



THE LAW SOCIETY
OF NEW SOUTH WALES

18 May 2011

Director of Strategic Policy
Comcare
GPO Box 9905
Canberra ACT 2601

By email: pi.guide@comcare.gov.au

Dear Director,

Consultation on edition 2.1 of Comcare's permanent impairment guide

The Law Society's Injury Compensation Committee (the Committee) thanks you for the opportunity to contribute to this consultation.

Please find attached the Committee's submission.

Please do not hesitate to contact the Committee for any clarification. The policy lawyer with responsibility for this matter is Patrick McCarthy, who can be contacted on (02) 9926 0214 or by email at patrick.mccarthy@lawsociety.com.au.

Yours sincerely,

Michael Tidball
Chief Executive Officer

Submission to Comcare: Consultation on edition 2.1 of Comcare's permanent impairment guide

Executive Summary

The Injury Compensation Committee (the Committee) would like to thank Comcare for the opportunity to comment on its draft 'Guide to the Assessment of the Degree of Permanent Impairment' Second Edition (the Comcare Guide).

The Federal Court in *Broadhurst v Comcare*¹ strongly recommended that the Comcare Guide be reviewed. Edition 2.1 of the Comcare Guide, in its current form, operates to reduce lump sum compensation payable to injured workers who have suffered permanent impairment. Such reduction commenced with edition 2.0 of the Comcare Guide.

Edition 2.1 of the Comcare Guide would require radical amendment in order to implement a more equitable approach to the assessment of permanent impairment.

The issue that causes the Committee the most concern is the range of criterion (e.g. 10-18%) that edition 2.1 of the Comcare Guide adopts. The existence of this range causes confusion and increasing difficulty in its interpretation. While the Committee recognises that the range has been adopted for illustrative purposes, it in fact obscures distinctions within the range. This is particularly concerning as variations within the range correlate to varying legal entitlements.

Comcare has indicated that it intends to edit the Comcare Guide to accommodate certain additional deficiencies as noted in *Canute v Comcare*² and *Fellowes v Military Rehabilitation and Compensation Commission*³. The Committee would welcome revisions made to achieve this end, however it would appreciate the opportunity to review any proposed amendments in this regard.

¹ [2011] FCAFC 39

² [2006] HCA 47; (2006) 229 ALR 445; (2006) 80 ALJR 1578 (28 September 2006)

³ [2009] HCA 38 (23 September 2009)

Submission

1. Permanent Impairment - Statutory Requirement

- 1.1 Section 24 of the *Safety Rehabilitation and Compensation Act 1988* provides that compensation for permanent impairment is not payable if the degree of whole person impairment is less than 10%.
- 1.2 In the case of *Broadhurst* the Full Federal Court indicated that in so far as the Comcare Guides related to lumbar spine impairments⁴, they did not provide for a 10% criteria. Accordingly, it was impossible to determine whether a person satisfied the 10% threshold. The most appropriate method to make such a determination was to proceed to utilise the American Medical Association 'Guides to the Evaluation of Permanent Impairment' (5th ed) (AMA Guides (5th ed)).
- 1.3 The use of the AMA Guides (5th ed) is not without problem. The AMA Guides (5th ed) do not provide for a 10% criterion for every condition and therefore the use of the AMA Guide (5th ed) will be arbitrary. Further, the AMA Guides (5th ed), along with every other edition of the AMA Guides, contains a cautionary note that the Guides are "not to be used for direct financial award, nor as the sole measure of disability."

2. Assessment and development of 10% threshold and appropriate Comcare Guides

- 2.1 Following the *Broadhurst* judgment, Comcare inserted a 10% criterion for all tables within the Comcare Guide that did not provide for a 10% threshold.
- 2.2 Comcare now proposes to adopt a range of percentage figures used in the AMA Guides (5th ed) such that each table contained within edition 2.1 of the Comcare Guide now has a 10% rating. However, Comcare has decided not to adopt the examples contained therein which are designed to assist medical and legal practitioners when identifying whether an injured employee fits within a range of given percentage points.
- 2.3 The proposed use of a range of percentage points (which now includes a 10% rating to address the deficiencies in the current Comcare Guide) serves to provide a significant reduction in an injured workers compensation entitlements as the injured person will now be assessed as having a 10-13% permanent impairment.
- 2.4 In some cases Comcare has made it easier to attain the 10% threshold, for example in the less common assessment of liver function and the female reproductive system, where Comcare has renamed the 8% criterion as a 10% criterion. In other situations, and with particular regard to the most common assessment of permanent impairment to the cervical and thoracic spine tables, the 18% threshold has been renamed as a 10-18% criterion.
- 2.5 The inherent difficulty in having a proposed range in assessing permanent impairment is in the doctor determining where within that range the injured worker should be assessed. This will ultimately result in continued delay in payment of a workers entitlements, additional litigation and unnecessary appeal costs, and argument and confusion amongst the medical profession as they decipher the appropriate percentage point to award an injured worker within the range criterion

⁴ Table 9.17

provided. Furthermore, adoption of such a system to assess permanent impairment will result in a reduction in proper compensation for the injured worker.

- 2.6 Comcare has the power to make a permanent impairment guide. It is not obliged to adopt any component of the AMA Guides (5th ed). Where there is no direct policy decision to reduce entitlements, Comcare should not utilise the decision of *Broadhurst* or any other judicial criticism of the Comcare Guide as a means to reduce the entitlements of injured workers.
- 2.7 The Committee submits that the new 10% permanent impairment criteria should be developed and inserted into the relevant parts of the 2.0 edition of the Comcare Guide which do not contain 10% ratings and descriptors. The new criteria should measure "*the loss, the loss of the use of, or the damage or malfunction*" of the relevant body or bodily system or function, or part of such system or function⁵.
- 2.8 The Committee submits that Comcare should engage the medical profession and other stakeholders to develop a 10% threshold criteria for all tables contained within the Comcare Guide to adequately and equitably assess permanent impairment in a consistent manner.
- 2.9 In the alternative, the Committee submits that for all edition 2.0 tables where no 10% rating exists, Comcare's proposed edition 2.1 should simply change the percentage rating immediately below 10%, such that it becomes a 10% rating. This would more appropriately reflect the beneficial nature of the legislative framework. It would also provide an improved trade-off between the legislation's removal of common law damages and journey claims, and the introduction of a reasonable lump sum permanent impairment payment system.

The *Canute* and *Fellowes* decisions

- 3.1 The concept of permanent impairment was redefined following the decisions of *Canute* and *Fellowes*. Separate injuries can no longer be combined to satisfy the 10% threshold for an entitlement to permanent impairment. Each injury is to be treated individually in order to obtain a lump sum payment.
- 3.2 The Committee submits that Comcare should adopt amendments to allow for permanent impairment ratings from all injuries arising out of the same incident or event to be combined.

⁵ Section 4(1) definition of "impairment" in the *Safety Rehabilitation and Compensation Act 1988*