

26 November 2015

## **Submission from Self Insurers Council to the Regulation of Legal Costs for Work Capacity Decision Reviews**

Please find attached the Wollongong City Council response to the invitation for submissions to Regulation of Legal Costs for Work Capacity Decision Reviews.

It should be noted that the Council takes the position that dispute settling process in NSW requires urgent attention to remove the complexity of the system. In response to the focus questions,

### **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?**

The Council submits that legal costs should not be payable in respect of review applications regarding work capacity decisions. In effect, no changes are needed to this aspect of the regulations. Excluding the payment of legal costs connected to this regulation has assisted the scheme in bringing legal costs under control and has circumvented in many cases the early involvement of lawyers in the claims process, which may have a detrimental effect on the Return to Work outcome.

The Council disagrees that all or most employers/insurers use their own internal (in house) legal services for dealing with work capacity matters. Most large self insured organisations may have a legal section, however, they are not personal injury lawyers, if SI's require legal advice for workers compensation matters it is almost all cases sourced externally. At Council all Work Capacity Assessments and Decisions are made by the writer, with no legal assistance.

The Council submits that a Work Capacity Assessments and Decisions is just another review point in management of a claim, in the same category as determining PIAWE, making a liability decision determining if medical treatment is reasonable estimate reviews etc.

Therefore the Council submits that legal costs for any stage review of a Work Capacity Decision, Internal, Merit or WIRO should continue to be prohibited.

### **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?**

The Council submits that no legal costs should be payable at all in respect of any stage of the review process for the reasons given in question 1, either internal, merit or WIRO, including those that may result in a recommendation to change a work capacity decision.

It should be noted that other than internal review, Merit and WIRO decisions are made independently of the insurer and are based on either material evidence or ensuring due process has been followed. The injured worker does not have to make a considered and documented decision, the review officers at SIRA or WIRO do.

**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?**

The Council is of the opinion this would establish another unnecessary layer to the current review process .The process is already burdensome in its current form and there does not need to be a further class of review beyond the current Internal, Merit and Procedural reviews that are in place.

The Council suggests streamlining the review and dispute process rather than expanding it to enable a review be undertaken by one tribunal to cover content and procedural.

**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?**

The Council submits that the existing regulations precluding legal costs should remain in place. However if costs are to be payable, that costs must follow the event, and,

In the case Work Capacity Decisions, to recover costs the worker must succeed on overturning of the Work Capacity Decision on completion of the review process, whichever stage the review reaches.

That costs be payable for only one review, not for each or any subsequent review.

Worker to pay costs if review application is vexatious, frivolous or without justification

Legal aid funding not to be provided to worker by ILARS because of inherent conflict with WIRO being the third reviewer

Self-insurer legal costs be unrestricted.

**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)?**

As indicated above the Council submits that the existing regulations precluding legal costs remain in place, however if it is deemed that legal costs should be payable a simple fixed amount be regulated for any eligible review, this process does not require further complication.

**Focus Question 6: In what circumstances should one party be required to bear the other party's legal costs?**

The Council submits that the existing regulations precluding legal costs remain in place and that each party are to bear their own costs. However in the case of a claim/review that was brought without foundation, frivolous or vexatious then costs should be borne by the injured worker.

**Focus Question 7: What measures might be included in the regulation to better promote and encourage compliance?**

Self Insurers are bound by the existing regulations around work capacity decisions and the review process, along with all aspects of a claim, whether by legislation or guidelines. The Council believes that SIRA can help further promote and support the existing process through provision of information and in raising stakeholder awareness around compliance requirements.

**Focus Question 8 :How should eligible legal costs be billed, paid and claimed?**

The Council submits that the existing regulations precluding legal costs remain in place.

However if a costs schedule is to be implemented, a fixed costs regime is fundamentally easier to administer by avoiding debate over what is reasonable or unreasonable. This said, the absence of volume from the scheme means that the old approach of "swings and roundabouts" wherein a figure of \$980.49 would be appropriate is no longer viable. The typical break even cost is \$150.00 an hour (on the basis of a blended rate). This would mean that 6.5 hours is available for the current prescribed fee. Any less time - a profit is made. Any more time - money is lost. This reality means that employers tend to get the service that matches the money available.

In order for a legal practitioner to properly review and assess a file can take 3 to 4 hours. Thereafter, dictating a letter, checking and finalising can take at least another 3 hours so a typical file review needs about 7 hours to complete. This costing allows no time for dealing with follow up enquiries, assembling evidence or anything else that may arise. A proper figure that is neither too mean nor too generous needs to be struck to ensure viability for all concerned.

Having regard to all these issues, the Council would consider an allowance of 7 hours at \$200.00 per hour = \$1,400.00 as a proper allowance for advising in respect of a work capacity decision. An additional 2 hours would cover merit review (\$1800.00) and additional 3 hours to full WIRO review (\$2000.00).

**Focus Question 9 : What are important operational and administrative matters that must be considered when designing this regulation?**

The Council submits that the existing regulations precluding legal costs remain in place.

However any design or re-design of the regulations involving operational or administrative aspects must be a simple single fee to paid on the completion of the review process, whichever stage, on production of an account or receipt to the party liable for payment.

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

Again the Council submits that the existing regulations, precluding legal costs is appropriate, however as already indicated any fee schedule must be simple and cost effective, a single flat fee, not based on the stage the review process is complete.

**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?**

The state Government has instituted changes in the scheme through the creation of the 3 bodies to replace WorkCover, Safework NSW, SIRA and Icare to better regulate the function and has promoted less regulation on business in NSW, this proposal, of introducing legal costs for Work Capacity Decisions will increase the cost of the scheme and regulatory burden on employers in NSW.

**This letter is authorised by**

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