

Verlinden and Comcare [2014] AATA 46 (31 January 2014)

Key Points

- The Tribunal had to consider the appropriate method of determining an employee's degree of permanent impairment.
- In determining this, the Tribunal had to consider whether the criterion listed in Table 9.17 of the Comcare Guide to the Assessment of the Degree of Permanent Impairment (Edition 2.1) were met.

Background

In April 1993, Mr Verlinden suffered a work-related injury to his lumbar spine in the nature of an aggravation of previously asymptomatic mild lumbar spondylosis.

Comcare accepted liability in respect of this injury pursuant to the SRC Act.

As a result of Mr Verlinden suffering further minor aggravations, he suffered from a substantial lumbar spondylosis that limited the range of movements in his lumbar spine and his capacity for lifting and bending. This condition was considered a permanent impairment pursuant to the SRC Act. Reports from medical practitioners indicated that Mr Verlinden had diffuse degenerative disc disease, and it was agreed that he had no significant signs of radiculopathy and no fractures of the spine.

The parties disputed how the degree of Mr Verlinden's permanent impairment was to be assessed. This dispute was heard before the Tribunal.

The Law

Section 24(5) of the SRC Act provides that the degree of permanent impairment is to be determined under the approved Comcare Guide to the Assessment of the Degree of Permanent Impairment (**the Guide**) in force at the relevant time. At the time of Mr Verlinden's workers' compensation claim, Edition 2.1 of the Guide was in force.

Pursuant to section 24(7), compensation is not payable to an employee where the employee's degree of permanent impairment is less than 10 per cent.

Part 1 of the Guide includes Tables by reference to which an employee's permanent impairment may be assessed, and assessments are expressed in terms of a percentage of "whole person impairment" (**WPI**). In respect of Mr Verlinden's condition, Table 9.17 set out the degrees of impairment according to diagnostic-related estimates in relation to the lumbar spine.

Principle 12 of the Guide provides that, if an employee's impairment is of a kind that cannot be assessed in accordance with Part 1 then, save for certain impairments or conditions, the assessment is to be made under the American Medical Association's *Guide to the Evaluation of Permanent Impairment* (**the AMA Guide**).

Conclusion

The parties did not dispute that, if assessed by reference to the diagnostic criteria in Table 9.17 of Edition 2.1 of the Guide, Mr Verlinden's degree of permanent impairment was 8 per cent.

However, Mr Verlinden submitted that merely because a Table pertains to a particular part of the body, this does not mean it is relevant to assessing every kind of impairment that can arise in that part of the body, and that if the Table is only applicable if certain diagnostic criteria are met, it can only be relevant to impairments of that kind. Accordingly, he submitted that Table 9.17 could not be used to assess his kind of impairment as it was not radiculopathy-based.

Mr Verlinden further submitted that as Table 9.17 does not deal with his kind of impairment, it does not permit a truly relevant assessment of the degree or severity of his impairment, and so was inapplicable. Specifically, Mr Verlinden noted that Table 9.17 did not permit a claimant to attain the 10 percent threshold for compensable permanent impairment of the lumbar spine, no matter how severe the impairment, unless there was radiculopathy or a compression fracture. In absence of those criteria, the maximum percentage impairment was 8 percent.

Mr Verlinden considered that, as the Guide could not be used, the AMA Guide ought to be used which include Diagnostically-Related Estimates Tables and Range of Motion Tables which measure different kinds of impairments in relation to the back.

Comcare argued that the Guide and the AMA Guides are not alternatives from which a claimant can select the more favourable. Given the medical evidence was clear on the applicant's type of impairment, Comcare argued that Mr Verlinden's impairment was a type of impairment that could be assessed under the Guide, and that this assessment must stand.

The Tribunal preferred the submissions of Comcare, and found no reason why Mr Verlinden's impairment could not be assessed using Table 9.17 as his symptoms fit squarely within the diagnostic criteria attracting a rating of 8 per cent. As a result, Mr Verlinden's degree of impairment level of 8 per cent was applicable, and the Tribunal affirmed the decision under review.

Lessons Learnt

The decision provides clarification that the AMA Guides are not to be used as an alternative in situations where an impairment can properly be assessed pursuant to the Guide.

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