

AMA V bugs Canberra

By Mark Blumer

In the ACT at the moment (March 2011) ALA members are actively campaigning against radical changes to the CTP insurance and compensation regime in the ACT.

Until now, the ACT has retained most features of a common law scheme. The new regime, if passed by parliament, will introduce thresholds for general damages (15 per cent whole person impairment under AMA V), increase the discount rate (on future medicals, economic loss and care) from 3 per cent to 5 per cent, introduce medical panels for the assessment of disability and other, less harmful, measures.

One of the proposed 'innovations' is to use the AMA Guides to assess disability.

Dr Pillemer's call for uniformity across Australia in the assessment of impairment, (*Precedent*, Issue 101), is one with which everyone can agree. However, if using the *AMA Guides* to assess quantum and eligibility for all workers' compensation claims is the cost of uniformity, it is too high. Every single edition of the *Guides* contains the following cautionary note:

'The *Guides* is not to be used for direct financial awards, nor as the sole measure of disability. The *Guides* provides a standard medical assessment for impairment determination and may be used as a component in disability assessment.'

However, many Australian jurisdictions have adopted the *Guides* for precisely this purpose – to definitively determine financial awards – as the sole measure of impairment and/or disability.

It has been noted that:

'The *Guides* is not the objective, medical evaluative system it

purports to be and that has been so appealing to legislators and other decision-makers. Instead, like any impairment rating scheme, it rests in large part on important and difficult normative judgements. Yet the *Guides* obscures this from the reader; it is laden with hidden or poorly explained value judgments that frequently are gender-biased. The *Guides'* flawed promises of objectivity are especially troubling because they appeal to the craving of legislators and other decision-makers for certainty and clarity in the difficult arena of impairment and disability assessment.'

The Texas Court of Appeals found that: 'The impairment ratings generated from use of the *Guides* have no adequate scientific base and have no reasonable relationship to true impairment:

1. the 15 per cent threshold as a qualification for supplemental benefits is arbitrary in and of itself and further that it is based upon an arbitrary use of the *Guides* ...'

This finding has not been contradicted in subsequent appellate cases in the US.

As pointed out in *Understanding the AMA Guides in Workers' Compensation*,⁴ the 6th edition of the *Guides* criticises previous editions for failing to be comprehensive or based on evidence, and for not having accurate ratings. Chapter 1 of the 6th edition quotes an article in the *Journal of the American Medical Association*, which stated that the numerical ratings in the *Guides* were more 'legal fiction than medical reality'. Section 1.2a of *AMA Guides* (6th edition, 2008) says that the 5th edition used 'antiquated and confusing terminology' and had 'limited validity and reliability of the ratings'.



Why would we in the ACT support the adoption of such an unfair measure of an injured person's disability?

Soon this may not be just an ACT issue, as the Productivity Commission's draft report on Disability Care and Support recommends, in relation to a National Injury Insurance Scheme, that 'The NIIS would be structured as a federation of separate, state-based injury insurance schemes. The purpose of federation membership should be to ensure consistency in assessments and to provide certainty around a benchmark minimum standard of care.'

It is clear to ALA members in the ACT that quality will be sacrificed for the appearance of certainty and equality. We are fighting that outcome in the ACT. ■

Notes: 1 *Guides to the Evaluation of Permanent Impairment*, 5th Edition, p12.

2 Ellen Pryor, 'Flawed Promises: A Critical Evaluation of the American Medical Association's Guides to the Evaluation of Permanent Impairment', 103 *Harvard L Rev* 964, at 965, 968, 976 (1990).

3 *Texas Workers' Comp. Comm'n v Garcia*, 893 S.W.2d 504, 519-20 (Tex. 1995).

4 Babitsky & Mangraviti, 4th edition, pp 3-4. 5 My emphasis. Productivity Commission Draft Report *Overview and Recommendations*, February 2011, p36.

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