

# Filling the Holes in the *AMA Guides*:

## *Zagar v Transport Accident Commission*

[2005] VCAT 820

By Michael Lombard

Since the introduction of the hybrid 'no-fault' and 'common law' scheme for transport accidents in Victoria, controversy has surrounded the use of the American Medical Association's Guides to the Evaluation of Permanent Impairment (the Guides).

In the Victorian Transport Accident Scheme, the fourth edition of the Guides (AMA4) plays a central role. The level of impairment assessed under AMA4 determines whether a lump sum can be paid, the period during which loss of earning capacity benefits can continue, and provides one of the gateways to common law.

The Guides play similar roles in the Victorian Workcover Scheme and have been adopted in other Australian and international jurisdictions.<sup>2</sup>

### THE ISSUE

The case of *Zagar*<sup>3</sup> relates to a condition not included in the second edition of the Guides (AMA2). Mr Zagar suffered injuries, including a fracture of the odontoid process, in a transport accident in 1997. He was assessed by the Victorian Transport Accident Commission (TAC) as having a permanent impairment of 32%. He appealed against this determination to the Victorian Civil and Administrative Tribunal (VCAT) which has jurisdiction for reviewing any decision of the TAC. The subject of the dispute was the fracture of the odontoid process, which did not appear in chapter one of AMA2, the orthopaedic chapter. The medical experts considered that, as AMA2 provided for fractures of posterior elements of the spine and dislocations or subluxations of one vertebra, this condition should also rate an impairment.<sup>4</sup> Bowman J had to decide whether the Act allowed him to include a major injury in the assessment.

A Deputy Convenor of Victorian Medical Panels, Dr Peter Lowthian, had previously delivered a paper on the omission of a condition from AMA2, to which Bowman J referred in *Zagar*.<sup>5</sup> Dr Lowthian had argued that the Guides were not totally inclusive and that a number of areas were open to interpretation. Dr Lowthian offered the following solution: "It is reasonable in such cases after careful assessment to provide an impairment based on similar impairing conditions, which must of course be accompanied by a clearly expressed rationale."

Dr Lowthian cited such conditions as post-Q fever fatigue and fractures of the back part of the ribs, as examples.

Bowman J found this approach and the approach of the doctors who gave evidence attractive. The elements that gave the condition an impairment value appeared to be:

- the condition was a very serious one;

- the non-union of the fracture;
- the potential for dislocation or subluxation; and
- the view of the doctors that the condition should be assessed under the Guides.

Bowman J therefore assessed Mr Zagar's level of whole person impairment for this condition at 5% despite the fact that the fracture was not specifically referred to in AMA2.

### CONCLUSION

Although every case must be judged on its facts, this decision, which was not appealed by the TAC, shows that an impairment can be allocated to a condition not specified in the Guides. The decision of the VCAT seems to have application to any edition. A clear, logical explanation of why the allocation of an impairment should be made is the key. This can ensure that the badly injured are not always disadvantaged by the application of the Guides. ■

**Notes:** 1 Sections 47, 53, 93 of the *Transport Accident Act* 1986. 2 The *Guides* are used in NSW and other states, parts of Canada and the USA. 3 [2005] VCAT 820 (4 May 2005). 4 *Ibid* para 15. 5 Paper entitled *Successfully Interpreting the AMA Impairment Guidelines (4th edition)*, presented at a conference, 'Personal Injury Victoria 2005', held by Lexis Nexis in Melbourne.

**Michael J Lombard** is the partner in charge of the Transport Accident Division at Holding Redlich, Melbourne. **PHONE** (03) 9321 9999 **EMAIL** michael.lombard@holdingredlich.com.au

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