

4 September 2024

Funding for counsel to appear at Expedited Assessment Conferences

On 15 August 2024, the Acting Independent Review Officer (Acting IRO) conducted a final review of a decision stating that funding for counsel to appear at an Expedited Assessment Conference was not available.

The Acting IRO's decision cannot be published for reasons of privacy. However, the following comments and observations are provided to inform and assist Approved Lawyers:

- Paragraph 2.13 of the Guidelines provides:
"Funding approval is at the complete discretion of the IRO and will be considered on a case-by-case basis."
- Paragraph 5.2 relates to funding for counsel. The Funding Principles is set out at para 5.2.1 as follows:
"Counsel briefed by a Lawyer must be an IRO Approved Barrister (exceptions to the choice of counsel may apply with respect to matters outside the jurisdiction of the Commission)."
An experienced Lawyer should not require assistance from counsel on fundamental aspects of the law and practice.
In certain circumstances, the IRO may encourage a Lawyer to seek early assistance from counsel as they develop their acquaintance with the law and practice.
The IRO considers it inappropriate to fund both Lawyers and counsel for the same work.
Where counsel is briefed to undertake work the IRO considers should be within the expertise of the Lawyer, such as conducting a teleconference in the Commission, the IRO may reduce the professional fees payable at the conclusion of the matter."
- Paragraph 5.2.3 provides:
"The IRO considers it reasonably necessary for counsel to appear at a conference and/or hearing and pre-approval is not required to brief counsel to appear."
- In this matter, the Approved Lawyer had several years post-admission experience in workers compensation and held a large number of open ILARS grants. The Acting IRO determined that they had the requisite experience not to require counsel to appear at an Expedited Assessment Conference.
- The Acting IRO noted that the Approved Lawyer made submissions about complexity, some of which were raised in the [IRO Practice Note for Counsel at Teleconference](#). That Practice Note provides some guidance on when IRO would fund counsel for a teleconference in addition to professional fees. The Acting IRO determined that the matter was *"not so inherently complex that it moves beyond the bounds of "fundamental aspects of law or practice"."*

- The “complexity” issues that were raised included the need to address the definition of “suitable employment” in s32A of the Workers Compensation Act 1987 (WCA) and to make
- submissions concerning the treating doctor’s decision to sign off on one of the vocational options that was identified in the insurer’s work capacity decision (WCD). The Acting IRO determined that these issues are “*fundamental aspects of law and practice*” and he observed that matters of evidence commonly arise when an adverse WCD is being challenged. He was not persuaded that there is any inherent complexity that would justify additional funding for counsel.
- The Approved Lawyer stated that they were “*aware of circumstances where funding is approved for counsel to appear at the expedited assessment on the basis that an expedited assessment is, in essence, a hearing.*” The Approved Lawyer also attached an email from an IRO Principal Lawyer (in relation to a different matter), in which they expressed a view that an expedited assessment is “*technically a hearing*” and that “*there is no need to seek pre-approval to brief counsel to appear.*”
- In response to these submissions, the Acting IRO considered the issue of “*what is a hearing and what is a teleconference for the purposes of the Guidelines*”. He stated, relevantly:

“Whilst I acknowledge that this is a position that has been communicated to your firm – and possibly others – on prior occasions, that is not the position I take with respect to the ILARS Guidelines. The Professional Fees Schedule (referred to above) clearly sets out that “hearings” is a term describing a separate Stage 3 resolution pathway to expedited assessment. The term “hearings” in the ILARS Guidelines describes Stage 3 of the Legal Disputes pathway as stated on the Personal Injury Commission website at <https://www.pi.nsw.gov.au/types-of-disputes/workers-compensation/legal-pathways>. Furthermore, paragraph 35 of the Commission’s [Procedural Direction WC5 – Work Capacity Disputes](#) reinforces that an Expedited Assessment is not a hearing, in that it contemplates that a dispute in the Expedited Assessment pathway may be referred to a hearing.”
- The Acting IRO referred to the Professional Fees Schedule (at para 6.3 of the Guidelines), which refers to Stage 3 resolutions. He stated, relevantly:

“In relation to pre-approval, the table referred to above distinguishes teleconferences from other appearances at the Commission such as conferences and hearings. Further, item 3.2 specifically describes the forum in which an expedited assessment is heard as a teleconference. It is not a hearing for the purpose of the ILARS Guidelines. Regarding Paragraph 5.2.3 of the ILARS Guidelines, there is no reference to a teleconference, so pre-approval would be required.”
- The Acting IRO concluded:

“I have advised the ILARS team of my view on the above matters for clarification of how ILARS funding should operate going forward.

Having regard to all matters that can give rise to funding for counsel to appear at a teleconference, the facts of this grant, the ILARS Guidelines and the IRO Practice Note, my view is that funding for counsel in addition to Stage 3 professional fees to appear at a teleconference for your client in respect of this Application for Expedited Assessment is not justified.”

Approved Lawyers are strongly advised to consider the Acting IRO's determination before requesting approval of funding for counsel to appear at Expedited Assessment Conferences in the Personal Injury Commission.

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