



**New South Wales Teachers Federation
a branch of the Australian Education Union**

AEU NSW Teachers Federation Branch ABN 86 600 150 697



Locked Bag N° 3010, Darlinghurst NSW 1300 • 02 9217 2100 • www.nswtf.org.au
NSW PRESIDENT: Maurie Mulheron • NSW GENERAL SECRETARY: John Dixon

30 November 2015

In reply please quote: 1154/2015/JD/AC/ja

State Insurance Regulatory Authority
Locked Bag 2906
LISAROW NSW 2252

Email: 2015benefitsreform@sira.nsw.gov.au

Dear Sir/Madam

Re: Submission on Work Capacity Decision Review Costs

Please find attached a submission from New South Wales Teachers Federation on Work Capacity Decision Review Costs.

Thank you for allowing us an extension until today.

Yours sincerely



**John Dixon
General Secretary**

Attachment



NEW SOUTH WALES TEACHERS FEDERATION

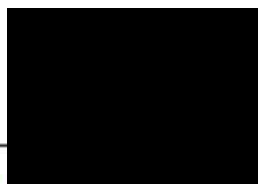
SUBMISSION TO

STATE INSURANCE REGULATORY AUTHORITY (SIRA)

ON

WORK CAPACITY DECISION REVIEW COSTS

Authorised by



**John Dixon
General Secretary
NSW Teachers Federation**

30 NOVEMBER 2015

FOCUS QUESTION 1:

Should the regulation provide for payment of legal costs in connection with all work capacity decision review types – ie Internal Reviews, Merit Reviews and Procedural Reviews?

The Workers Compensation system and legislation is too complicated for workers to successfully negotiate without legal representation.

Reviews of all work capacity decisions require a detailed knowledge of the legislation and how it can be applied to the review. Workers with work-related injuries should have the right to access advice and to do so without being out of pocket.

A number of Federation members have successfully sought an internal review and had their work capacity decisions overturned. An example was a teacher who had a physical injury and was sent, by the Insurance funded rehabilitation provider to a physical strengthening program. At this program he suffered a hernia injury. His nominated treating doctor (NTD) then added a 5kg lifting restriction to his Certificate of Capacity.

Regardless of this restriction he received a work capacity decision listing courier driver as a possibility for employment. As an educated, professional he had the literacy skills to compose his own review application and have an illogical decision overturned.

A worker with less literacy or a newly arrived worker with limited ability in English may not have been successful in explaining the situation to their doctor to obtain the required evidence, or the literacy to explain in formal English the reasons why he did not have current capacity for work of that type. A worker with psychological injury may also be disadvantaged in this process.

Allowing for the payment of legal costs in matter of work capacity decisions is necessary to remove the current inequity where a worker's low level of education and literacy can be a factor in the success or otherwise of their request for review.

There is also inequity between workers who have their payments declined by a work capacity decision as opposed to a declination under Section 74 of the *Workplace Injury Management and Workers Compensation Act 1998 (NSW)*.

When a claim is declined by the insurer under S 74, a worker, who now has no further access to weekly payments, has the legal right to seek representation to pursue the disputed claim with the aim of having their weekly payments restored.

A work capacity decision can have the same practical and financial effect on a worker, in that their weekly payments cease; however they do not currently have the same right to assistance with the drafting of their review.

A teacher who has suffered a psychological injury as a result of alleged workplace bullying or as the result of a violent incident at school, may be placed in a short term placement at an alternate workplace as part of a graduated return to work plan. Over time they may increase their hours and duties towards full pre-injury hours. A work capacity decision can then be made that they have capacity for full pre-injury duties so all payments cease.

Although the teacher has been successful teaching at the alternative location, the triggers for their injury may still exist in their substantive workplace. Therefore it is common for the nominated treating doctor (NTD) to continue to place a restriction on the Work Capacity Certificate that the teacher is not able to return to their original school.

The injured teacher cannot enter their former workplace against the advice of their NTD, but the restrictions on suitable duties are ignored and what should be a medical decision as to the health of the worker is overridden by the work capacity decision.

Under the current system this teacher cannot access legal representation to have the work capacity decision reviewed. If the same teacher had been sent for an independent medical examination which deemed them fit for pre-injury duties, their payments would also cease, but they would have grounds to seek ILARS funding and legal representation.

It is an irregularity in the process that depending on the choice of the insurance case manager either to dispute liability under Section 74 or make an adverse work capacity decision leaves one injured worker with access to legal assistance in the former case and another injured worker to seek review without such advice and assistance.

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?

No.

Such a proposal would discourage workers from lodging review applications that ought to be lodged. Workers who have had warning of cessation of weekly payments, or have actually had these payments cease, are often under financial pressure and even a possibility of having to pay their own costs may dissuade them from seeking a review of the decision.

Under the present system for ILARS legal funding for Workers Compensation Claims denied under Section 74 of the *Workplace Injury Management and Workers Compensation Act, 1998 (NSW)* and other similar clauses the legal service provider must apply and have their funding approved.

A similar, if more concise system for funding applications on work capacity decisions would similarly encourage realistic triaging by those seeking funding.

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 Parkes Project Advisory Committee Recommendations dated July proposed changes to:

1. Remove the multiple review processes for work capacity decisions.

2. Replace the multiple dispute resolution paths with a single dispute resolution process/system in a single tribunal (the Workers Compensation Commission) with an appeal path.

There are presently multiple review processes for work capacity decisions including internal reviews, merit reviews and procedural reviews. Rather than create a further class of review, Federation recommends that they be replaced with a single dispute resolution system which allowed for legal representation and an appeal path.

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?

As an active participant in the Parkes Project Advisory Committee, Federation concurs with the recommendations dated July 2015 which stated:

COSTS AND LEGAL REPRESENTATION

Principles adopted

1. Workers and insurers should be able to obtain legal **advice** and representation with respect to all disputes (including WCDs).
2. Costs should reflect proper remuneration for all lawyers for both workers and insurers.

If there is a maximum cost it must relate to the time and effort needed to draft and lodge the review.

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)?

The Parkes Project, after many meetings reached an agreed position between union, employer and insurer representatives, that lawyers play an important role in filtering applications that have no prospects of success thereby reducing the administration costs of the scheme.

FOCUS QUESTION 6:

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

Federation agrees with the extension of the right of injured workers to obtain legal advice in respect to work capacity decisions but emphasizes that this should be at no cost to the injured worker.

As previously stated under Focus Question 2:

Such a decision would discourage workers from lodging reviews. Workers who have had warning of cessation of weekly payments or have actually had these payments cease are often under significant financial pressure and even a possibility of having to pay their own costs may dissuade them from seeking a review of the decision.

FOCUS QUESTION 7:

What measures might be included in the regulation to better promote and encourage compliance?

Federation agrees with the position put forward by Unions NSW which would provide access by injured workers to pre-qualified specialist advocates who would be required to demonstrate specific knowledge, maintain competency levels and be open to random and routine audits.

These requirements would ensure that the injured worker had access to professional, informed advice while also ensuring appropriate use of funding.

FOCUS QUESTION 8:

How should eligible legal costs be billed, paid and claimed?

The Federation agrees with the position, originally put to the Parkes Review by Unions NSW that "the WIRO should accredit non legal agencies to provide support for injured workers through the review process".

At the present time, WIRO funded legal costs through ILARS are restricted to legal service providers with unrestricted practising certificates. This presupposes that such people have knowledge of workers compensation practice and procedure while excluding trade union industrial officers who have such knowledge and expertise but no practising certificate.

Federation is of the opinion that legal representation to assist injured workers prepare documents seeking a review of work capacity decisions should be extended to industrial officers who have the knowledge and skills to effectively assist and advise our members to lodge such reviews.

FOCUS QUESTION 9:

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

Federation agrees with the Unions NSW 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.*

There are a limited number of work capacity decisions reviewed in NSW every year and it would be to the benefit of injured workers to know that the person being funded to assist them in lodging their review had the current and specialised knowledge needed to effectively assist them.

FOCUS QUESTION 10:

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

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?