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9 October 2019

State Insurance Regulatory Authority
By email only: consultation@sira.nsw.gov.au

Dear Sir/Madam

**RE: CONSULTATION REGARDING WORK-RELATED HEARING LOSS IN THE
NSW WORKERS COMPENSATION SYSTEM**

We appreciate the opportunity to provide this submission in response to the Consultation Paper of August 2019. We do so in our capacity as legal representatives for many workers suffering from work-related hearing loss. We agree for a copy of these submissions to be published, with our details, by SIRA.

We acknowledge that SIRA aims to ensure *"people who experience injury and loss are provided with fair, timely, respectful, inclusive and appropriate services"* such that NSW workers *"have confidence they will receive fair treatment from the workers compensation system"*.

We are grateful that the system, in the most part, certainly does that. NSW has a strong Workers Compensation Scheme which functions well in its current form.

Under the current system, workers are assisted by the Workers Compensation Independent Review Office (WIRO) in pursuing their workers compensation entitlements. WIRO has functions which includes assisting injured workers with complaints or disputes, and administers the Independent Legal Assistance Review Service (ILARS) which facilitates access to independent legal advice and assistance from lawyers who are Approved Legal Service Providers (ALSP).

On the last business day of 2018, WIRO made known a change to its policies when dealing with applications for grants of assistance from ALSPPs seeking funding to act for some workers suffering work related hearing loss injuries.

It provided that, as of 1 January 2019, *"WIRO will no longer provide funding for the purpose of investigating or pursuing a claim for hearing aids where the worker is eligible for subsidised hearing services under the Australian Government Department of Health Hearing Services Program."*

The legislation itself has not changed. If you are an injured worker suffering from hearing loss caused by exposure at work, you are still entitled to bring your claim and the entitlements if successful are unchanged. The change in position from WIRO however means that some workers would have the ability to obtain legal advice and assistance in pursuing those entitlements, whilst others would not.

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The only differentiating factor between those affected by the policy change and those who are not, was an 'entitlement' to obtain hearing aids under the federally funded, Department of Health, Hearing Service Program. Where a worker is not eligible for subsidised hearing services under the Hearing Services Program (HSP), they would still be able to obtain the grant of assistance. If they are however an injured worker in this State, but fall within the group of people who are entitled to hearing aids through the HSP, they could not get legal funding and as such would be essentially forced to obtain aids through that federally funded scheme.

The excluded group relevantly included those who are:

- (a) a pensioner
- (b) a veteran
- (c) receiving a sickness allowance from Centrelink
- (d) a dependent of a person in one of the above categories
- (e) a member of the Australian Defence Force
- (f) referred by the Disability Employment/Management Services Program, or
- (g) a National Disability Insurance Scheme participant with hearing needs.

As mentioned the change does not preclude workers who are eligible for the HSP from making a claim for hearing aids under the NSW Scheme, only that WIRO will no longer provide funding for lawyers to assist workers in these circumstances. It would mean however that these workers would have to navigate a very tricky workers compensation area with no legal support. It would mean that these workers are the only group of workers in NSW who do not have access to this service.

Whilst it might be argued that the legislation and entitlements to the compensation haven't changed, without a doubt, the policy change meant that the most vulnerable of injured workers were now being prevented from pursuing their entitlement to hearing aids under the NSW Workers Compensation Scheme. In our opinion it was not expected that the policy change would result in those workers pursuing their own rights. It is clear that the change was to stop those claims from being made on the Scheme.

The possibility of discrimination

There is no doubt that the Scheme supports that injured workers have access to their workers compensation entitlements and assists workers by facilitating a department like WIRO to administer funding so workers can obtain legal assistance. The policy change goes against all that SIRA is trying to achieve in the Scheme – a fair system where injured workers are provided with support and a process which is *easy to deal with and delivers protection, recovery and restoration entitlements and a good outcome at an affordable price and in a sustainable way.*

As can be seen from the list above, those workers who are most affected by the change are those who we acknowledge as individuals requiring the most support from society and those who are least financially able to support themselves. The majority affected, in our experience over the last 10 months since this policy change, have been Aged Pensioners.

The policy change is a discriminatory one. It discriminates against a group of people for no other reason than they have the ability to access federal funding to obtain other hearing aids.

It seeks to disadvantage these workers, who in most cases would not be in a financial position to fund their own legal costs or pay for better hearing aids.

The NSW Workers Compensation Scheme is a strong scheme and, from recent discussions with WIRO, is in a strong financial position. It does not need to discriminate against classes of people unnecessarily. Recent changes to the funding regime by WIRO sees even more injured workers gain better access to legal assistance, yet despite the many concerns about the funding policy having been raised with WIRO directly, this policy remains in place and disadvantages a group of workers for no apparent reason.

The change in the policy is hugely disadvantageous to the individual worker involved, but the cost to the Scheme overall is not a significant one when you consider the limited group it affects.

On this point, when first introduced the effect was thought to also exclude the cost of the expert report of the ENT to support the claim. That cost however is recoverable through the Scheme regardless under s73 of the 1987 Act. The only thing that it therefore affects seems to be the professional costs of the ALSP. Those costs were recently increased to \$800 per claim; an amount which is in line with the amount paid for the ENT report. The total cost to the Scheme, given the group the policy affects, would not be onerous.

Hearing aids under the Commonwealth HSP

It has been suggested that the aids provided through the HSP are of similar quality to those available through the NSW workers compensation scheme. Whilst we are not experts in comparison of hearing aids, many of our clients suffering from work-related hearing loss have voiced to us the inadequacy of the fully subsidised HSP hearing devices to suit their needs. A common theme was that the devices were only used intermittently because, whilst they were suitable for some situations, they became ineffective when communicating in group situations or in spaces where background noise was present. This intermittent use only serve to discourage these workers from utilising the devices at all, and some even found the aids to be unhelpful.

The policy change has created a system whereby we have workers injured in NSW who are forced to accept inferior hearing devices or pay out of their own pocket to either upgrade to a better device.

Under the HSP, workers can be given a recommendation for a fully subsidised hearing device (noting that the HSP caps the amount given to each eligible participant) but are also offered the ability to upgrade at cost to better quality and technologically advanced, but only partially subsidised, hearing devices. Workers would have to pay the "gap" in the cost of obtaining those more advanced devices.

It has never been acceptable in this State to force someone to pay for their own treatment when they have been accepted as having been injured in this State. It is the most fundamental of entitlements that this policy seeks to deprave.

This policy change has effectively forced this upon this disadvantaged group of workers. A person who has worked to advance this State and has suffered an injury in NSW has an entitlement to be provided a treatment. Whether it is better than or equal to what is available under the HSP is ultimately irrelevant. It is an entitlement. The Scheme should not in any way intentionally pervert the injured person's ability to access that entitlement.

Beyond the quality of the device though, the entitlement extends to the after sale care and service of the device, the batteries and other accessories which are not available to people who do not have that entitlement under the NSW Workers Compensation Scheme.

Those not managed by ICare

The other point that should be made is not all injured workers fall under the Scheme as managed by Icare. Many affected workers are also employed by self-insured employers.

There is a growing concern that self-insurers will use this change to disadvantage workers who make a claim for hearing aids only.

A self-insured employer will often dispute what might otherwise be considered a straight forward claim for hearing aids, forcing the incurring of costs of making further enquiries, to commission an expert opinion, and perhaps ultimately proceeding to the Workers Compensation Commission. Those costs to a worker who are not eligible for funding through WIRO would be far more than the cost of the hearing aids themselves making the exercise futile.

It could become an easy means for abuse by self-insurers to avoid fulfilling their statutory obligations to compensate injured workers with the medical treatment they deserve.

Current pathways to receiving a hearing aid

The current pathway for an injured person to obtain hearing aids is a suitable one. It includes the requirement to identify the loss of hearing as being related to noise exposure, it requires the identification of a last noisy employer and a claim being made. The process is quick and efficient and in the most part people receive access to their entitlements within a few months.

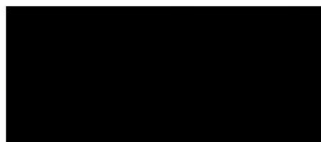
The need for hearing aids is a question put to medical experts in the field. The hearing aids ultimately fitted have to be chosen after specific consultation with the injured worker and taking into account that persons individual circumstances. They have to be provided by Audiologists/Audiometrists who are accredited by SIRA. The range of devices are understandably restricted by SIRA through its approved list to ensure uniformity and fairness. The cost of the fitting, supply and then maintenance of the devices is restricted through the Workers Compensation (Hearing Aid Fees) Order to ensure fairness and parity in the system.

The introduction of these measures have been a positive move for the Scheme and assists all stakeholders by ensuring less dispute is created over relatively minor things like the cost of batteries or fitting fees. It ensures workers receive access to their entitlements quickly and efficiently without burdening the system with more disputes.

Ultimately, the policy change introduced by WIRO is counterintuitive to SIRA's mission. Workers who are affected by the change cannot have "*confidence*" in our workers compensation system because they are not receiving "*fair, timely, respectful, inclusive and appropriate services*". It is contrary to ensuring "*equitable and fair*" treatment and "*positive experiences*" being provided to injured workers. The policy change, simply put, is discriminatory. Any cost saving benefit to the Scheme would be negligible in comparison to the disadvantage being caused to this group of injured workers.

Yours faithfully

TURNER FREEMAN



Per: Richard Dababneh
Partner