Submission: Regulation of legal costs for work capacity decision reviews

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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?

Payments for all levels of review would provide equity for the worker and accord with the beneficial intent of the Workers Compensation Scheme. It is of benefit to the scheme that appropriately prepared, legally accurate and factual appeals are submitted at all levels within the appeals process. This in itself is a saving in the time and energy or the employees of the insurers, regulator and WIRO as the arguments and issues on which an appeal is being made will be easier to identify. It would not be of benefit to the scheme that bottlenecks are created by disallowing certain levels of appeal to remain subject to the capacity of the injured worker. Payment of legal costs at the internal review stage has the benefit of ensuring a quality preparation of the case for the worker at first instance. This holds the potential to avoid escalation to Merit Review and Procedural Review. Payment of legal costs at the merit review stage allows for the worker to provide clarity in their evidence via a professional to ensure that any deficiencies or clarifications that arose in the insurers address to the internal appeal are addressed. The scheme is designed to be fair and provide income support. The intention is to "get it right", not eject the worker because of a misunderstanding, lack of clarification or worse still, an insurer that adopts an adverse position despite the evidence. This is the final review at a merit level – it is only fair to ensure that its presentation is of quality and is sound at law and at fact. Once again, there are going to be a percentage of cases that are clarified at this point that prevents the matter being escalated to procedural review, and this reduces costs to the scheme. Procedural Review is the final throw of the dice (other than a judicial review). The WIRO decisions since 2013 provide multiple circumstances in which the insurer has failed to comply with the legislation and the guidelines. This is an area of technicality and it requires a trained, professionally educated and experienced eye to review the decisions provided by the insurer. Once again, the beneficial nature of the scheme is paramount and this has been repeatedly brought home within the WIRO decisions of the past 3 years.

Recommendation:

1. Payments for all levels of review are available to all injured workers.

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?

A work capacity decision recommending no change does not necessarily mean that there has been no change in the circumstances of the injured worker, only that the insurer sees no need for change. It may mean a worker's current situation has been ignored by the insurer. This might be the case if the worker's condition has deteriorated which, if considered appropriately, may lead the insurer to decrease expectant work hours and increase weekly income replacement. As a formal response of "no change" may not be reflective of change there should be no attempt made to remove this from access to professional assistance.

Recommendation:

1. Payments for all forms of decisions are available to all injured workers.

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?

No new classes of reviews should be contemplated unless they replace a current level (internal review for instance) and are controlled and conducted by the Workers Compensation Commission or similar independent conciliation/arbitration body. The system currently allows for three levels of review which is complicated enough. Adding other classes or levels or any other form of review beyond which is already in place would be counterproductive as it would add to the paperwork already burdening injured workers.

Recommendation:

1. No new classes of review should be introduced unless: A. They are managed by an independent government conciliation/arbitration body such as the Workers Compensation Commission. B. They replace an existing level of review with the suggestion that the internal review be the level replaced.

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 Injured Workers Support Network provides limited assistance to injured workers who we would classify as having complex needs who are referred to us by other community organisations. Though we cannot provide a fair and reasonable maximum cost, we can identify the intricacies we face in providing assistance with work capacity decision reviews. These intricacies need to be taken into account in any attempt to identify a fair and reasonable maximum cost. A complex need according to our policy refers to:

- People living with an intellectual disability,
- People with a hearing or sight disability,
- People living with an impairing psychological illness,
- People who are functionally illiterate and
- People who are unable to communicate in English (with the assistance of an interpreter).

Within the payment scale some leeway must be provided to complex cases. In this we make a differentiation between complexity identified in our current assistance policy and complexity based on the matter content. A system of payment must allow for levels of complexity including capacity for payments to proceed to the Supreme Court on points of law and gross injustices. Prior to 2014, The Injured Workers Support Network provided broader assistance to our membership and can reflect that it takes our employees and volunteers between 5-11 hours to prepare an appeal. This was limited in 2014 because of the large amount of time it was taking away from other core business without adequate compensation to supplement the time taken. The process is very much dependent on the documentation provided in the work capacity decision, the location of the member and the quality of writing in that work capacity decision. Work capacity decisions are an accumulation of information sourced from rehabilitation providers, job placement assessors and medical practitioners within the established legal framework. A holistic approach to interpreting a work capacity decision is therefore required to adequately assess the potential inadequacies of these decisions. The cost structure should also include tiers for alternative professional services. This is reflective of the service the Injured Workers Support Network current service provision means we must absorb the costs into our limited budget, as do unions and other parra professionals. Being able to access a cost structure to gain compensation for the time and resources would enable us to provide an expanded service to the current group covered by our policy as well as expanding these services.

Recommendation:

1. Costs must reflect the incurred costs of the organisation or professional conducting the work as well as an incentive cost to ensure professionals continue to provide legal services.

2. Any cost structure needs to be inclusive of: A. The reality of workers with complex needs in relation to life situations and claims/ B. The holistic nature of work capacity decisions C. The range of professional advice and sources required to adequately appeal. D. The other professionals that currently provide a service in this area.

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)?

A single fixed maximum cost applied to all eligible reviews would potentially rule out any capacity for complex cases to attract appropriate costs in relation to the expenditure required (as with the population targeted in our current assistance provision policy). A maximum cost would discourage appropriate service provision where required. Such discouragement may be to deny a non-English speaking worker from accessing an interpreter as this would increase the costs but decrease the return for professionals. If such a system was to be contemplated that system would have to include a capacity to seek reimbursement for costs associated with assisting workers with complex needs. The system would also require a capacity to reimburse for costs associated with assisting worker with complex cases. The regulator should concentrate on empowering injured workers to access their rights of appeal within the current workers compensation framework a fixed maximum cost is unlikely to achieve this desired behavior. The appropriate application of the legislation and regulations with respect to Work Capacity Appeals should be expected of insurers in the first

instance. The capacity to achieve this lies within the regulator's current power and as such an attempt to impose this through a cost system which would encompass and potentially infringe on the rights of injures worker is unnecessary. Ultimately, getting the decision right the first time around, has to be paramount in order to ensure faith in the system exists, and unnecessary costs are avoided. More importantly, this can avoid more adverse outcomes for Workers who are adversely impacted by further adversarial reviews. Unfortunately the Injured Workers Support Network has little faith in the capacity of the insurers to do so give their behaviour to date. The appeals process should be given strength through the cost structure to promote quality care from the insurer towards the injured worker but this cost structure cannot be to the detriment of the injured worker.

Recommendation:

1. That a fixed maximum cost not is contemplated due to its inbuilt function of limiting the capacity for agents and professionals to work with complex cases and limit the capacity for injured workers to take up the rights they have within the system.

2. That if a system was to be introduced the capacity for reimbursement of additional costs for workers with complex needs and/or complex cases be also introduced.

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

There is no circumstance in which the injured worker should bear costs for the insurer or the regulator's legal costs. Any system that entails this distinctly disadvantages the injured worker and would serve as a tool for denying injured workers an inherent right to justice and equal treatment. The current workers compensation system lacks capacity to make precedent law, which can only be made through the court system, within the appeals system. The lack of this capacity means there is no method of determining whether one matter would fall under a precedent making an attempt at prejudging an appeal viable. This is likely a reflection that each and every individuals matter will, and should be, distinguishable from other cases due to the holistic nature of information gathered by the insurer to make that decision). Any attempt to make injured workers bear the cost for the insurer or the regulator would be a quasi attempt at creating precedent law- an ability that should only be given by the court system.

Recommendation:

1. That there is no mechanism in place within the regulation which could enable insurers from seeking to make an injured worker pay for their legal costs.

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

There is a need to discourage legal, paralegal and other service providers charging above and beyond prescribed fees. This prevents abuse and keeps the scheme affordable for the scheme and the Worker. Cost disclosure to the client is standard practice and if used should comply with standard requirements of the Law Society. Fines/penalties should be available to the regulator for those that overcharge. Removal from the scheme is one potential outcome for the more extreme examples. This should not be a limitation restricted to Worker representatives. Insurer solicitors

should be subject to the same requirements to ensure unnecessary cases are not pursued. The current professional standard mechanisms should be utilised as a referral process to ensure automatic reporting of adverse findings. Dealing with non-compliant legal representatives is best held within the jurisdiction that best understands it. The regulator should also take into consideration a mechanism to ensure quality compliance as well as regulatory compliance. This could be achieved through the application system to access the cost structure and a complaints mechanism through the regulators complaints line available through insurers. This should be based not on numbers of complaints but through an investigation of the quality of reports. Compliance with time frames should also be taken into consideration this can be achieved through a split payment system (as mentioned in our answer to question 8).

Recommendation:

1. That the regulation does its up-most to prevent over charging by professionals.

2. That compliance encompasses regulatory, quality and time constraints.

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

Given the tight 30 day timeframe currently in place for all levels of appeal, a pre-approval system should be adopted for any standardised fees established in the scheme. People with complex needs could be identified through the current system and funding appropriate to meet their needs should be made available within a pre-approval system to encourage services to engage with them. Payments could be split between engagement and completion as each appeal is lodged with a claim made by the service attached with the appeal. The ILARS system is one option for providing costs. This would be of particular relevance to any attempt to appeal to the Supreme Court where the merits of that appeal can be judged independently of the regulator. Any system adopted should not require the Worker to meet costs up front.

Recommendation:

1. That a pre-approval system be adopted to ensure no interference with the timeframes within the system.

2. That a split fee payment system be adopted between engagement and completion

3. That the ILARS system be utilised for matters which are to be appealed to the Supreme Court.

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

Care must be made to not disadvantage the injured worker in making an approach to a legal service for assistance of that appeal with particular reference to the legislated time-frames within the appeals process. This may be overcome through a pre-register system whereby the injured worker, upon receiving notice that a Work Capacity Assessment is being conducted is also sent information on the appeals process and offered the opportunity to register with the regulator their nominated appeals support service/solicitor. It would be incumbent on the insure to forward the work capacity decision to this nominated support as well as directly to the injured worker. Regulation would also be required to ensure that deals are not done between insurers and appeals support services for the

referral of injured workers with punitive measures included to punish breaches if this was to occur. The insurer should not be providing any advice on who the injured worker should seek legal advice from. Utilising a one-stop-shop for lodging all appeals (divided logically into the stages and the recipient of that appeal) would benefit the tracking of the system, expedite the lodgement process and produce a greater capacity to assess the appeals process into the future.

Recommendation:

1. That a pre-register system be adopted to ensure the timeframes for appeals are not interfered with by a post register application system.

2. That insurers are banned from any deal with solicitors or other professionals for the referral of workers lodging appeals.

3. Computerised lodging of claims and simultaneous requests for payments should be a feature of any system.

4. Providing a table of costs with item numbers and fee ranges is an appropriate administrative tool. Monitoring and audit of costs should be carried out as well as a reporting system from Workers.

5. Providing a capacity of oversight of the system beyond the regulator and resting with WIRO would provide accountability to the system of both payments and appeals

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

There is a need to ensure that insurers are objectively and fairly administering the scheme. In the more extreme cases where the insurer fails to make a decision that is fair, logical, justified, in the best interests of the scheme, a breach of guidelines, deliberate, etc. There need to be a fine/penalty of a punitive nature to ensure appropriate and quality decisions. These decisions need to be published as well. The requirement of good faith would be appropriately embedded into this scheme in order to protect workers and the integrity of the scheme. There is a need to ensure a separation of the legalistic language used by insures in their work capacity decisions from the decision itself. Though this requirement has been reinforced by a litany of WIRO decisions greater care should be taken by the insurer to use a plane language model in drafting the letters to injured workers. Highlighting the core information as to how they reached their decision and the information they have used to do so. Sources of support for injured workers during the appeals process should be supported. Several Unions offer free support to their members in drafting and submitting appeals at all three levels. The regulations should support their access to the funding made available to encourage this to occur. Support for the appeals process can be delivered through an independent community service, as is currently occurring at the Injured Workers Support Network through on a strict limited basis. For the population groups the Injured Workers Support Network currently assist, the time frames are drawn out to ensure the member understands what is occurring and what we are doing. Depending on the individual circumstance this can add 10-15 hours on top of the hours identified in question 4 There is scope within the 2015 amendments for an independent, not-for-profit community based organisation to provide assistance to injured workers through the review and appeals process, similar to the Victorian and South Australian models. Such a service should be considered and included in the mix of support. This could be done directly through funding and

grants of a service or through allowing the Injured Workers Support Network to participate in the legal cost scheme to a similar degree as other services.

Recommendation:

1. That the cost structure includes a mechanism to accommodate the work that the Injured Workers Support Network currently provides as well as unions.

2. That there is a requirement of good faith for everyone involved embedded into this scheme.

3. That the originating work capacity decision be structured to ensure clarity of language for the injured worker.

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 matter of costs necessitates limits and regulations/guidelines to ensure it is appropriately handled. The system does need to recognise that in more extreme cases, the costs need to reflect the complexity. Outlier cases can and do happen and a limited costs framework can prevent assistance being rendered at all, or on a more careful and professionally exercised basis. There does not appear to be any discussion or allowance for the costs associated with the obtaining of medical reports, investigations or advice from counsel. These are costs that should fall under the requirements of internal and merit reviews and necessitate addressing. Standards of service provision must be included in the regulations with capacity for oversight for the adherence to these standards. The system used should enhance the capacity of injured workers to receive assistance and exercise their entitlements to a fair and just appeal process.