Workers compensation medical dispute assessment guidelines

State
Insurance
Regulatory
Authority

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General introduction

Publication and commencement

The State Insurance Regulatory Authority (SIRA) is a statutory body constituted under the *State Insurance and Care Governance Act 2015* which is responsible for regulating workers compensation insurance, motor accidents compulsory third party (CTP) insurance and home building compensation insurance in NSW.

These Guidelines are published by SIRA and replace the WorkCover *Medical Assessment Guidelines* 2006 which were issued on 25 October 2006. These Guidelines apply to all existing disputes in the Commission and to new disputes under Part 7 of Chapter 7 of the 1998 Act from 1 January 2019.

Legislative framework

The following legislation outlines the rights, responsibilities and obligations of workers, employers and insurers, should a person suffer a work-related injury in NSW:

- *Workers Compensation Act 1987* (the 1987 Act)
- *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act)
- Workers Compensation Regulation 2016 (2016 Regulation).

Guideline-making power

These Guidelines are made under sections 328, 331 and 376 of the 1998 Act.

Interpretation of the guidelines

These Guidelines should be read in conjunction with the relevant provisions of the Acts and the Regulation; the chapter on independent medical examinations and reports in the *Workers compensation guidelines;* SIRA Guides made under section 322 of the 1998 Act; the Workers Compensation Commission Rules, Practice Directions and Registrar's Guidelines issued by the Workers Compensation Commission.

Purpose of the Guidelines

These Guidelines set out the procedures for the referral of medical disputes for assessment and appeal, and the procedures for assessment and on appeal under Part 7 of Chapter 7 of the *1998 Act*.

Application of the Guidelines

Relevant parts of the Guidelines apply to key scheme stakeholders and service providers, including:

- insurers
- health practitioners
- lawyers and other representatives
- staff of the Authority

- decision makers
- courts and other dispute resolution bodies.

Scope of the Guidelines

The Guidelines contain the following Parts:

- Part 1: Interpretation
- Part 2: The referral process
- Part 3: The assessment procedure
- Part 4: The medical assessment certificate
- Part 5: Reviewing or appealing the medical assessment certificate.

Definitions

Words defined in the NSW workers compensation legislation have the same meaning in these Guidelines.

Part 1: Interpretation

Abbreviations used in these Guidelines

1.1 In these Guidelines, these abbreviations are used:

Abbreviation	Term
AMS	approved medical specialist
Commission	Workers Compensation Commission
Registrar	Registrar of the Workers Compensation Commission
MAC	medical assessment certificate
MAP	Medical Appeal Panel
SIRA	State Insurance Regulatory Authority
WPI	whole person impairment
1998 Act	*Workplace Injury Management and Workers Compensation Act 1998*
1987 Act	*Workers Compensation Act 1987*
2016 Regulation	Workers Compensation Regulation 2016

Words and phrases defined in these Guidelines

1.2 In these Guidelines these words and phrases have the following meanings:

Word/phrase	Definition
approved medical specialist	A medical practitioner appointed under Part 7 of Chapter 7 of the 1998 Act as an AMS
day or days	Calendar days unless specified as working days
claimant	A person who has made a claim under the 1998 Act
lead assessor	A lead assessor is nominated by the Commission where a worker's injury requires more than one AMS to assess different body systems, structures and/or disorders.
party	Includes the claimant, an insurer or an employer
insurer	An insurer within the meaning of the: • *Workers Compensation Act 1987* • *Workplace Injury Management and Workers Compensation Act 1998.* It includes a: • licensed insurer • former licensed insurer • specialised insurer • self-insurer or former self-insurer, and scheme agent.

Part 2: The referral process

Referral to an approved medical specialist

2.1 A court, the Commission or the Registrar may refer a medical dispute for assessment by an AMS.

2.2 The Registrar is to give the parties notice of the referral.

2.3 A party can request a medical dispute be referred to an AMS.

2.4 The request must be in the form approved by the Registrar for that purpose.

Choosing an approved medical specialist

2.5 The parties to the dispute may advise the Registrar in writing of the name of the AMS they have agreed to appoint at the time of filing the application and/or reply or within seven days after the dispute is referred by the Registrar.

2.6 If the parties do not notify the Registrar of an agreed AMS within seven days as set out above, the Registrar is to choose the AMS who is to assess the dispute and advise the parties in writing of the name of the AMS – section 321(2) of the 1998 Act.

2.7 If the chosen AMS is not available within two months, the parties should select another AMS or the Registrar may appoint one.

2.8 When choosing an AMS, the parties or the Registrar should consider:

- 2.8.1 only AMSs on the Commission's list who are appropriate given the body systems to be assessed
- 2.8.2 which location to attend the examination would be most convenient to the worker
- 2.8.3 the availability of the AMS.

2.9 The full list of AMSs is available on the Commission's website at www.wcc.nsw.gov.au

2.10 The Registrar may choose a different AMS if not satisfied that the AMS chosen by the parties meets the above criteria.

Lead and non-lead assessments

2.11 In the case of a complex injury where different medical assessors are required to assess different body systems, a lead assessor will be appointed to coordinate and calculate the final degree of permanent impairment as a percentage of WPI resulting from the individual assessments.

2.12 If the parties do not notify the Registrar of the agreed lead assessor within seven days, the lead assessor will be selected by the Registrar.

2.13 The AMSs chosen to undertake the multiple assessments will be notified by the Registrar in the referral of the lead assessor and non-lead assessor(s).

2.14 In matters concerning complex injury, the non-lead assessor will carry out an assessment and provide it to the lead assessor. The lead assessor undertakes an

assessment, consolidates it with the non-lead assessor's assessment and provides a consolidated MAC.

2.15 There may be more than one non-lead assessor undertaking an assessment for consolidation by a lead assessor.

Conflict of interest

2.16 It is important that the medical assessment process promotes public confidence through transparency, impartiality and fairness. A conflict of interest arises when an AMS is unable, or appears unable, to perform his or her responsibilities independently and free from any influence external to the assessment. An apparent or potential conflict may involve pecuniary interests or non-pecuniary interests.

2.17 An AMS to whom a matter is allocated must not accept a referral if there is a known conflict of interest.

2.18 The AMS should review the referral documents within seven days of receiving them to identify any potential conflict of interest.

2.19 If the AMS considers that there may be a conflict of interest, the AMS is to immediately notify the Registrar and return the referral documents. The matter will then be reallocated to another AMS by the Registrar.

2.20 A party may apply to the Registrar to have the matter reallocated on the grounds that the AMS, to whom the matter has been allocated, has a conflict of interest. To do that, the party must apply:

2.20.1 within seven days of receiving notification of the name and contact details of the AMS

2.20.2 in writing, detailing the reasons in support of the reallocation.

2.21 The Registrar is to decide on the application for reallocation within seven days of receipt.

2.22 If the Registrar is of the opinion that there are reasonable grounds for believing that the appointed AMS may have a conflict of interest (for example, someone previously treated or examined or where there is a personal relationship), the Registrar must reallocate the matter.

The Registrar arranges the assessment

2.23 The Registrar advises the parties of the date, time and location of the assessment.

2.24 If an interpreter is required, the Registrar is to organise for a National Accreditation Authority for Translators and Interpreters (NAATI) certified interpreter to attend the examination. In circumstances where a NAATI certified interpreter is unavailable the Registrar may approve an interpreter.

2.25 When the Registrar refers the matter to the AMS, the Registrar is to provide the AMS with:

2.25.1 all documentation admitted on behalf of a party to proceedings relevant to the medical dispute referred in compliance with the 2016 Regulation

2.25.2 any applicable provisions of the *Workers Compensation Commission Rules 2011,* and

2.25.3 any orders of a Court or the Commission.

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2.26 The Commission file may contain video surveillance material obtained as part of investigators' reports. Video surveillance shall not be disclosed to the AMS unless ordered by the Commission in exceptional circumstances.

2.27 Parties to a medical dispute are not to attach legal submissions in the documents lodged in connection with the dispute. Any legal submissions will be removed from the documents lodged prior to referral to the AMS.

2.28 If it is necessary for a worker to bring x-rays or similar documents to the assessment, the worker will be advised of this in the letter from the Registrar.

2.29 The parties are not to communicate directly with the AMS at any time with the exception of the worker during the examination.

2.30 The parties are not to provide additional information directly to the AMS at any time.

2.31 An AMS may call for the production of medical records necessary or desirable for the purposes of assessing a medical dispute. This request should be made through the Registrar.

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Part 3: The assessment procedure

Examination by approved medical specialist

3.1 The *Medico-Legal Guidelines* of the NSW Medical Board, as in force from time to time, apply to examinations by AMSs.

3.2 The AMS Code of Conduct governs the conduct of AMSs. The Code seeks to guide AMSs in carrying out their duties in a manner that is consistent with the objectives of the Commission.

3.3 The procedures set out in the *NSW workers compensation guidelines for the evaluation of permanent impairment* apply to the conduct of assessments relating to whole person impairment. The applicable guidelines are those in force at the time of the assessment.

3.4 The *Table of Disabilities* applies when assessing permanent loss for injuries before 01 January 2002. The *Table of Maims* applies to injuries received before 4 pm on 30 June 1987.

3.5 The Commission does not allow workers to record examinations undertaken by an AMS.

3.6 When assessing a medical dispute, an AMS is not restricted to the material before him or her. The AMS may do any one or more of the following:

- 3.6.1 consult with any medical practitioner or other health care professional who is treating, or has treated, the worker
- 3.6.2 call for medical records (including x-rays and the results of other tests) and other information that the AMS considers necessary or desirable to assess the dispute
- 3.6.3 require the worker to submit himself or herself for examination by the AMS.

3.7 An AMS may examine the worker by video consultation as an alternative to a face-to-face consultation in limited circumstances. For example, assessment of a psychological injury where a worker is situated in a rural or remote location.

3. 8 The Registrar's approval is required before an assessment is done by video consultation.

Assessing a medical dispute "on the papers"

3.9 In the majority of matters, the AMS will need to medically examine the worker to form an opinion.

3.10 However, the AMS may make an assessment without a medical examination if satisfied that the information provided is sufficient to enable determination of the issues in dispute.

3.11 In exercising the discretion not to conduct a medical examination, the AMS must consider:

- 3.11.1 the nature and complexity of the issues in dispute
- 3.11.2 the likely impact of non-examination on the outcome of the dispute
- 3.11.3 the extent and detail of the information provided

3.11.4 any submission by the parties as to why a medical examination is required

3.11.5 the availability of the worker.

3.12 Assessment without a medical examination occurs only in rare circumstances, for example, where a worker suffered an injury and later died before an examination was able to be undertaken.

3.13 The AMS should confirm in the Medical Assessment Certificate (MAC) the reasons why an examination of the worker was not required.

Accompanying person for the worker at an assessment

3.14 A support person, such as a family member or friend may accompany the worker to a medical assessment if it is reasonable in the circumstances.

3.15 A union representative or legal practitioner instructed to act for the worker in the Commission is not permitted to accompany a worker to a medical assessment.

3.16 The accompanying person is to conduct himself or herself appropriately during the examination.

3.17 Before the examination commences, the AMS should explain that the support person must not take an active role.

3.18 The AMS has the right to ask the support person to withdraw if their behaviour interferes with the conduct of the examination.

Interpreters

3.19 The Registrar will appoint a NAATI certified interpreter if required.

3.20 If appointed, an interpreter should disclose any potential conflict of interest and the Registrar will then determine whether another interpreter is required.

3.21 In limited circumstances, where a certified interpreter is not available, a non-certified interpreter may be appointed.

3.22 Any non-certified interpreter will hold appropriate qualifications and must demonstrate the absence of any conflict of interest with the worker or AMS.

Non-attendance by the worker

3.23 If the worker is unable to attend the scheduled assessment, the worker is to notify the Registrar prior to the date of the examination.

3.24 The AMS must notify the Registrar in writing if the worker did not attend the scheduled appointment. The notification is to be provided within two working days of the scheduled appointment.

3.25 Failure to attend on two occasions without a reasonable excuse may result in the proceedings being dismissed.

Paying the worker's expenses

3.26 The insurer must meet any reasonable costs incurred by the worker, including wages, travel, maintenance and accommodation. This may include pre-payment of travel and accommodation expenses. If the worker is not reasonably able to travel unescorted, this may include expenses for the worker's escort (section 330 of the 1998 Act).

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Part 4: The medical assessment certificate

4.1 The AMS is to provide the Registrar with a completed MAC within 10 working days of the assessment.

4.2 The MAC must be in the form approved by the Registrar and must include the following information:

- 4.2.1 details of the matters referred for assessment
- 4.2.2 the AMS's opinion with respect to those matters
- 4.2.3 total amount of whole person impairment (where applicable)
- 4.2.4 the facts on which that opinion is based
- 4.2.5 the AMS's reasons for that opinion or diagnosis
- 4.2.6 in matters related to permanent impairment, correct reference to the Table of Disabilities (injuries before 1 January 2002) or to the *NSW workers compensation guidelines for the evaluation of permanent impairment* (injuries from 1 January 2002) is required. The *Table of Maims* applies to injuries received before 4 pm on 30 June 1987.

Issuing a medical assessment certificate

4.3 The Registrar issues the MAC to the parties.

4.4 Before issuing a MAC, the Registrar is to ensure the MAC addresses the matters referred for assessment.

4.5 The following matters assessed in a MAC are conclusively presumed to be correct in proceedings before the Commission:

- 4.5.1 the degree of permanent impairment of the worker as a result of an injury
- 4.5.2 whether any proportion of permanent impairment is due to any previous injury or pre-existing condition or abnormality
- 4.5.3 the nature and extent of loss of hearing suffered by a worker
- 4.5.4 whether impairment is permanent
- 4.5.5 whether the degree of impairment is fully ascertainable.

4.6 The MAC may also contain other matters which are not conclusively presumed to be correct in proceedings before the Commission but may be admitted into evidence. These matters are:

- 4.6.1 the worker's condition (including the worker's prognosis), aetiology of the condition and the treatment proposed or provided
- 4.6.2 the worker's fitness for employment.

Errors in the medical assessment certificate

4.7 The Commission's practice direction *No 4 Correction of "obvious error"* sets out what constitutes an obvious error in a MAC and the procedure for parties to follow to correct the obvious error.

4.8 If the Registrar is satisfied that the MAC contains an obvious error, the Registrar may issue an amended MAC to correct the error.

4.9 Once the MAC has been corrected, an amended MAC will be issued.

4.10 The Registrar is to provide the parties and the AMS with a copy of the amended MAC.

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Part 5: Reviewing or appealing the medical assessment certificate

Time for making an appeal

5.1 An appeal application (on the grounds that the assessment was made on the basis of incorrect criteria or the MAC contains a demonstrable error), must be lodged within 28 days after the date the MAC is issued, unless special circumstances apply.

5.2 If the appeal application is lodged after 28 days, the appealing party must lodge submissions setting out the special circumstances to be considered by the Registrar.

5.3 A party cannot appeal against a medical assessment if the Commission has already issued a Certificate of Determination in respect of the dispute concerned.

Application for appeal/opposition

5.4 Parties lodging an appeal, or opposition to an appeal, must use the approved forms and attach relevant submissions. For further information on completing these forms refer to *Guides for completing forms* available on the Commission website at http://www.wcc.nsw.gov.au.

5.5 The appeal will be rejected if the party lodging the appeal does not use the approved form or attach relevant submissions.

5.6 If the appeal application is on the grounds that the assessment was made on the basis of incorrect criteria or the MAC contains a demonstrable error and the application is lodged after 28 days, the appealing party must lodge submissions setting out the special circumstances for the Registrar to consider, including justification for extra time to make the appeal.

Procedure for appeals against a decision of an approved medical specialist

5.7 If an appeal against a decision of an AMS is accepted for filing, the application and copies will be sealed and issued to the appealing party.

5.8 A standard timetable will be issued to ensure that the parties comply with the legislation and guidelines. The timetable will provide for the period to lodge a certificate of service and notice of opposition.

5.9 The filing party should serve an unsealed copy of the opposition on each other party (including the insurer) prior to lodgement with the Commission.

Referral for appeal, further assessment or reconsideration

5.10 The Registrar will review an appeal application and any submissions.

5.11 If the Registrar is not satisfied that a ground of appeal is made out on the face of the application and any submissions that a ground of appeal is made out, the appeal will not proceed to an appeal panel.

5.12 Where the Registrar is satisfied on the face of the application and any submissions made to the Registrar that a ground of appeal has been made out, the Registrar may refer the matter for determination of the appeal by a MAP, or for further assessment as an alternative to an appeal.

5.13 The Registrar may refer a matter to the AMS for reconsideration on one or more occasions (section 329(1A) of the 1998 Act).

Procedure of the medical appeal panel

5.14 A MAP consists of two AMSs and one arbitrator.

5.15 The MAP is to be constituted by the Registrar. Confirmation of the members of the MAP is to be communicated to the parties.

5.16 The MAP will undertake a preliminary review of the matter.

5.17 The MAP may adopt any of the following procedures in accordance with the needs of the individual case:

5.17.1 'on-the-papers' review

5.17.2 further medical examination by an approved medical specialist on the appeal panel

5.17.3 assessment hearing.

5.18 The MAP decides which of the procedures is to be adopted.

5.19 The decision of the appeal panel is to be informed by its assessment of the needs of the particular case.

5.20 Where a further medical examination is required, the Registrar will advise the worker of the time and place of the examination.

5.21 A support person (other than an agent or legal adviser) may accompany a worker to the examination.

5.22 The worker should not bring any additional medical or other reports to the examination, unless specifically asked to do so.

5.23 If it is necessary to bring x-rays or similar documents the worker will be advised of this in the letter from the Registrar.

Hearing

5.24 Where the MAP determines a matter is not capable of determination on the papers, either with or without a further medical examination, a hearing will be arranged.

5.25 The MAP hearing will be informal and non-legalistic, and will afford the parties a full opportunity to present oral submissions in support of their claims. The hearing is non-adversarial and in most cases no evidence will be taken or cross-examination permitted.

5.26 A party is entitled to be represented at the hearing and may choose to be accompanied by a person (including but not limited to a legal adviser or agent) to assist in the presentation of their case.

5.27 The hearing will be sound recorded and a copy of the recording will be available to the parties on request.

Revocation or confirmation of the medical assessment certificate

5.28 The MAP can confirm the MAC issued by the AMS or revoke that MAC and issue a new certificate.

5.29 The decision of a majority of the members of a MAP is the decision of the MAP.

5.30 In all cases where the MAP decides to revoke the MAC and issue a new certificate, the Registrar will send the new certificate to the parties.

Disclaimer

This publication may contain information that relates to the regulation of workers compensation insurance, motor accident third party (CTP) insurance and home building compensation in NSW. It may include details of some of your obligations under the various schemes that the State Insurance Regulatory Authority (SIRA) administers.

However, to ensure you comply with your legal obligations you must refer to the appropriate legislation as currently in force. Up to date legislation can be found at the NSW Legislation website legislation.nsw.gov.au

This publication does not represent a comprehensive statement of the law as it applies to particular problems or to individuals, or as a substitute for legal advice. You should seek independent legal advice if you need assistance on the application of the law to your situation.

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