Regulation of legal costs for work capacity decision reviews

The State Insurance Regulatory Authority

Submission of Unions NSW

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Please Contact: Shay Deguara

Unions NSW

Trades Hall Building

Level 3, 4 Goulburn Street

Sydney NSW 2000

T: 02 9881 5999

F: 02 9261 3505

E: whs@unionsnsw.org.au

Introduction

Unions NSW welcomes the opportunity to make a submission to the State Insurance Regulatory Authority on the issue of "Legal Costs for Work Capacity Decisions". Whilst Unions NSW welcomes the change by the government to include access to legal costs for work capacity reviews, NSW workers will still be disadvantaged due to the construction of the legislation with unclear definitions for work capacity and limitations on the review process.

Unions NSW as the peak council for unions in NSW has 60 affiliates with over 600,000 members. Unions NSW (formerly the Labor Council of NSW) has a proud history of representing injured workers in this state and in the national forum. Unions NSW negotiated the Workmens Compensation Act 1916 and the Workers Compensation Act 1926 as predecessors to the 1987 Act. The 1926 Act formed the Workers Compensation Commission, enshrining the principle of fairness and review in a no fault workers compensation system designed to restore the worker to the position they would have been in but for the injury.

These landmark Acts in the history of NSW have since the 1980s faced ongoing pressure as governments aim to shift costs by minimising scheme scope of liability and also benefits available to injured workers.

The introduction of work capacity processes has reduced access to fairness due to inadequate review processes and has been used as a tool to reduce compensation to injured workers.

The workers compensation work capacity assessment and decision process has been introduced into NSW legislation as part of a national push by insurance companies to reduce disputation over their decisions. The use and misuse of this process is popular amongst insurance companies as it enables them to minimise opportunities for injured workers to appeal, even when justice and fairness is on the workers' side.

Since the introduction of the work capacity process into NSW workers compensation law in 2012, Unions NSW has seen numerous complaints from injured workers reporting it has resulted in gaming of the system, with workers ending up with lower benefits than they would otherwise be entitled to.

The implementation of work capacity decision processes has furthered the departure from a no fault system that aims to restore the worker to the position they would have been but for the injury, to one that in effect punishes the worker for getting injured. A process whereby the insurance agents actively identify mechanisms where their knowledge and power imbalance enables them to impose inferior outcomes on workers. A process that allows insurance agents to maximise profits at the expense of a workers' recovery.

Unions NSW has numerous examples where insurers and employers have freely used lawyers to conduct work capacity decisions and the injured worker, with minimal knowledge and experience of the workers compensation system, is effectively unrepresented.

The same concerns have been expressed by the bi-partisan Law and Justice Committee and the WorkCover Independent Review Officer.

> *"Lawyers may not, by Section 44(6) of the 1987 Act, charge workers for services for Work Capacity Decision reviews, and this prohibition has the practical effect of preventing access to legal advice by injured workers during such a review. A similar prohibition in relation to lawyers charging insurers for work in this regard has not been effective, creating a discrepancy that appears to operate unfairly* ***in*** *favour of insurers"*
> (WorkCover Independent Review Officer 2013-2014, p. 14)

Other states have implemented processes similar to the NSW work capacity process, but have not removed access to fair appeal rights. Even with access to legal costs, injured workers in NSW will still be disadvantaged due to the construction of the legislation including poor definitions for work capacity, PIAWE, and suitable employment as well as limitations on the review processes.

In summary Unions NSW submits that legal costs should be covered for all review processes. Injured workers should not be required to bear the other parties costs. Agents and allied professionals should be included in a costs schedule of trained pre-qualified advocates.

This submission makes the following recommendations for inclusion in the Regulation.

- *Legal costs should be covered for injured workers at all stages of the review process.*
- *Supreme Court judicial reviews should have legal costs covered after a review of reasonable prospects of success by an independent panel of lawyers like ILARS.*
- *The WIRO review should be extended to include merit review.*
- *That all legal costs for the injured worker should be paid for irrespective of the outcome of the review appeal.*
- *That a licensing process involving training and qualifications should be utilised to ensure that injured workers' advocates have the necessary skills and knowledge to efficiently run all types of work capacity reviews.*
- *The internal review process should be changed to involve an alternative dispute resolution and conciliation process.*
- *The merit review with SIRA should allow for alternative dispute resolution.*
- *Approved advocacy services should include a union option that will allow better interaction between the workplace and review processes and provide the best options for supporting the injured worker back at work.*
- *A series of process costs should be formulated to ensure that all review processes are covered in connection with a work capacity review to assist in resolving the dispute early.*

- *The relevant professional bodies and service providers should establish a fee schedule for each process.*
- *Agents, paralegals and lawyers associated with the review should have a scheduled pricing structure established.*
- *Service providers should be subject to lay and professional accreditation and ongoing capacity should be audited.*
- *A pricing structure should be developed to enable adequate representation in the review process to occur including initial assessment, progress processes developing the review and access to external advice such as medical; vocational, paramedical, industrial relations or accounting advice.*
- *Union officials and agents have a vital role participating in advocacy in the review process as they are able to address issues in the review forum with workplace and occupational expertise and ensure appropriate interventions in the review and workplace to return the worker to work.*
- *SIRA should develop in consultation a flowchart of types of processes that may be applied in progressing a work capacity review to assist advocates and injured workers with case management.*
- *All advocacy services should be required to have public and professional liability insurance.*
- *Trained and competent advocacy services should assess eligibility and bill an independent agency of government when the process unit is completed.*
- *A positive penalty system should be introduced to ensure insurers act consistently with the objects of the legislation to support injured workers when undertaking work capacity reviews.*
- *The entire work capacity legislative suite including fact sheets, guidelines and legislation should be clarified and improved through consultation with all parties.*
- *Cases with overriding public interest value with questionable prospects of success should be able to be registered with WIRO to ensure that these matters are still pursued with justification and without risk to the advocates' professional standing.*
- *That there are a limited number of advocacy services allowed to operate and that they be pre-qualified and allowed to develop specialisation with the limited number of reviews.*
- *All information and reports should be made available to the injured worker and their representative.*
- *Rules to bind insurance companies on precedents should be included in the Regulation.*
- *The costs regime should allow for expert representatives (lay advocates and registered lawyers) and allied services to advocate in relation to work capacity decisions and there should be a schedule for lay persons included.*

- *The appropriate schedule should allow for alternate services to be employed in undertaking the work capacity review such as allied health or investigative services.*

The following answers are in response to the current call for submissions and should not in any way be interpreted as Unions NSW endorsement of the work capacity process as implemented in NSW.

FOCUS QUESTION 1:
Should the regulation provide for payment of legal costs in connection with all work capacity decision review types – i.e. Internal Reviews, Merit Reviews and Procedural Reviews?

In short, yes.

- Legal costs should cover all legal costs for all reviews.
- A process of managing the competence of the representation should be applied as referred to in questions below.
- For Supreme Court matters a process such as the ILARS vetting process should be used.

Section 44 deals with the issue of review of work capacity decisions.

44 Review of work capacity decisions

(1) An injured worker may refer a work capacity decision of an insurer for review:
(a) by the insurer (an ***"internal review"*** *) in accordance with the Workers Compensation Guidelines within 30 days after an application for internal review is made by the worker, or*
(b) by the Authority (as a merit review of the decision), but not until the dispute has been the subject of internal review by the insurer, or

(c) to the Independent Review Officer (as a review only of the insurer's procedures in making the work capacity decision and not of any judgment or discretion exercised by the insurer in making the decision), but not until the dispute has been the subject of internal review by the insurer and merit review by the Authority.

Unions NSW objects to the inability of the WIRO to undertake a merit review under this process. However, payment for quality representation is essential at all stages of the above review processes to ensure that the law is implemented correctly. It would also ensure that the scheme is not burdened with what might be called frivolous reviews.

1.1 Section 44 (1) a: Insurer Internal Review

This is the most questionable review in the Act as it is inherently conflicted with the insurer reviewing their own behaviour. However, having the capacity for workers to access legal support may lead to changed behaviour by insurers.

At the initial internal review, representation is essential to ensure that matters of relevance can be advocated and those without relevance, not pursued. This will ensure reviews are more efficient. Additionally whereas insurance agents have been employing lawyers to write work capacity decisions and review them, the worker has no knowledge on most occasions as to what their rights are, let alone how to run a work capacity review or navigate the workers compensation system. Legal representation for the worker will ensure the worker has a fair chance if the legislation has not been complied with.

Competent experienced legal representatives is essential to ensure that flaws in the insurer's application of its internal claims handling policy as compared to the SIRA Guidelines can be identified and rectified early.

Unions NSW wishes to emphasise the absolute necessity to fund the legal costs for the first internal review to ensure that the scope of the review is established correctly. While the independence of this type of review is questionable the rest of the review may be compromised if the workers case is not properly put at this stage.

1.2 Section 44 (1) b SIRA Merit Review

This is the first review by someone other than the insurer. It is important that the points of merit are put in full, but concisely to ensure the Authority can make their assessment. If the case is not properly argued and the Authority declines to overturn the decision, then the injured worker may be required to appeal to the Supreme Court of Appeal, which has standing for judicial review. As this is the first semi-independent stage of review and the insurer will have legal or experienced representation it is only fair to legally support injured workers especially when their livelihood is based on the outcome of the review and their only recourse is to the Supreme Court.

1.3 Section 44 (1) c WIRO Procedure Review

In the financial year 2013-2014 there were only 178 WIRO reviews. Of these the overwhelming majority of decisions were made in favour of the worker. A number of these reviews were supported by unions and their lawyers acting without payment from the injured workers. Identifying technical errors of law (Procedural Review) without expert assistance is unlikely to lead to success. With an approximate success rate of 90% justice dictates that legal support for this level of review should not be restricted to those lucky enough to have means or access.

1.4 Supreme Court Judicial Review

A Supreme Court judicial review is out of reach for almost every worker. The inclusion of a merit review by WIRO would provide an additional avenue for a review of merit other than the Supreme Court. The Supreme Court is not a cost effective mechanism to review a work capacity decision as the cost will far outweigh any benefit that could be gained from what might effectively become a 3 month delay before a new work capacity decision is implemented. Funding a Supreme Court judicial review should only occur after review by a competent panel of independent lawyers (like ILARS) to ensure that there are reasonable prospects of success, before being funded.

Recommendation:
Legal costs should be covered for injured workers at all stages of the review process.

Recommendation:
Supreme Court judicial reviews should have legal costs covered after a review of reasonable prospects of success by an independent panel of lawyers like ILARS.

Recommendation:
The WIRO review should be extended to include merit review.

FOCUS QUESTION 2:
Should the regulation provide for payment of legal costs only where the review results in a recommendation to change the work capacity review decision?

In short, injured workers should not have to bear the risk of having to pay legal costs in circumstances where insurers have a conflict of interest. It is a significant shock to most injured workers when they are injured, being required to live on reduced wages and facing the prospect of no wages and ongoing medical costs. To ask them to risk imposing the significant cost of a legal bill on themselves and their family would undoubtedly compromise their decision-making process and result in outcomes that should have been reviewed going unchallenged.

This same argument justifies paying legal costs for all review stages. Further in relation to the procedural review by WIRO, the need for legal expertise is further justification for not allowing costs to follow the event. Having lawyers involved in this stage of the process will also save time and money by ensuring the procedure review is conducted efficiently and frivolous proceedings are discouraged.

In relation to appeals to the Supreme Court the process proposed in relation to Question 1 will ensure only matters with reasonable prospects of success proceed. In those circumstances legal costs should be covered, irrespective of outcome. To not do so would be sure to deny injured workers, whose financial position is already compromised, access to justice.

Therefore the legal costs should always be paid and the advocate agents or solicitors must be trained in the specific requirements of work capacity processes.

Recommendation:
That all legal costs for the injured worker should be paid for irrespective of the outcome of the review appeal.

Recommendation:
That a licensing process involving training and qualifications should be utilised to ensure that injured workers' advocates have the necessary skills and knowledge to efficiently run all types of work capacity reviews.

FOCUS QUESTION 3:
Should a new class of review be prescribed to regulate legal costs, such as reviews where legal services are provided by approved providers, or reviews where the worker first engaged an approved advocacy service?

3.1 New review class?

Unions NSW would question whether there is a need for another level of review but instead suggests changing the internal review into a conciliation review.

Unions NSW suggests that the initial review with the insurer (44 (1) a) be replaced with an alternate dispute resolution process with an appropriately trained independent conciliator. This would be an improvement on the current system which relies on the reviewer assessing all the papers and taking into account all relevant matters. The insurer is also highly conflicted when they are reviewing their own decision. Alternative dispute resolution would expose the errors of the parties' arguments and allow for speedy resolution and reduced legal costs. Alternative dispute resolution is widely accepted by industrial and other courts as an effective mechanism at resolving matters or narrowing the areas of disagreement.

The merit review at section 44 (1) b should also allow for more alternative dispute resolution avenues including case conferences and investigations. The current system is often limited to the written papers, and could be improved by allowing argument and rebuttal. This is also another case where the skills of the reviewer could be improved in relation to work capacity, particularly pre injury average weekly earnings.

3.2 Approved Advocacy Service

In Victoria at an early stage of the disputes process WorkCover Assist, and WorkCover Union Assist operate to provide services to injured workers at the review and conciliation stages under a service agreement with WorkCover.

By having parties from a union and non-union background operating and authorised to provide advocacy services in this manner, the injured worker can have confidence in their representative. When the dispute continues, the workers are then provided with referral to an appropriate lawyer of their choice. This would be a cost effective mechanism for the early stages of the work capacity review process. It also allows SIRA to ensure that the cost structure is not blown out by "rogue" providers.

The Victorian example also provides for referral to solicitors with an expertise in workers compensation and the union option allows greater interaction with the workplace including exploration of return to work options.

Recommendation:
The internal review process should be changed to involve an alternative dispute resolution and conciliation process.

Recommendation:
The merit review with SIRA should allow for alternative dispute resolution.

Recommendation:
Approved advocacy services should include a union option that will allow better interaction between the workplace and review processes and provide the best options for supporting the injured worker back at work.

FOCUS QUESTION 4:
What is a fair and reasonable maximum cost for provision of legal services in connection with a work capacity decision review, and what criteria should be used to determine a fair and reasonable maximum cost?

There should be no maximum cost.

A fair and reasonable maximum cost for provision of legal services in connection with a work capacity decision review is dependent on the case, the review stage and the number of functions that are required to be undertaken in getting to that stage.

It is hard to identify the cost of work capacity decisions and the ancillary services. Many insurance companies have been going on "fishing expeditions" for doctors' advice that supports reducing weekly payments after a work capacity assessments. Similarly, insurers have also been spending much more on investigations than rehabilitation.[1]

Complex medical assessments may be necessary to assess the work capacity of the injured worker. Similarly wages inspection, accountancy services, review of roster arrangements would need to be assessed for a review of PIAWE. We refer to the examples provided by the CFMEU which detail a number of processes to achieve successful reviews.

If the work capacity review gets to the Supreme Court for judicial review, the worker will not be able to go there without adequate representation.

While the setting of caps is not reasonable, establishing processes to ensure legal and agents' services are used efficiently is more likely to get results in reducing costs. Additionally, process components can be priced in consultation with service providers and the relevant Law Society specialist group to ensure that the pricing arrangements for the process stages are appropriate. It is Unions NSW understanding that discussions have commenced with the Australian Lawyers Alliance regarding a pricing structure for work capacity reviews.

Additionally a number of injured workers have utilised paralegals and non-practicing lawyers and industrial officers due to the restrictions on legal practitioners undertaking work capacity reviews. There may be a need for inclusion of different levels of legal and agent work fees.

Information gathered from union legal officers and industrial officers who have been undertaking this work suggests that the initial review can take between 9 to 15 hours. If the dispute is properly resolved at the first stage then additional costs can be avoided.

Unions NSW supports the usual accreditation and audit processes for service providers as applies to most WorkCover (formerly known as) services.

[1] See Playford M., PWC Actuary, Workers Compensation Nominal Insurer, Briefing on evaluation Results 31 December 2013, page 8: describes rehabilitation expenditure at $259million and investigations at $411.2 million.

Recommendation:
A series of process costs should be formulated to ensure that all review processes are covered in connection with a work capacity review to assist in resolving the dispute early.

Recommendation:
The relevant professional bodies and service providers should establish a fee schedule for each process.

Recommendation:
Agents, paralegals and lawyers associated with the review should have a scheduled pricing structure established.

Recommendation:
Service providers should be subject to lay and professional accreditation and ongoing capacity should be audited.

FOCUS QUESTION 5:
Should the regulation use a single fixed maximum cost that will generally apply across all eligible reviews, or should the regulation use a more complex maximum cost structure to more directly influence behaviour (such as sound primary decision making) and achieve positive regulatory outcomes (such as early and sustainable return to work)?

In short, no.

Due to the same reasons set out in question 2 above, if there was a costs cap on the entire process very few people would receive any funding to attend later stage reviews like WIRO or the Supreme Court. This would make the injured worker liable for immense legal costs to ensure they have proper representation. Work capacity reviews may be single issue or have multiple grounds, all requiring different levels of research, investigation and work. Unions NSW refers to the CFMEU's examples conducted by their legal officers. A flow chart should be developed to guide advocates and injured workers as to the types and complications of processes in a work capacity review. This will also guide the advocate and the scheme on the costs that may be incurred.

Advocacy services should be provided with a fee for assessing work capacity reviews regardless of whether the matter is taken on or not. This may assist the worker to decide not to pursue a work capacity review but instead focus on the employer facilitating their return to work or undertaking an injury management dispute if this is the barrier to return to work.

Unfortunately, legal processes are rarely associated with outcomes such as returning a worker to work and the work capacity process has not achieved this. Although Section 43 deals with work capacity and suitable employment, the definition in Section 32A of the Workers Compensation Act enables insurers to claim that a worker has capacity and cut their benefits despite the worker not having been returned to their work or any real work. The Section 49 WIMWC Act requirement is avoided by employers, unfortunately leaving workers without actual work and with reduced weekly payments despite work capacity.

Lawyers and insurance companies are not generally associated with the workplace and have had less than optimal results in getting workers back to work.

Injury management disputes that are rarely used in the Workers Compensation Commission enable worker's representatives to advocate for better health support and return to work outcomes. These disputes are rarely used at the current time by lawyers. The fee structure is too low which means that many firms choose to not partake in these disputes. This should not be an outcome of the fee structure for work capacity reviews.

Much expertise for return to work lies with workplace related services such as agents and industrial officers. The removal of a fee structure for non-legally qualified persons in the 2012 amendments means that very few people are

assisted by the Injury Management jurisdiction as focus has shifted to areas where the advocates feel more comfortable such as industrial tribunals.

Unions NSW submits that parties such as unions are well resourced to assist workers return to work due to the union's role in the workplace dealing with workplace structures and workloads, enabling the union to identify appropriate means for the worker to achieve a sustainable return to work. Unions also participate in the negotiation of wages, rosters, conditions, restructures and job evaluation and have knowledge of how these are applied. This is highly relevant to, for example, decisions regarding suitable employment or PIAWE.

Too often unions are provided with cases after they have run their course at the Workers Compensation Commission where the worker is now seeking to return to work. The lawyers (if not union referred) simply discontinue supporting the worker and this often results in medical termination as the lawyer has not advocated for the worker with their Injury Management or Return to Work plans. Frequently the injured workers' employment protection has expired. Unions try to work with their referring legal firms to ensure that the appropriate workplace intervention is undertaken to ensure that the worker does not lose their job but can return to the workplace as soon as it is safe to do so with the worker's injury.

Recommendation:
A pricing structure should be developed to enable adequate representation in the review process to occur including initial assessment, progress processes developing the review and access to external advice such as medical; vocational, paramedical, industrial relations or accounting advice.

Recommendation:
Union officials and agents have a vital role participating in advocacy in the review process as they are able to address issues in the review forum with workplace and occupational expertise and ensure appropriate interventions in the review and workplace to return the worker to work.

Recommendation:
SIRA should develop in consultation a flowchart of types of processes that may be applied in progressing a work capacity review to assist advocates and injured workers with case management.

FOCUS QUESTION 6:
In what circumstances should one party be required to bear the other party's Legal costs?

The injured worker should not be required to bear the other party's costs. The workers compensation system is a no fault system that now utilises work capacity decisions based on an insurance agent's internal claims policy and the guidelines to take away injured workers weekly income support. The current system rewards insurance agents to undertake a range of verification assessments in order to achieve the goal of reducing support provided to the worker. It is unfair to then require the injured worker to bear their own and the other party's costs if they wish to challenge the decision. This will simply lead to workers being punished again.

The more appropriate approach to manage frivolous or vexatious disputation is to ensure that specialist advocacy services are registered to allow for the review of advocacy work and appropriate training to assess matters and apply appropriate case management. There should be a mechanism to allow the advocate to assess the case for reasonable prospects of success. Another process should be introduced to ensure adequate case management such as audits and/or license conditions to ensure adequate case management practice.

The registration of cases with questionable prospects of success, where there is a public interest such as Supreme Court matters, could be managed by the WIRO, who could review an assessment of the prospects and the public interest. This could then reduce the risk to the independence of the advocacy service.

Recommendation:

A small number of advocacy services should be registered to provide the work capacity review advocacy work who are trained and competent in the areas of work capacity.

Recommendation:

Cases with overriding public interest value with questionable prospects of success should be able to be registered with WIRO to ensure that these matters are still pursued with justification and without risk to the advocates' professional standing.

FOCUS QUESTION 7:
What measures might be included in the regulation to better promote and encourage compliance?

Unions NSW notes that despite the cuts to workers entitlements in 2012 the costs of administering the scheme have not decreased and still remain at approximately 50% of all scheme costs.

Unions NSW also notes that with work capacity decisions the cost of investigations is higher than the cost provided for rehabilitation.

The definition of suitable employment in Section 32A of the Workers Compensation Act 1987 and the other definitions included in the 2012 legislation amendment package create confusion. There is a need to ensure that the scope of these reviews is managed by persons with experience in this subject matter.

As recommended in question 2 above, specialist training and pre-registration should be provided to ensure that the quality of the legal advice is such that the case covers all the main arguments, and no arguments without merit. The specialist training will also allow the advocacy service to make an assessment of when a case does not have reasonable prospects of success.

As recommended in question 5, an assessment fee should be provided to ensure that advocates do not take cases to simply generate greater income flow. This will prevent the advocacy service adding other billable services to make up the lost time to assess the case.

Only a few advocacy services should be allowed to operate as the level of specialisation and experience is unlikely to be adequate to maintain the existing number of registered ILARS lawyers.

The advocacy services should be similar to the Victorian model whereby there is a choice of a union service which then allows the advocacy service to refer matters to the union to seek interventions to get the worker back to work or advocate for safety changes to prevent re-injury.

As the insurers have access to lawyers, lay advocates, medical and allied medical personnel, the advocacy services should include both registered practicing lawyers and lay advocates and other allied professions to ensure that workplace factors are considered.

All advocates should be required to carry professional and public liability insurance.

All advocates should have intermittent reviews and audits of their case management.

Recommendation:
All Advocacy Services should be required to have public and professional liability insurance.

8. FOCUS QUESTION 8:
How should eligible legal costs be billed, paid and claimed?

Pre-qualified specialist advocates should be able to service an injured worker once the worker has completed the relevant form requesting their services for a review of a work capacity decision. The specialist advocate will then ensure that the injured worker qualifies for support, and then bills the appropriate funding authority appropriately for the billable units of work conducted. These can be billed process units or time units. This should not be provided by the insurance agent but an independent arm of government.

Like all other aspects of former WorkCover services, service providers should be required to maintain competency levels and specific knowledge and have random and routine audits to ensure the appropriate use of funding.

There has been a level of concern at delays for some application for ILARS funding with WIRO. This is due to the change in process from where the solicitor or agent assessed the case and then billed during progress milestones to the current process where approval is sought after the initial assessment and application then billing after progress milestones. With the reduction of quantum of reviews indicated by question 9 below it is likely that a hybrid model could be pursued.

Recommendation:
Trained and competent advocacy services should assess eligibility and bill an independent agency of government when the process unit is completed.

FOCUS QUESTION 9:
What are the important operational and administrative matters that must be considered when designing this regulation?

9.1 Size of Service Requirement

The area of work capacity decision reviews is governed by the policies of the insurance agents and self-insurers in applying the legislation and guidelines. Unions NSW submits that these parties are increasingly structuring their internal claims management practices to use work capacity decisions to reduce the benefits of workers. Unions NSW submits that this area does not look like being an area that will result in an uncontrolled blow out in the scheme costs. If we look at the latest published statistics during the peak of the transition period when work capacity assessments were introduced, the WorkCover Annual Report 2013-2014 reported the following:

Year 2014-2014	Number	% of transitional reviews
Work Capacity Decisions in Scheme	8963	
Insurance Internal Reviews	2334	
WorkCover Merit Reviews	1136	97%
WIRO Procedure Reviews*	178	
Number of Register ILARS lawyers**	1016	

Source:

WorkCover Annual Report 2013-2014

*WIRO Annual Report 2013-2015

** WIRO Website Register of ILARS lawyers

Whilst these reviews are likely to differ in the proportion that are transitional reviews, it is likely that the numbers of reported work capacity reviews will decrease as the transitional cohort ends and the review process shifts focus to workers injured more recently.

If SIRA employs a similar process to that used with the ILARS system where almost any lawyer can apply for registration regardless of specialisation, this will lead to poor outcomes for the scheme and the injured worker. If this were the case there would be on average for every registered ILARS lawyer approximately 2 insurance agent internal reviews per year, 1 SIRA merit review, and 1 procedural review every 5 or more years. This does not warrant maintaining

knowledge of the latest practice of the administrative law surrounding the conduct of work capacity reviews. Instead there is unlikely to be much specialisation in this area and legal representatives working in this area will be forced to work in other specialisation or worse tout for business to ensure adequate business comes through the door.

Unions NSW submits that the number of registered advocates should be minimised to maintain specialty.

The Victorian WorkCover Assist and Union Assist services are potentially a model to be followed in NSW. Both organisations assist workers with advocacy services in conciliation and beyond, with referrals for more developed legal matters. The Union Assist service also allows for feedback with the employer and workplace union representatives to assist with injury prevention and return to work. The Unions Assist service also undertakes a range of community education services to assist workplaces understand workers compensation, injury management and return to work services.

9.2 Information

There is a reluctance for insurance agents and self-insurers to hand over medical reports. Under the Section 119 of the WIMWC Act 1998, there is a provision to provide medical reports but this is not conducted for work capacity assessments with only selected documents forwarded to the worker. The provision of all information on file should be provided to the worker so that the worker can dispute the information for which the work capacity decision was made.

This is likely to save time in the dispute, when there is no overseeing body such as the Workers Compensation Commission available to order production.

Recommendation

That there are a limited number of advocacy services allowed to operate and that they be pre-qualified and allowed to develop specialisation with the limited number of reviews.

Recommendation

All information and reports should be made available to the injured worker and their representative.

FOCUS QUESTION 10:
Do you have any innovative ideas that might be incorporated into the legal costs regulation or otherwise enhance the regulation?

10.1 Precedents

Currently there is no public posting of reviews at the WorkCover (SIRA) levels. It is only with the WIRO review that the decision is made public. All injured workers are important but not all injured workers' reviews have suitable merit to be supported under the Act.

To reduce duplication of disputes and increased costs on the same subject matter, reviews with redacted personal information should be made public on the internet. This will enable advocates to ascertain whether their case will have minimal prospects of success or whether there is enough merit to differentiate cases and have a successful review. There is currently a historical knowledge vacuum for the merit review process.

10. 2 Binding of Precedents

Currently insurance companies are bound to follow precedence of WIRO for that case only and not required to change the practice of that case for all cases (it is encouraged). By making the WIRO decisions binding could minimise the need for repeat reviews where the insurance agents makes the same decision but waits to see if the worker's representative is aware of the previous decision.

10.3 Focus on Lawyers Services misguided- need for agents and other services

Part of the problem with work capacity decisions by insurers, is decisions the insurance agent claims officer is making is often made without any of the relevant skills or qualifications. This leads to increased expenditure on investigations rather than support for injured workers through rehabilitation and other support. It can also lead to increased disputation.

For example Section 43 Work capacity decisions by insurers refers to the following work capacity decisions being "final and binding" except by WCD review:

- *a decision about a worker's current work capacity,*

This decision is a health decision that should be made by the appropriate qualified medical profession and not by an insurance company claims officer. It is likely that if the insurance company has made a Work Capacity Decision with a friendly IME then the worker will be required to access similar standard of medical evidence that may cost money. The IME report is not always shared with the worker.

(b) a decision about what constitutes suitable employment for a worker,

This is a combined industrial relations/vocational and health question unable to be made properly by an insurance company claims officer. This may require investigation in the workplace or a qualified rehabilitation provider. This is a cost that the worker may also need to incur to ensure the merits of their argument.

- *a decision about the amount an injured worker is able to earn in suitable employment,*

This is an industrial relations question and unable to be determined by an insurance company claims officer. This may require a vocational assessment and/or the use of an industrial officer to assess industrial instruments and roster arrangements.

- *a decision about the amount of an injured worker's pre-injury average weekly earnings or current weekly earnings,*

This is a statement of fact that can only be determined by an employer, the worker or a suitably empowered person with right of entry permit and knowledge of the industrial instrument and work patterns. This is not a decision that can be made by an insurance company claims officer and is further complicated if multiple employment is affected by the injury.

- *a decision about whether a worker is, as a result of injury, unable without substantial risk of further injury to engage in employment of a certain kind because of the nature of that employment,*

This is a decision for suitable medical specialist, or allied health professional and not the decision of claims officer. The effect of this clause for the worker is that they are effectively able to be terminated on medical grounds from their employment with restricted access and considerable hurdles to unfair dismissal and no access to a bona fide redundancy.

- *any other decision of an insurer that affects a worker's entitlement to weekly payments of compensation, including a decision to suspend, discontinue or reduce the amount of the weekly payments of compensation payable to a worker on the basis of any decision referred to in paragraphs (a)-(e).*

This is effectively a mechanism that requires compliance with all the demands of the insurer regardless of whether they fit with the existing WorkCover guidelines or directions. This provision is used to bully workers to see IMEs with short notice or suffer the consequences. In these instances simple advice would prevent procedural errors from occurring in having injured workers complying with unreasonable directions which would be an issue of merit and process.

Recommendation:
That rules to bind insurance companies on precedence should be developed into the Regulation.

Recommendation:
That the costs regime should allow for expert representatives (lay advocates and registered lawyers) and allied services allowed to advocate the grounds of the work capacity decision and that there should be a schedule for lay persons to be included in conciliation.

Recommendation
The appropriate schedule should allow for alternate services to be employed in undertaking the work capacity review.

FOCUS QUESTION 11:

Are there any other matters relevant to the legal costs regulation that have not been addressed elsewhere in the SIRA discussion paper or your submission?

11.1 Insurance Gaming

There have been a number of cases where the insurance agents game the work capacity process.

This creates a further punishment for injured workers as their support is removed from them and the insurer is rewarded due to the perverse nature of the reward structure of the scheme agents.

Workers are punished whilst the insurance agent runs the probability that they will not have the matter overturned.

The insurance agents and self-insurers should be made accountable for gaming work capacity decisions by making work capacity reviews that are overturned at a higher level subjected to an automatic penalty, with multiple penalties leading to removal of the scheme agent or removal of license.

11.2 Clarity of the Legislation and Processes

The Work Capacity Guidelines have never been the subject of proper consultation with unions or injured workers.

The legislation is unclear in a range of areas including the definition of suitable employment. The information explaining the work capacity process to workers is hard to find on the website and not easy to understand.

Recommendation:

A positive penalty system should be introduced to ensure insurers act consistently with the objects of the legislation to support injured workers when undertaking work capacity reviews.

Recommendation:

The entire work capacity legislative suite including fact sheets, guidelines and legislation should be clarified and improved through consultation with all parties.•