KJK LEGAL SEMINAR

20 August 2025

TODAY'S AGENDA:

Dr BORIS FEDORIC:	**Best practice vocational assessments, psychosocial rehabilitation post injury and how it improves return to work as well as how to determine accurate functional capacity**
CHRISSY PSEVDOS & CLAIRE EAGLE:	**Section 18 of the *Return to Work Act 2014* (SA)**
TRACEY KERRIGAN & LAUREN KNAPPSTEIN :	**Impairment Assessment Guidelines Third Edition (IAG3)**
SUZANA JOVANOVIC:	**Closing remarks**

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Section 18 of the RTW Act 2014 (SA)

Part 1

Section 18 of the RTW Act:

Previously:

- A pre-injury employer was required to provide suitable employment to a worker who remained incapacitated
- …UNLESS it was not reasonably practicable to do so
- There is limited case law about what "**reasonably practicable**" means, what constitutes "**suitable duties**" and **when this obligation ends**.

Currently:

- More generous to workers
- SA employers have the most onerous expectations
- BUT…the requirements under a section 18 of the RTW Act are also often at odds with the Fair Work Act and or business needs

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Section 18 vs FWA:

- Section 18 requires an employer to provide suitable employment to a worker with a compensable injury where that worker is able to perform work in **any** capacity.
- This is at odds with the inherent requirements of the job defence in the federal scheme under the Fair Work Act and the Disability Discrimination Act.

Section 18 of the RTW Act continued:

No time limitation…unless

It is not ‘reasonably practicable’ to provide suitable employment

The worker left his or her job before becoming incapacitated

The worker resigns

Alternative employment options have been ‘**agreed**’ between the worker, the employer and Return to Work SA

The worker has already returned to work with the pre injury employer or with another employer

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Section 18 of the RTW Act continued:

- No restriction on an employer's statutory obligation to provide 'suitable employment'
- A worker could remain employed with their pre-injury employer performing suitable duties in an alternative role for many years following the date of the injury,
- There must be some ongoing certification that there is a need for the injured worker to be provided with alternative duties
- …but it is not clear how detailed that will need to be

Will specialist doctors have to visit worksites and identify tasks?

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Section 18 of the RTW Act continued:

- What if:
  - a worker who has been certified as unfit for work and in receipt of income support payments for the maximum period decides to seek suitable employment with their employer once those payments cease…
  - …and then sustains a new injury or an aggravation or exacerbation of the existing injury while undertaking suitable employment?

Residual risks

Residual risks if an employer brings the employment to an end based on the belief that a worker cannot, and is unlikely to ever be able to, safely perform the inherent requirements of the role

Incoming claims

- Risk of new claims

Section 18 Application:

- Section 18(5) of the RTW Act enables a worker to seek an order from the SAET directing the worker's pre-injury employer to provide suitable employment

Key takeaway:

- Get advice – do you accommodate an injured worker in alternative duties effectively indefinitely OR go to the time and expense of demonstrating that it is not 'reasonably practicable'

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Section 18 of the RTW Act continued:

- **What is suitable employment?**

"suitable employment", in relation to a worker, means employment in work for which the worker is currently suited, whether or not the work is available, having regard to the following:

(a) the nature of the worker's incapacity and previous employment;

(b) the worker's age, education, skills and work experience;

(c) the worker's place of residence;

(d) medical information relating to the worker that is reasonably available, including in any medical certificate or report;

(e) if any recovery/return to work services are being provided to or for the worker;

(f) the worker's recovery/return to work plan, if any;

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Section 18 of the RTW Act continued:

- Physical vs Psychological injuries
- *Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide Health Service)* [2021] SAET 144
- *Roberts v Department for Education* [2021] SAET 255

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Section 18 of the RTW Act continued:

What the 2024 Amendments Introduced:

- Duty to provide suitable employment continues after recovery
- Backpay Orders against the employer
- Obligations on Labour Hire Host Employers:
- Obligations on Self-Insured Employers

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Section 18 of the RTW Act 2014 (SA)

Part 2

Section 18 of the RTW Act continued:

Supporting evidence

Workers are required to provide written requests which include:

- confirmation that they are "*ready, willing and able to return to work with the employer*"; and

- details of the type of employment that they consider they are able to perform.

Workers are also required to provide supporting medical evidence establishing that they have capacity for work (e.g. Work Capacity Certificate)

Section 18 of the RTW Act continued:

Capacity for work

- Previously, the Tribunal had held that Section 18 of the RTW Act only applied to workers who had a current incapacity for work.
- **The amendments to the RTW Act mean that it also applies to workers who have ceased to be incapacitated for work as a result of the work injury.**
- However, a worker who has ceased to be incapacitated for work as a result of their work injury, and who seeks employment with their pre-injury employer under Section 18, must provide their employer with written notice of their request **within six months of ceasing to be incapacitated**.

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Section 18 of the RTW Act continued:

Timeframe for response

- An employer then has **one month** within which to respond to the worker advising whether or not they will provide suitable employment

- If the employer refuses to provide suitable employment, **OR** the worker "*considers that any employment offered by the pre-injury employer … is not suitable*", then the worker can, within one month of the refusal or offer of unsuitable employment, apply to the Tribunal seeking an order that the employer provide employment.

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Section 18 of the RTW Act continued:

Serious and wilful misconduct

- Section 18 will have no application if the worker's employment was terminated on account of serious and wilful misconduct
- **However**, the employer bears the onus of establishing that the worker has engaged in serious and wilful misconduct
- Under the amended Act, it is not clear whether performance issues would be sufficient to defend a Section 18 claim.
- However, the existence of performance issues, at least in some cases, may provide sufficient basis for an employer to argue it is not "*reasonably practicable*" for suitable employment to be provided.

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Section 18 of the RTW Act continued:

Powers of the Tribunal

- The Tribunal will now have the power to make orders which specify:
    - the duties to be provided;
    - any adjustments that the employer will need to make to allow the worker to perform specified duties; and
    - the number of hours of work that the employer must provide to the worker.

Section 18 of the RTW Act continued:

Payment of wages

- Tribunal will have the power to require an employer to pay a worker the wages or salary that they would have expected to receive in the suitable employment if it had been provided from the date they made their request…even where a worker is outside of their entitlement period for weekly payments
- As matters can move slowly through the Tribunal - this could result in a significant lump sum payable to a worker – and a significant financial implication for an employer
- There might be a concern that a worker is ‘double dipping’ if they have already received compensation for their economic loss.

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Section 18 of the RTW Act continued:

Groups of self-insured employers and agencies and instrumentalities of the Crown

- The duty of an employer to provide suitable employment, where that employer is a part of a group of self-insured employers or is an agency or instrumentality of the Crown, now extends to other employers within the group and other agencies and instrumentalities of the Crown

- The duty is no longer limited to the pre-injury employer

- The other employers, agencies, or instrumentalities should only be considered if there are "*good reasons*" for employment to be provided by another member, agency or instrumentality

Section 18 of the RTW Act continued:

Groups of self-insured employers and agencies and instrumentalities of the Crown

- **However**, with respect to groups of self-insured employers, these amendments will only apply to groups which are "*related bodies corporate*", and so presumably they would share a management structure which would make the movement of the worker from one employer to another a coordinated process

- It will be interesting to see how the Tribunal deals with the legalities of enforcing a separate entity into an employment relationship with someone who is not their employee
- Presumably there will also be issues of retraining and vocational suitability

- There is no explanation of what a "**good reason**" would be for requiring a different employer to provide employment

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Section 18 of the RTW Act continued:

Costs

- The amended RTW Act now specifies that an employer (who is not the compensating authority) has the ability to claim costs from the compensating authority for their involvement in a Section 18 dispute (up to the prescribed amounts) regardless of the outcome of the dispute

- …provided that the employer has not acted unreasonably or vexatiously in the course of the proceedings

- Previously, the employer was only able to claim their costs if the Tribunal declined to make an order that the employer provide the worker with suitable employment

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Section 18 of the RTW Act continued:

Labour hire workers

- Labour hire workers are also protected under the amendments to the RTW Act
- There will now be an obligation on host employers to cooperate with the pre-injury employer in offering suitable employment to the labour hire worker
- However, the amended RTW Act does not create any obligation on the host employer to directly employ the labour hire worker. They will remain an employee of their pre-injury employer

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Section 18 of the RTW Act continued:

Cessation of Section 18 obligations

- The amended Act still does not address when an employer's obligation to offer suitable employment under Section 18 comes to an end
- Seriously injured workers have no entitlement to weekly payments past retirement age (unless their injury occurred less than 104 weeks before they reached retirement age, or if it occurred after they reached retirement age)
- An employer's obligation to offer suitable employment under Section 18 is ongoing past retirement age and does not come to an end
- Arguably, that obligation never disappears, unless any of the exclusionary factors set out in Section 18(2) of the RTW Act apply

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CASE STUDY:

- worker is employed as a FTE Permits Officer in a State Government department with transferable skills that are essentially administrative
- worker claims that he suffers a psychological injury arising from bullying in the workplace and inappropriate management/ support for non-work related medical conditions
- claim is rejected and disputed
- worker seeks to be placed in a Wildlife Keeper role on a casual basis which has been advertised as "*open to everybody*"

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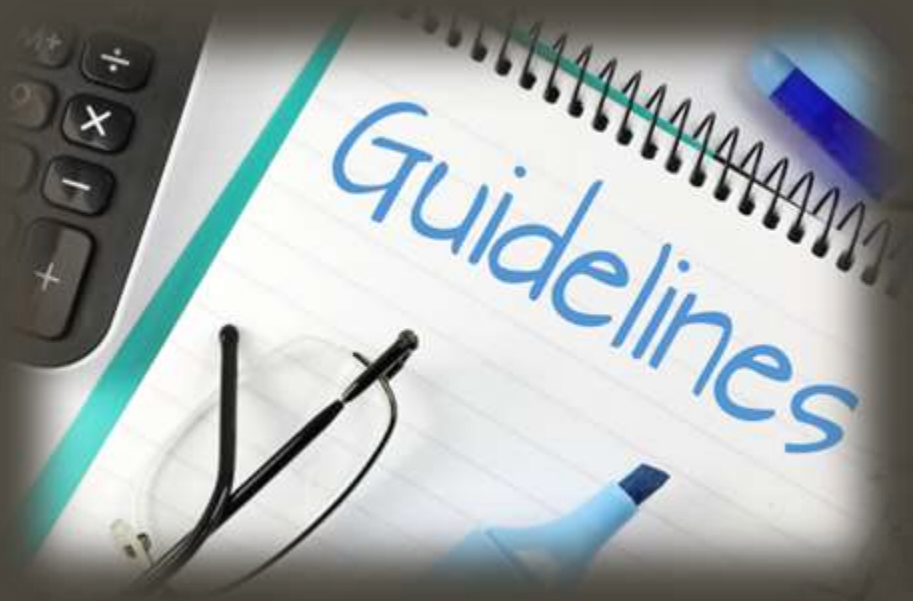

Impairment Assessment Guidelines Third Edition

Part 1

Impairment Assessment Guidelines – 3rd Edition

1 October 2025

- IAG3 apply to any assessment that occurs on or after 1 October 2025 regardless of the date of injury
- If a worker has already attended for a PIA assessment prior to 1 October 2025 – then IAG1st edition applies

Stabilised condition

- Worker's condition now has to '**stabilise**' rather than the worker achieving MMI
- Meaning not likely to fluctuate in the foreseeable future
- A worker having achieved MMI is taken to be a reference to the injury having stabilised.

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Impairment Assessment Guidelines – 3rd Edition

Material Changes to PIA process generally

- If during the assessment, the assessor identifies an impairment caused by a medical condition that is not identified in the assessment request or the assessor is not accredited for assessment of the injury, the assessor must:
  - contact the requestor to discuss the issue;
  - (if unable to make contact with the requestor) describe the history of the condition but not proceed with the WPI calculation;
  - complete as much of the assessment as they can and then feed the information back to the requestor.

- Similarly, where the assessor concludes the injury is not stabilised or further test/investigations are needed, the assessor should:
  - contact the requestor and discuss what is required. But if the worker is from a regional area then the assessor may order the appropriate investigations to reduce inconvenience

- Requestors are to use best endeavours to obtain all relevant information for the assessor.

Impairment Assessment Guidelines – 3rd Edition

Choice of assessor

- Worker still gets to select the assessor – the process of nomination has not changed
- If multiple assessments are needed, then should nominate the assessor who can assess the most body parts
- Draft report request to be provided and worker given **at least 20 business days to consider/respond**
- Information should be provided to the assessor **at least 10 days prior to appointment**
- Clauses 14 to 50 give guidance regarding specific conditions including time frames as to when certain conditions can be assessed and who can carry out certain assessments

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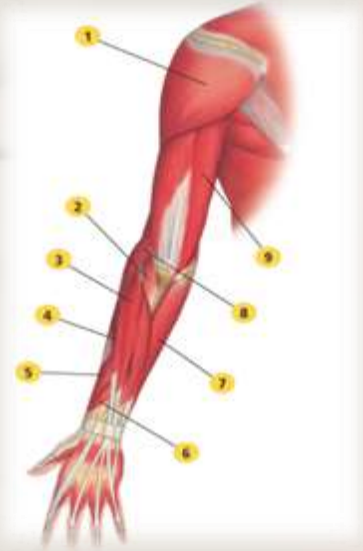
Impairment Assessment Guidelines – 3rd Edition

Chapter 2 – upper extremity

- Peripheral nerve injuries can't be assessed until symptoms have persisted for **at least 12 months**

- Adhesive capsulitis can't be assessed for **at least 18 months**

- Major changes re CRPS:
  - assessors have to have specific CRPS training
  - condition present for **at least 18 months** and have stabilized
  - lower threshold for diagnosis (only 1 sign in 3 of 4 categories)
  - but ratings are lower – have classes 1 to 3 (class 1 – 15 to 29% UEI)



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Impairment Assessment Guidelines – 3rd Edition

Chapter 3 – lower extremity

- New assessment for rating joint replacement e.g. now have classes 1 to 4 (good, fair, poor and very poor)
- Only ‘very poor’ class reach 35% WPI threshold
- No real changes for spine

Impairment Assessment Guidelines – 3rd Edition

Chapter 9 – Hearing

- Must be in person assessment
- Can only be undertaken by ENT
- CERA testing can be requested if inconsistency in standard testing
- Clearer identification of any non work related impairment
- Whether assessor utilises air/bone conduction thresholds – above 2000 hertz, must use air conduction thresholds
- Assessment of tinnitus
- Use of prior audiograms – where worker has retired assessor must consider any audiogram undertaken after ceasing work and prior to assessment – requestor must provide direction
- Clear methodology for the inclusion of loss below 2000 hertz -
- Threshold limits at each frequency to be applied when rating NIHL

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Impairment Assessment Guidelines Third Edition

Part 2

lAG– 3rd Edition (Chapter 9 – Hearing Loss)

CASE STUDY:

John Smith, a 70 year old retired worker, has noticed hearing loss for the last 11 years. Claims that he has ‘no non-work-related noise exposure’ and no history of familial hearing loss

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IAG– 3rd Edition (Chapter 9 – Hearing Loss)

PREVIOUSLY:	**NEW AMENDMENTS:**
• ‘retirement’ did not flag any obligation for assessors	• when assessing a retired worker who has retired on account of age or ill health, the new guidelines will require the assessor to consider any audiograms undertaken after ceasing work and prior to the assessment • to better determine any non-work-related components of the current impairment and also to potentially assess the PIA at an earlier date rather than the assessor using the results of the audiogram that they take on the day of the assessment

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lAG– 3rd Edition (Chapter 9 – Hearing Loss)

Applying new guidelines to case study:

- Say John has been seeing Audika for the last 5 years and has had audiograms during this time
- Rather than using the audiogram on the day of the PIA, the assessor can now adopt the results from Audika which applied at a date much closer to retirement (and potentially last exposure to noise)
- This would potentially achieve a lower BHI and exclude non-work related losses that may occur after retirement.
- At the moment, generally assessors will use the audiogram taken on the day and the only deductions are likely to be age related (presbycusis).

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lAG– 3rd Edition (Chapter 9 – Hearing Loss)

Key takeaways:

- Direct the assessor to the fact that the worker has retired on account of age or ill health
- Obtain the relevant records from the hearing aid provider/s that may contain audiograms taken closer to the date of retirement

lAG– 3rd Edition (Chapter 9 – Hearing Loss)

Case study continued:

- Previously: John simply notified his assessor that there was no non-work-related noise exposure
- Now further investigations are required to take place
- John's hearing tests post-retirement to his assessment date have shown that there is a decline in his hearing (i.e. not work related)
- This expands investigations to include what could be causing this decline in hearing ability (perhaps John likes to shoot the rabbits in his yard, or perhaps he is simply getting older, and his hearing is deteriorating with age)

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IAG– 3rd Edition (Chapter 9 – Hearing Loss)

Case study continued:

- John also reports that he is suffering from Tinnitus in both ears and has been noticed for the last 11 years
- His tinnitus is rated from mild to at worst moderate
- How has the tinnitus impacted the worker's life; and what difficulties the worker is facing as a result
- In this scenario, John does not have trouble sleeping. However, he does have problems when communicating with others and watching TV which affects his overall mood
- Only rated if severe tinnitus

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lAG– 3rd Edition (Chapter 9 – Hearing Loss)

PREVIOUSLY:	**NEW AMENDMENTS:**
• John's assessor would apply clinical judgment and experience in their field, consider the examples of tinnitus loading in the previous chapter 9 of the guidelines, and the impact of the tinnitus upon the worker's Activities of Daily Living (ADLs) • An assessor would simply be using their judgment to provide a percentage • In this case, the assessor said that a loading of 3% Bilateral Hearing Loss would be appropriate for his tinnitus.	• John's tinnitus will be classified as mild, moderate or severe • Mild and Moderate tinnitus is simply not rateable and will therefore attract 0% • If the tinnitus is judged to be severe, the assessor will need to document the impact of the tinnitus when referring to ADLs • There needs to be a clear rationale that supports the value that has been assigned for tinnitus • An assessment of up to 5% for severe tinnitus

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lAG– 3rd Edition (Chapter 9 – Hearing Loss)

Case study continued:

- John's audiograms are inconsistent with the reported history of noise exposure and/or clinical examination

- Under the new guidelines, an assessor has the ability to request Cortical Evoked Response Audiometry (CERA) to be undertaken. A rationale for this test being potentially required will need to be included in the assessment report. CERA testing can provide a more objective testing outcome to assist the assessor.

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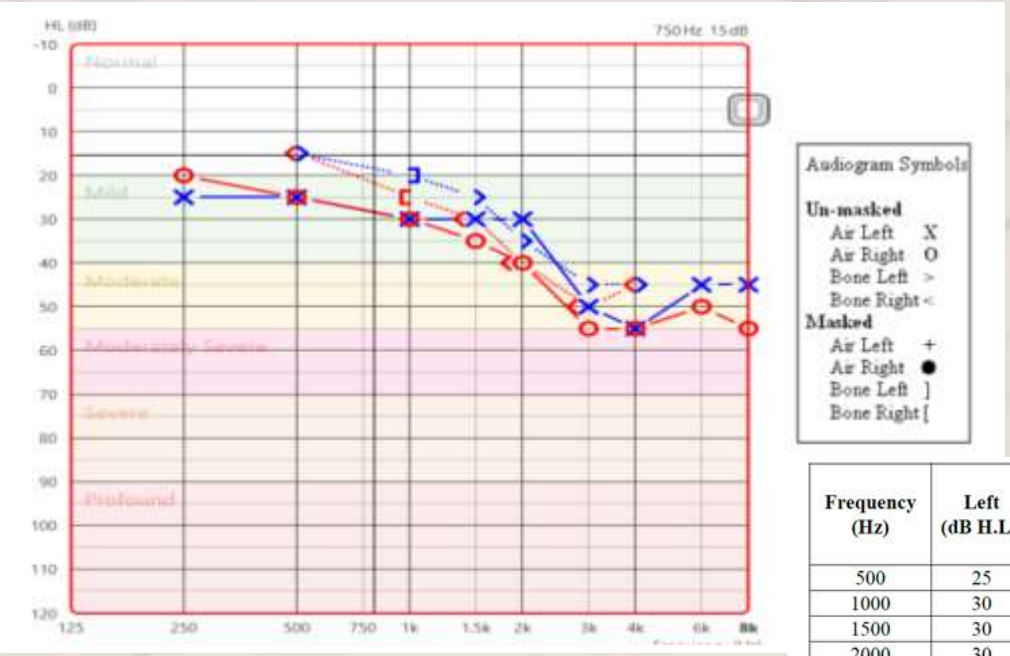
IAG– 3rd Edition (Chapter 9 – Hearing Loss)

- ‘Stabilisation’ is generally satisfied in noise-induced hearing loss cases which injuries are deemed to occur on specific dates
- Hearing loss results from last noise exposure and once lost cannot return, regardless of treatment
- By its very nature it is a stable condition
- In the absence of significant and unprotected noise exposure after the deemed injury date, further noise-induced hearing loss cannot result
- The same concept applies post changes.

lAG– 3rd Edition (Chapter 9 – Hearing Loss)

- There are also changes in respect to whether the assessor uses air or bone conduction thresholds
- Each level of loss (500 hertz to 4000 hertz) has a capped maximum rating that applies.

IAG– 3rd Edition (Chapter 9 – Hearing Loss)



- Overall for John; originally under the Schedule 2 of the IAG; a WPI would have sat at around 9%
- From rough calculations adopting the Schedule 3 of the IAG; WPI is more likely to sit around 5%

Frequency (Hz)	Left (dB H.L.)	Left Monaural Loss (%)	Right (dB H.L.)	Right Monaural Loss (%)	Total Hearing Impairment (% B.H.I.)	Noise-Induced Hearing Loss (% B.H.I.)
500	25	1.4	25	1.4	1.4	0.0
1000	30	3.5	30	3.5	3.5	0.0
1500	30	2.8	35	4.5	3.4	3.4
2000	30	2.1	40	4.8	2.9	2.9
3000	50	4.8	55	5.6	4.9	4.9
4000	55	5.2	55	5.2	5.2	5.2
				Total % B.H.I.	21.3	16.4
				Presbycusis correction		-2.9
				Tinnitus Loading		3
				Adjusted total B.H.I.		16.5
				Whole Person Impairment (W.P.I.)		**9%**

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IAG– 3rd Edition (Chapter 9 – Hearing Loss)

It is possible you will now see some lower impairment percentages

These changes tighten definitions, reporting formats, and assessment criteria

There appears to be less room for inconsistent interpretations between assessors

IAG 3 is positive with more standardisation in place

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Thanks!

Do you have any questions?

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