Australian Industry Group

Work-related hearing loss in the NSW Workers' Compensation System

Submission to State Insurance Regulatory Authority in response to Consultation Paper

OCTOBER 2019

WORK-RELATED HEARING LOSS IN THE NSW WORKERS' COMPENSATION SYSTEM

SUBMISSION TO STATE INSURANCE REGULATORY AUTHORITY IN RESPONSE TO CONSULTATION PAPER

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Our vision is for ***thriving industry and a prosperous community*****.**

We have ongoing contact and engagement with employers across Australia on the broad range of issues related to the operation of their businesses, informing them of regulatory changes, discussing proposed regulatory change, discussing industry experiences and practices and providing advice, consulting and training services.

We also interact with and provide regulators and scheme managers across all Australian jurisdictions with employer views and experience on WHS/OHS and workers' compensation.

Our membership is diverse, operating across a broad spectrum of industries. We have a significant number of large organisations within our membership. However, around three quarters of our members employ fewer than 50 employees and half employ fewer than 20 employees.

CONTRIBUTING TO THIS REVIEW

Ai Group welcomes the opportunity to provide feedback on employer experiences in relation to work-related hearing loss claims.

The information we are providing is largely based on feedback received from employers during the provision of training and consulting services and when member companies contact our Workplace Advice Line, or our specialist workers' compensation advisers, to discuss difficulties they are experiencing within the scheme. We have also asked members to provide us with information specifically associated with this review.

We have encouraged members to share their first-hand experiences by making their own submissions to the review. However, we highlight that there are a number of barriers to them doing so, particularly: a lack of time to allocate to this type of activity; a view that workers' compensation will always be difficult to deal with and there is little value in providing feedback; and concerns that detailed feedback about their experiences with a claim may lead to the identification of individual claimants and breach their privacy and confidentiality obligations.

Scope of the Review

We note that the consultation paper identifies issues that stakeholders have been discussing with SIRA, relating to the following areas:

- current pathways for a worker to receive a hearing aid
- access to legal funding to make a work-related hearing loss claim
- the methodology to assess work-related hearing loss and to determine if the hearing loss is not caused by work
- the provision of hearing aids and supports to meet individual needs
- cost-effective support for people with a work-related hearing loss

The consultation paper also indicates that "the overall objective of this review is to simplify the process for making a claim for work-related hearing loss, and have a system that delivers good claimant experience, operates efficiently and effectively."

This overall objective raises concerns for employers who often perceive that the process for making a claim for work-related hearing loss is relatively simple and that the noise levels of the workplace and the claimant's exposure to other noise are not considered when determining a claim.

When claims for hearing loss are accepted against an employer, without proper investigation, two issues arise for an employer: that a worker may receive workers' compensation payments for an injury that is not work-related; and that the last "noisy employer" bears the cost in their premiums of all noise-induced hearing loss. These issues are accentuated when a claim is lodged many years after a person has ceased employment with that employer and often when the person is of advanced age.

Accordingly, we will focus our submission predominantly on the questions that relate to improvements in relation to employer support and information and insurer claims management.

Pre-existing hearing loss

We note that the Model WHS Laws require employers to undertake audiometric testing if PPE is required to protect a person from noise levels that are above the exposure standard of $L_{Aeq,8h}$ of 85 dB(A); or $L_{C,peak}$ of 140 dB(C). This testing is required within three months of commencing employment and subsequently every two years.

Although NSW has adopted the Model WHS Laws, an exemption from the need to carry out audiometric testing has been in place since implementation; currently this exemption extends to 31 December 2020.

In spite of this exemption, Ai Group encourages NSW employers to undertake audiometric testing, and to do so before a person commences work. This enables an employer to have a baseline which we believe should be taken into account if a hearing loss claim is later lodged by the worker. If the pre-employment assessment identifies existing hearing loss, some employers also encourage workers to make a hearing loss claim against a previous employer to ensure that they do not acquire responsibility for pre-existing loss.

We also encourage employers to arrange audiometric testing at the time employment ceases; once again to establish a baseline.

We note that, in Victoria, audiograms undertaken before a person commences employment can be taken into account when determining liability, as outlined in the WorkCover Claims Manual:

> "The Agent is advised to use medical assessments in deciding liability only if an employer has pre-employment audiograms to confirm the extent of loss before commencing employment."

The NSW Claims Management Guide does not have any reference to whether or not pre-employment assessment would, or should, be taken into account. The Guide does highlight that the liability for a claim can be distributed across multiple employers if the worker was engaged in "noisy employment" in the preceding five years.

It is Ai Group's view that any information that indicates that a hearing loss existed prior to the last "noisy employment" should be taken into account when determining where the cost of the claim should be allocated for premium purposes.

The issue in this instance is less about whether the worker has an entitlement, and more about which employer will pay the premium cost of the claim. We recognise that it may be difficult to separate the two issues, but in the spirit of fairness, equity for employers should occur.

Recommendations

- SIRA should investigate whether evidence of a pre-existing hearing loss can result in all or some of the costs of the claim not being allocated to the premium calculation of the last "noisy employer".
- If pre-employment audiograms can be utilised to identify a pre-existing loss that will reduce the quantum of claims costs allocated to an individual employer, this information should be made readily available to employers and they should be encouraged to undertake such assessments.

Determining "noisy employment"

The NSW Claims Management Guide identifies the difficulties associated with determining whether a workplace was noisy, and references the case of *Dawson and others trading as The Real Cane Syndicate v Dawson* [2008] NSWWCCPD 35

The findings of the court are presented within the Claims Management Guide:

> The worker in this matter was 70 years old at the time of the decision. He had worked for the employer as a cane harvester/operator from 1980 to 1985.
>
> The appeal concerned whether the worker's duties were duties that constituted 'noisy employment' within the meaning of section 17of the 1987 Act (employment to the nature of which the condition of boilermaker's deafness or deafness of like origin is due). In considering the evidence required to establish 'noisy employment', Roche DP stated:
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> > "The preferred method of proving noisy employment is to call an acoustics expert to give evidence as to the level of noise to which the worker was exposed, over what period, and an expert as to whether that exposure involved a real risk of boilermaker's deafness. I acknowledge, however, that it is not always possible to call such evidence, especially if the employer has ceased business or changed its equipment or method of operation."
> >
> > [at para 40]
>
> He went on to say:
>
> > Whilst it is not necessary for a worker to call an acoustics engineer in every case of boilermaker's deafness, it is not sufficient for a worker to merely say "my employment was noisy and I have boilermaker's deafness". It is always essential that he or she present detailed evidence (if no acoustics expert is to be relied on) of the nature (volume) and extent (duration) of the noise exposure and for that evidence to be given to an expert for his or her opinion as to whether the "tendency, incidents or characteristics" of that employment are such as to give rise to a real risk of boilermaker's deafness.
> >
> > [at para 44]

It has been the experience of our members, including in a recent case currently being reviewed by icare, that there is often an assumption that the employment was noisy, unless the employer can prove that it was not.

This creates a difficulty for employers where the workplace is not noisy. WHS Regulations require that employers manage the risks associated with noise by applying the hierarchy of controls.

There is no specific obligation in the Regulations to undertake a noise assessment; the Code of Practice recommends an assessment only if noise levels can not immediately be reduced to below the exposure standard.

In the situation referred to above, the employer was requested to complete a questionnaire which asked whether any noise conduction surveys had been carried out and whether the employer considered that the workplace is a 'noisy' environment. The employer answered "no" to both questions. Additional questions relating to the workers' duties were also answered; and a cursory review of these answers would indicate to us determine that the workplace environment was most probably not noisy.

However, the next communication from the Agent was a letter advising the employer that the claim had been accepted and allocated to the claims experience of that employer.

Recommendation:

- SIRA should engage with icare to identify how "noisy employment" is being determined to ensure that investigations are robust enough to correctly identify if the claimant did work in "noisy employment".

Determining the last noisy employer

From an employer's perspective there is usually no transparency about any investigations made by the Agent to determine if there has been any employment in a "noise environment" since a claimant ceased the employment with the claimed employer. This is particularly concerning when there has been a delay in claim lodgement and the claimant is at an age where you would expect that other employment would have been undertaken.

Recommendation:

- SIRA should establish requirements on Agents to communicate with the relevant employer about any investigations they have undertaken in relation to subsequent employment, and to seek input from the employer about what they might know about the worker's employment since they left the employment of the claimed employer.

Access to legal funding to make a work-related hearing loss claim

Compensation for hearing loss is a statutory entitlement, involving no consideration of fault. Therefore, it is unclear why in the majority of cases, a worker would need access to legal funding. If a worker has been working in "noisy employment" and required to wear hearing protection, the entitlement to compensation will be almost automatic; the only question might be in relation to the quantum of payment.

The payment of statutory entitlements to a worker should not be eroded by unnecessary legal costs and the scheme should not be required to fund legal costs that do not add value.

The scheme should facilitate a process that alleviates the need, in most cases, for legal advice to be provided. This could be supplemented by providing information to a worker about their ability to access legal assistance if certain circumstances arise, e.g. it is determined that the named employer does not have a "noisy workplace", or there is disagreement about the level of impairment and hence the quantum of payment.

Recommendation:

- SIRA should investigate how processes could be established to provide legal funding only in limited cases where there is disagreement about "noisy employment" or level of hearing loss.

Assessing work-related hearing loss

Whilst the document refers to the assessment of work-related hearing loss, the real assessment question is whether the hearing loss is noise-related. Ai Group is not in a position to comment on this process, but we do think the final outcomes should be presented in a different manner, as summarised below.

When a claim is made for work-related hearing loss, three factors need to be determined:

- Is the hearing loss noise-induced?
- Has the claimant worked in "noisy employment"?
- Are there any other significant noise exposures that could have contributed to the noise-induced hearing loss?

Despite the third question it has been our experience, across all Australian jurisdictions, that if the answer to the first two questions are "yes", a claim will generally be successful. Therefore, the assessment is not really about whether the hearing loss is work-related, properly assessed.

We note that the Claims Management Guide states:

> "There is no requirement to prove that the last noisy employer actually caused the hearing loss - only that it was capable of causing hearing loss."
>
> and then, a bit further on:
>
> "However, just because a worker has worked in noisy employment does not necessarily mean that any deafness is due to workplace noise."

We note, however, that the Guide does not provide any further information to assist Agents to identify how they would take into account exposure to noise that was not within the workplace. This leads us to believe that a noisy workplace will generally result in an accepted claim, no matter how short the employment was at that workplace.

Recommendation:

- SIRA should consider providing guidance about how Agents assess the comparative noise exposure of a workplace and other noise. This will become a more significant issue in the future with the increasing use of ear pieces and headphones with mobile devices.

The provision of appropriate hearing aids and supports to meet individual worker's needs

The availability of hearing aids via online services is increasing the competitiveness within the hearing aid industry and leading to a decrease in the price of hearing aids compared to much lower quality hearing aids available only five year's ago.

Ai Group is not aware of the way in which icare currently sources and funds hearing aid supplies. However, it is our view that a central process which requires claimants to source their hearing aids from a pre-determined supplier would provide icare with a buying power that could reduce the cost of high-quality hearing aids and enable icare to oversee the level of service provided to claimants.