assessment based on multiple assessments from a single medical examination to be developed.

The development of an adequate Comcare guide for the assessment impairment would also require a careful analysis of the effect of the movement of Comcare from the first edition to the second edition of its Guide. Whilst some data is available in respect of the total amount paid for impairment prior to and after the change, more detailed data is necessary to examine the effect of the change. The data would require disaggregation into injury years and specific injury types. An analysis based on a schedule of most common impairment types would also be necessary.

We raise the following issues with regard to the Comcare permanent impairment regime:

1. Thresholds in Act

We note that to establish an employers liability for an injury or impairment resulting from that injury, a worker must satisfy Comcare or a licensee of the existence of a permanent impairment and that this condition was work related. A minimum threshold of 10% whole person impairment for the most common conditions is an unnecessary further burden on a worker who has already established their injury and impairment is a result of their work. The imposition of a threshold on top of Guides, which are specifically designed to exclude any rating for minor injuries, results in the denial of an impairment payment for significant impairments.

Permanent impairment benefits should apply for all permanent impairment that has occurred as a result of a worker's employment.

2. Quantum

We note that only Western Australia and the ACT have lesser maximum permanent impairment benefits than Comcare¹. We also note that the Accident Compensation Act Review Final Report, on the Victorian system, recommends to the Victorian Government that the maximum permanent impairment benefit available under that scheme is increased to \$484,830². If this recommendation is adopted by the Victorian government, the Victorian scheme will have the highest maximum permanent impairment benefits of all Australian jurisdictions and will have a maximum benefit \$275,035 or 230% greater than the maximum Comcare benefit.

3. Range of Rating in Guides

In a number of key areas, such as spinal injuries, the current 2nd Edition Guide fails to provide an assessment of 10% forcing an assessor to determine whether the injured worker meets 8% or 13% (lower back), or 8% or 18% (upper back and neck), with nothing in between. The current 2nd Edition Guide also regularly sets unachievable impairment levels and sets criteria that are virtually impossible for an injured person to meet.

4. Basis for Guides

We note the considerable national and international criticism of the AMA Guides for the evaluation of permanent impairment. We note on Page 5 of the 5th Edition of the AMA Guides the following: *'Most impairment percentages in this fifth edition have been retained from the fourth edition because there are limited scientific data to support specific changes. It is recognized that there are limited data to support some of the previous impairment percentages as well. However, these ratings are currently accepted and should not be changed arbitrarily. In this edition, some percentages have been changed for greater scientific accuracy or to achieve consistency throughout the book.'*

While the AMA Guides attract significant criticism, they constitute an acceptable basis for the development of satisfactory impairment assessment methods in Australian compensation jurisdictions. The AMA Guides are not a static document, hence the recently released 6th Edition and subsequent errata. Similarly where the AMA guides fail to adequately assess impairments it has been possible to modify or supplement those guides to ensure an equitable result (see the Victorian modification of the fourth edition AMA guides for the assessment of infectious diseases and industrial asthma).

Any guides adopted by Comcare should be the subject of constant stakeholder review and the adoption of Comcare Guides should be accompanied by the establishment of a Comcare tripartite working group to discuss, consider and recommend changes to the Guides to take account of the latest medical knowledge or the Australian context.

¹ Policy Review of Comcare's Permanent Impairment Guide, Page 8

² Accident Compensation Act Review Final Report, August 2008, Table 7.4, Page 257

5. **Common Law**

Access to common law damages is a fundamental element of any workers' compensation system. Awards at common law can more closely reflect community standards and expectations with regard to proven employer negligence. Awards at common law also provide scope for those more seriously injured as a result of the negligence of their employer to exit the workers' compensation system while maintaining financial surety.

The maximum amount of award available under common law should equal the combined maximum amount available under s24 and s27 of the Act.

6. **Interaction with Common Law**

While actions under common law can take considerable time to progress through the Court system, this should not deny injured workers' access to compensation for their permanent injury or incapacity, or for any non-economic loss. Workers' should be able to pursue a common law action while concurrently seeking permanent impairment compensation. If successful in their common law case the permanent impairment amount should then be deducted from the common law award.

7. **Assessor Training/Accreditation**

We note that the AMA guides readily acknowledge that not every type of injury or incapacity is covered by the AMA Guides. Page 2 of the 5th Edition Guides details that: '*... the 5th Edition includes most of the common conditions, excluding unusual cases that require individual consideration.*'

For consistency of decisions and so that over time a local body of knowledge can be gained on Guide interpretation and deficiency issues from a medical profession position, permanent impairment assessments should only be made by Doctors trained and accredited by Comcare to carry out such assessments. Further Comcare should provide, at low cost, training in the interpretation and use of the guides to workers' compensation and personal injury lawyers.

8. **Dispute Settlement**

We note that disputes regarding permanent impairment ratings are dealt with via the AAT and subsequently the Court system. There is no role for medical professionals in dispute settlement of matters that invariably involve purely medical questions. There should be an ability for dispute adjudicators to seek the views of medical experts.

Further Comcare disputes take an exorbitant amount of time to resolve. In 2006-07 only 29% of Comcare disputes were resolved within 6 months, compared to the Australian average of 74.4% of disputes resolved within 6 months. The Comcare disputes resolution process needs to be changed so that it is simple, accessible and low-cost for our members.

9. **Stakeholder Reference Group**

A Stakeholder Reference Group comprising equal numbers of the social partners should oversee the work of the Comcare Permanent Impairment Project. The SRG should review the issues raised in the current round of consultations. The Director of the Project should liaise with the SRG regarding the development of the Options Paper. The SRG should review the development of the final report of the project at each stage of its development and the SRG should be fully involved in the development of the Recommendations of the Final Report.

While permanent impairment guides are complex and use specific medical and legal concepts, the SRG members should be allowed to seek the involvement of their medical and legal advisors the deliberations of the SRG.

The SRG should continue on following the completion of the Project as submitted in 4. above.