

MANAGEMENT OF HEARING LOSS CLAIMS

Please Refer to the 2005 Deed Glossary for Defined Terms

Reactivation of Industrial Deafness Claims

This operational instruction sets out the policy regarding the reasonable necessity of:

- (a) Claims for further hearing loss
- (b) replacement of hearing aids
- (c) maintenance of hearing aids and supply of batteries.

It provides guidance to the Scheme Agent to assist injured Workers, solicitors, doctors and hearingaid suppliers, and outlines standards regarding the provision of hearing aids and their maintenance in respect of reactivated deafness Claims.

A declaration form to be completed by the Worker and the Workers Nominated Treating Doctor to confirm the need for replacement of a lost or damaged hearing aid is attached to this operational instruction, as is a standard letter to the Worker regarding the need for a new hearing aid or maintenance of a hearing aid.

Request from a solicitor

Under section 60 of the 1987 Act, Employers of injured Workers are liable for the cost of medical and related treatment that is reasonably necessary. Case law indicates that treatment is reasonably necessary for the purposes of section 60 if it meets the tests of:

- (a) appropriateness
- (b) the best of available alternatives
- (c) effectiveness and cost-effectiveness
- (d) maintaining, or slowing the deterioration of, a Workers health.

Treatment that is ordered by legal practitioners will not ordinarily be considered capable of satisfying the reasonably necessary requirement. Usually, treatment is only capable of being reasonably necessary when it is ordered, or supported by, a medical practitioner, unless the Scheme Agent has other authoritative evidence of the need for such treatment. Accordingly, the Scheme Agent is not generally liable for the cost of any treatment ordered by a legal practitioner.

When such a request is received from a solicitor, the Scheme Agent must inform them, in writing, that contact will be made with the Worker to relay the solicitor's request and determine the Workers needs. The Workers Nominated Treating Doctor must then verify this request on the declaration.

Document name: Operational Instruction 1.22	Prepared by: Provider Services Group
Version: 3.0	Issue date: March 2009
Revision: 0	Review date: February 2010
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Request from a medical practitioner/audiologist

When requests for replacement hearing aids are received, the Scheme Agent must make further assessments by:

- (a) contacting the Worker to confirm there is a requirement to replace hearing aids
- (b) providing the Worker with a declaration form if the hearing aids have been lost or damaged.

Recommended maximum amounts payable

A reasonable amount payable for a monaural replacement hearing aid and supply of batteries for the first year is \$1,200 for an analogue hearing aid; digital replacement is \$2,000. This reflects the current charges in the community and those of the National Office of Hearing Services. The maximum amount payable for ongoing annual maintenance and supply of batteries is \$150.

Section 66 Claims for further hearing loss (with or without hearing aids)

Under section 66 of the 1987 Act, when Claims for compensation for further hearing loss are received, the Scheme Agent is to arrange further assessments by:

- (a) contacting the Worker and arranging for a Claim for Permanent Impairment to be completed
- (b) arranging consultation with an ENT specialist to establish further hearing loss and, if claimed, the need for a replacement hearing aid(s) specialists must provide appropriate reports in accordance with the WorkCover Guides for the Evaluation of Permanent Impairment.

Legal costs

Where Claims are submitted by solicitors, legal costs can only be paid if the Claim is:

- (a) a duly made new Claim, or
- (b) a Claim for further hearing loss, made under section 66.

Solicitors cannot recover legal costs for reactivation of deafness claims solely for maintenance of hearing aids, supply of batteries, or hearing-aid replacement. The only costs that are recoverable in relation to a Claim for compensation are those set out in Schedule 6 of the Workers Compensation Regulation 2003.

Claim closure

If a hearing aid is issued, and maintenance and batteries for the first year have been arranged, the Claim is to be closed. If subsequent requests for a new hearing aid or maintenance are received, proceed as per this operational instruction.

NEED FOR EXPERT "NOISE-LEVEL" REPORTS

The Nominal Insurer stands in the shoes of the Employer of an injured Worker and is directly liable to compensate Workers for Injuries. This principle is derived from the general law of insurance, and from the Workers Compensation legislation and regulation.

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WorkCover has issued operational instruction 4.4 providing scheme agents with details of the *Litigation Policy* to be complied with when acting on behalf of the Nominal Insurer. Consistent with operational instruction 4.4 and the *Model Litigant Policy* in operational instruction 4.5 WorkCover now issues this operational instruction governing the management of Claims by Workers for compensation in relation to noise induced hearing loss, including both litigated and non-litigated Claims.

This operational instruction is issued to clarify questions concerning the onus of proof and the adequacy of evidence arising out of the decision of *Combined Civil Pty Ltd –v- Stanko Rikoloski* [2007] NSWCCPD 181.

1.1 ADEQUATE EVIDENCE

At the time of making a Claim for noise-induced hearing loss a Worker need only provide to the Employer or the Scheme Agent a comprehensive medical report and hearing loss assessment from a relevantly qualified Ear, Nose and Throat [ENT] specialist or other appropriately qualified medical specialist (see list on WorkCover website) together with a detailed work history showing all periods of exposure to industrial noise.

A history of noise exposure as described in a medical report can be taken as evidence of the facts asserted, until such time as those facts are contradicted either by different histories given to other doctors or by expert evidence. The employment history as described to the ENT specialist should accord with that described by the Worker in their Claim for hearing impairment and should be verified by the Employer/s concerned.

1.2 EXPERT REPORTS

- (a) The Scheme Agents may require any Worker making a Claim for noise-induced hearing loss to produce a report from, or be assessed by, an ENT who is trained as an assessor of permanent impairment prior to accepting liability.
- (b) No scheme agent may require a Worker to produce a report from a sound recording engineer or other similar expert report concerning the noise level of the workplace in the absence of unequivocal instructions/evidence from the Employer that the issue of "noisy employment" is in dispute. Such reports may only be requested when the Scheme Agent is in possession of a similar report which, if accepted by the Workers Compensation Commission, would show that the worksite was not noisy for the purposes of the Workers Compensation Act 1987 at the time the worker was employed there.

1.3 ONUS OF PROOF

Once a Worker has produced evidence sufficient to give rise to a finding of noise-induced hearing loss and employment at the worksite nominated in the Claim form, the onus shifts to the Employer and the Scheme Agent to show that either the employment was not noisy or the employment was not the last noisy employment engaged in by the Worker. This is consistent with the NSW Court of Appeal decision of *Blayney Shire Council –v- Lobley & Anor* (4 August, 1995) which held:

"If an Employer contends, notwithstanding the 'nature' of its employment, that it did not in fact cause any hearing loss (and thus that 'the Injury was not due' to the nature of the employment properly understood) the forensic onus of exculpating itself falls upon it. For the achievement of the purposes of section 17(1)(a) of the [1987 Act], it is enough for the Worker to succeed against the Employer to show that the 'nature' of this employment was such as to give rise to hearing loss." (per Kirby, A-CJ).

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3. Assessment of Additional Hearing Impairment (when initial hearing loss was calculated using Table of Disabilities)

This operational instruction should be read in conjunction with the *WorkCover Guides for the Evaluation of Permanent Impairment*. It clarifies the assessment of hearing impairment where the previous impairment was <u>not</u> assessed in accordance with the WorkCover Guides, as is shown in the following example:

The calculation of whole person impairment for additional hearing impairment is made as follows:

- (a) the current level of binaural hearing impairment is established by the relevant specialist
- (b) convert this to whole person impairment, as per Table 9.1 of the *WorkCover Guides for the Evaluation of Permanent Impairment*
- (c) calculate the proportion of the current binaural hearing impairment that was accounted for by the earlier assessment and express it as a percentage of the current hearing impairment
- (d) the percentage of current hearing impairment that remains is the amount to be compensated.

For example:

- (a) the current level of hearing impairment is eight percent
- (b) percentage of whole person impairment is four percent
- (c) the hearing impairment for which Workers Compensation was paid previously is six percent ie. 75 percent of the current hearing impairment
- (d) remaining 25 percent is the percentage of whole person impairment to be compensated
- (e) 25 percent of the whole person impairment (four percent) is one percent.

The Worker is compensated an additional one percent whole person impairment.

References

Workers Compensation Act 1987

Workers Compensation Act 1987, sections 60, 66

WorkCover Guides for the Evaluation of Permanent Impairment

2009 Deed, Schedule 2,

Operational Instruction 1.9

Operational Instruction 4.4

Operational Instruction 4.5

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