

Transport Accident Act Impairment Assessment Protocols – 1 March 2005 (amended as from August 2007)

1. INTRODUCTION

- 1.1 Consistent with its mission and vision statement, *Client Service Charter* and public commitment to model litigant guidelines, the Transport Accident Commission (TAC) strives to assess and deliver the correct impairment entitlements to claimants as expeditiously as possible.
- 1.2 The TAC, Law Institute of Victoria (LIV) and Australian Lawyers Alliance (ALA) all agree that these protocols recognise the appropriate mechanisms to deliver impairment benefits and ensure that claimant's legal rights and obligations are being observed and are not abandoned for the lack of opportunity to enforce them.¹
- 1.3 The role played by claimant's lawyers in this process is recognised by the TAC.
- 1.4 The protocols have been agreed by the Transport Accident Commission (TAC) with LIV and ALA who agree that they and their membership will comply with them.

2. OBJECTIVES

- 2.1 The processes giving rise to the consideration, assessment and delivery of impairment benefits are, by the mutual and early exchange of relevant and reasonable information and documents, productive of quality decision making by the TAC. Claimant's lawyers will use their best endeavours to facilitate this by providing relevant information and documents to the TAC at the earliest opportunity in the impairment decision making process.
- 2.2 Impairment benefit delivery processes and procedures be fair, efficient and provide an expeditious and transparent process for the delivery of appropriate no fault impairment benefits to people who sustain injuries as a result of a transport accident.
- 2.3 The TAC maintains its commitment to adhere to model litigant guidelines.
- 2.4 The parties will have reference where appropriate to a claimant's clinical and medical information in making its impairment determinations based on the requirements of the *Guides* which state:

In practise, the first key to effecting an accurate impairment evaluation is a review of office and hospital records maintained by the physicians who have cared for the patient since the onset of the condition. Such records include clinical notes, medical and consultation reports, hospital records, admission and discharge summaries, notes on operations, pathology and laboratory test reports, and reports on special tests and diagnostic procedures.

Using multiple sources of information and attempting to ensure that the sources are objective can help eliminate bias, and error introduced by selecting or encouraging one outcome over another.²

The strength of the medical support for an impairment estimate depends on the completeness and reliability of the medical documentation.³

¹ *Justice Statement May 2004*, Modernising Justice at paragraph 3.3

² *Guides*, Section 1.2, Chapter 1 (Impairment Evaluation), page 3

³ *Guides*, Chapter 2 (Records and Reports), page 8

3. APPLICATION

- 3.1 These protocols apply to the determination of impairment benefits in accordance with sections 46A, 47, 48, 54 and 55 of the Transport Accident Act 1986 (the TAA).
- 3.2 These protocols will apply to a request for impairment assessment made after 1 March 2005 where a TAC claimant has:
 - 3.2.1 At any time after the transport accident, retained a law firm which is a member of either LIV or ALA to provide advice about the consequences of the transport accident injury; and
 - 3.2.2 Provided the TAC with written confirmation that the law firm has been retained to act for the claimant in respect of the impairment assessment process.
- 3.3 The TAC confirms that the claimant's lawyer will always be advised of a decision at the same time as the claimant.

4. IDENTIFICATION

- 4.1 Where the TAC's claims impairment screening process identifies a claimant who appears to be or to be likely to be entitled to impairment benefits, the TAC will write to the claimant (and their lawyer where applicable) to advise that the impairment assessment process has commenced.
- 4.2 Where the TAC has not identified a claimant who appears likely to be entitled to impairment benefits, a claimant, through her/his lawyer, may request the TAC to consider the claimant for an impairment assessment.
- 4.3 In either case, a claimant's lawyer can assist in expediting the TAC's impairment assessment process by:
 - 4.3.1 Advising the TAC in writing that they act for the claimant;
 - 4.3.2 Requesting the TAC commence an impairment assessment in accordance with these Protocols; and
 - 4.3.3 Providing or facilitating the provision of the information described in Chapter 5 necessary for the TAC to make the correct or preferable impairment assessment.
- 4.4 Written communication with the TAC can be made to the Manager, Impairment, Transport Accident Commission, 60 Brougham Street, Geelong 3220 or DX 216079, Geelong.

5. EXCHANGE OF INFORMATION

- 5.1 In order for the TAC to commence or finalise its impairment assessment process in accordance with these Protocols, the TAC shall, within 28 days of receiving the written request in accordance with Clause 4.2 provide to a claimant's lawyer all information and documents in the possession of the TAC that have been used or are intended to be used by the TAC in its impairment assessment process including a copy of the claim form unless the information or document has already been provided to the claimant or the claimant's lawyer.
- 5.2 The claimant's lawyer shall, within 150 days of the receipt of information provided by the TAC in accordance with clause 5.1, provide or facilitate the provision of the following information to support the request for an impairment assessment:
 - 5.2.1 A signed statement by the claimant which sets out the circumstances of the transport accident and other information known to the claimant which may be relevant to an impairment assessment;

- 5.2.2 Medical and treatment information not already provided to the TAC including where appropriate clinical notes and reports from the claimant's treating general practitioner(s) and all test or diagnostic reports relating to the injuries.
- 5.2.3 Impairment assessments conducted by an accredited medical practitioner that are sought to be relied on by the claimant, together with the letter and attachments sent to the practitioner requesting the assessment where not already provided. Such reports need to demonstrate, where appropriate, how the practitioner has considered the question of apportionment of any impairment between the transport accident and pre-existing or unrelated factors.
- 5.2.4 Advice of any other medical information being sought or that may be sought to be relied on in relation to the claim for impairment benefits.
- 5.2.5 Where a claimant has a pre-existing injury or condition that has been affected by the transport accident and affects an impairment assessment, clinical notes and information from the medical practitioner(s) that treated the claimant for such pre-existing injury or condition.
- 5.2.6 A claimant's lawyer may provide a summary if the lawyer determines clarification is required in respect of the following issues which have not been adequately dealt with by the provision of a claimant's statement or in the content of the medical reports relied upon:
 - 5.2.6.1 Pre-existing injuries; or
 - 5.2.6.2 Overlap; or
 - 5.2.6.3 Unique point of law.
- 5.2.7 If a summary is provided by the claimant's lawyer it is to set out:
 - 5.2.7.1 Each and every injury they believe is likely to attract a rating for impairment and the reasons why;
 - 5.2.7.2 An explanation of how each injury was caused as a result the transport accident the subject of a claim;
 - 5.2.7.3 An explanation of how the injuries have manifested themselves as a current and permanent impairment; and
 - 5.2.7.4 An explanation of how each injury will rate in accordance with the applicable edition of the Guides.

6. EVALUATION AND ASSESSMENT

- 6.1 The TAC will in the commencement or continuation of an impairment assessment evaluate information provided by a claimant lawyer in accordance with Chapter 5 within 28 days of its receipt by the TAC.
- 6.2 As a result of the evaluation, the TAC may, within 28 days of receipt of the information, require:
 - 6.2.1 Clarification of impairment assessments made by an accredited medical practitioner engaged by the claimant.
 - 6.2.2 Clarification of an impairment summary provided by a claimant's lawyer;
 - 6.2.3 Clarification of an impairment assessment report;

- 6.2.4 A claimant to be independently medically examined;
 - 6.2.5 The claimant to provide further information; and/or
 - 6.2.6 Where the date of the transport accident is before 1 July 1999, the claimant to provide a signed authority.
- 6.3 Where a claimant refuses or fails without reasonable excuse to comply with the TAC's request to submit for independent medical examination, the claimant's right to compensation may be suspended in accordance with the provisions of section 71 of the TAA.
- 6.4 A claimant must take reasonable steps to comply with the TAC's request to provide clarification or further information as the case may be. The claimant shall within 28 days of such request provide to the TAC:
- 6.4.1 The clarification or information; or
 - 6.4.2 Where the clarification or information is not available, an explanation of all steps taken to obtain the clarification or information; or
 - 6.4.3 A statement explaining why the request for clarification or information is considered to be unreasonable or unnecessary and the extent it has not been complied with. In such a case, the claimant cannot rely on such information in disputing the TAC's impairment determination either in a pre-issue review or an application to the VCAT for merit review except by consent or leave of the VCAT.
- 6.5 The TAC will make its impairment determination within 28 days of the latter of either:
- 6.5.1 Receipt of Chapter 5 information from a claimant's lawyer; or
 - 6.5.2 Where clarification, information or reports are requested by the TAC in accordance with Clause 6.2, the date of receipt of such information from the claimant or the TAC's independent medical examiner(s).

7. LEGAL COSTS

- 7.1 In recognition of the role played by a claimant's lawyer in the process of a claimant in providing the information required to assist the TAC make the correct or preferable impairment decision, the TAC will, within 14 (fourteen) days of payment of an impairment lump sum or annuity to the claimant pay to a claimant's lawyer:
- 7.1.1 Legal costs of \$2,890⁴ where the claimant provides a release in respect of impairment benefits under sections 47 and 48 of the TAA; or
 - 7.1.2 Legal costs of \$2,100⁵ where no release is provided.
- 7.2 The TAC will reimburse the application fees and associated charges for requests made for a claimant's hospital and ambulance records pursuant to the Freedom of Information Act 1982 and requests made for medical records pursuant to the Health Records Act 2001 where these requests are made for the purposes of an assessment of impairment under the Impairment Assessment Protocol. The TAC will also reimburse the reasonable cost of interpreter fees incurred for an Impairment Assessment Protocols application.
- 7.3 Where payment of legal costs is made in accordance with clause 7.1.2, this amount shall be offset against any legal costs payable to the claimant's lawyer in any subsequent dispute or merit review in respect of the claimant's entitlement to impairment benefits.

⁴ Indexed by CPI at 1 January 2007

⁵ Indexed by CPI at 1 January 2007

- 7.4 The following clauses deal with points of overlap and what price points will be paid and in what circumstances, where there are concurrent applications under the Impairment Assessment and Common Law Protocols in relation to impairment generally or in relation to the 30% threshold and for a serious injury certificate and/or a common law settlement pursuant to the provisions of the Common Law Protocols is negotiated.
- 7.4.1 An Impairment Assessment Protocols price point will be paid where the following material is received in support of an Impairment Assessment Protocols application and the conditions in clauses 7.4.1.4 and 7.4.2 are met:
- 7.4.1.1 Claimant's statement (including a list of injuries); and
- 7.4.1.2 Medical reports; and
- 7.4.1.3 Lawyer's summary (where provided); and
- 7.4.1.4 The material provided supports a whole person impairment determination of more than 10%.
- 7.4.2 The required material must have been received at the time the serious injury certificate is granted or the common law settlement is negotiated (whenever the payment of an Impairment Assessment Protocols price point is sought). Where a claimant is relying on the medical material held by the TAC and no additional medical material is to be provided, this must be clearly stated in a letter and any differing interpretation of the medical material articulated.
- 7.4.3 Where the Impairment Assessment Protocols price point is sought at the time a common law settlement is negotiated, the claimant will not seek an impairment release.
- 7.5 Where a claimant makes an application pursuant to the Impairment Assessment Protocols and the TAC makes an interim payment only, the TAC will pay the Impairment Assessment Protocols price point (no release obtained) where the following information has been received at that time of the interim determination and payment and the conditions in clauses 7.5.4 and 7.5.5 are met:
- 7.5.1 Claimant's statement (including a list of injuries); and
- 7.5.2 Medical reports; and
- 7.5.3 Lawyer's summary (where provided); and
- 7.5.4 The material supports an impairment determination of more than 10%.
- 7.5.5 If a final determination is later made and a release is signed, the additional price point sum that attaches to the signing of a release will be paid. Where the claimant's common law damages are settled and a release in relation to any final impairment has not been signed, the latter will not be requested by the claimant.

8. PROTOCOL DEVELOPMENT FORUM

- 9.1 The TAC will convene a forum with representatives of the LIV and ALA at least once every six months after these protocols come into force.
- 9.2 The forum will discuss and review matters of relevance including:
- 9.2.1 Quality improvement initiatives to enhance the effectiveness of these protocols;
- 9.2.2 The procedures and definitions in these protocols;

- 9.2.3 Specific identified examples of non-compliance with these protocols, if any;
- 9.2.4 Reports containing relevant data about participation in the protocol processes;
- 9.2.5 Development and consideration of key indicators of success of these protocols;
- 9.2.6 The development of reporting and measurement methodology.