Independent Review Office

Practice Note

Practice Note TITLE	Reasonably Necessary Disbursements
ILARS Guideline reference	2.6, 3.1.5, 4.2.1, 4.2.2, 5.1.2, 5.1.3, 5.2, 5.3, 5.4 & 6.4
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Purpose

This Practice Note provides guidance on the practice and determination of whether a disbursement is **reasonably necessary** as required by the ILARS Funding Guidelines (Guidelines).

This Practice Notice includes:

- The operational rules and criteria for IRO to approve reasonably necessary disbursements
- The information required to support the application for a disbursement
- The procedure to be followed when requesting disbursements

Criteria, Practice and procedure

Criteria

The overriding principle of ILARS funding is set out in clause 1.1 of the Guidelines, as follows:

> Lawyers are essential and important service providers in the NSW workers compensation system and are expected to provide advice and act in a way that furthers the system objectives and supports the functions and objectives of the Independent Review Officer, including promoting a worker's return to work and seeking to resolve claims and disputes as soon and as cost effectively as possible.

IRO will fund disbursements where it is **reasonably necessary** to conduct investigations, obtain evidence or incur expenses to progress a claim or matter (clause 4.2.1).

IRO **will not** reimburse expenses incurred **unnecessarily** or **unreasonably**.

The IRO may not pay an amount considered excessive or unreasonable.

The IRO recognises the limits on the number of ***forensic medical reports*** admissible in proceeding in relation to a claim or dispute referred to in clauses 43, 44 and 45 of the *Workers Compensation Regulation 2016* (the Regulation).

The disbursement requested must be reasonably necessary for the claim or dispute the subject of the grant.

Disbursements where fees are fixed by Order under section 339 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act), must comply with the Order.

GST is **not** payable on any disbursements.

Practice

All disbursements must be reasonably necessary. The question of whether a disbursement is reasonably necessary will depend on:

1. The extent to which the disbursement meets the purpose of the grant of funding
2. The stage of funding granted
3. Whether the disbursement is one which requires pre-approval under the Guidelines

Purpose of the grant

When assessing whether a disbursement was reasonably necessary IRO will consider whether and the extent to which it aligns with the purpose of the grant. Specifically (but not exclusively) IRO will look at:

- Whether the disbursement furthers the objectives of the workers compensation system (section 3 of the *Workplace Injury management and Workers Compensation Act 1998*). In particular, did the disbursement contribute to a cost effective and timely resolution of the dispute or claim
- Whether it was appropriate to incur the disbursement at all. This might include considerations around whether the Lawyer had a reasonable evidentiary basis for electing to incur the disbursement
- The timing of the disbursement – was it incurred too early to be useful, or would require duplication at a later date
- Whether there was a more cost-effective alternative

This assessment will be made with respect to all disbursements, regardless of whether pre-approval was sought or granted.

Stage of Funding

Generally, pre-approval is not required before a Lawyer incurs disbursements or expenses consistent with the stage and type of funding granted (clause 4.2.2.1). IRO has discretion to fund a disbursement that is not consistent with the stage of funding granted but will only do so in exceptional circumstances.

Disbursements in Stage 1 funding are limited as set out in clause 3.1.5 of the Guidelines. Funding for counsel at teleconference is also limited (see: IRO Practice Note *Counsel at Teleconference*).

Pre-approval

Where a Lawyer is required to seek pre-approval for incurring a disbursement and does not, the general principle is that IRO will **not** fund that disbursement.

Restrictions and limitations on funding disbursements are set out in clause 4.2.2.2 of the Guidelines as follows:

> Pre-approval is required for incurring an expense in the following circumstances:
>
> - Where the fee is not fixed by the State Insurance Regulatory Authority (SIRA) or specified in the **Disbursements Schedule**, or
> - Where a second, additional or supplementary report is requested or required for any purpose from a specialist medical practitioner who has not treated the worker ('more than one medico-legal report'). This includes an additional report to assess another body system, a consolidation report or an updated examination and report. The Lawyer should provide details in support of the need for the report.
> - Where a service provider does not comply with the rates set by SIRA in a Fee Order (see Part 4.2.3.1 below).

Procedure

An Approved Lawyer seeking pre-approval for a disbursement must provide submissions outlining all issues relevant to the basis on which the disbursement is reasonably necessary.

Retrospective approval

IRO may consider retrospective funding for disbursements which require pre-approval. Approved Lawyers seeking reimbursement for this type of disbursement must provide submissions addressing the reasons why the disbursement was reasonably necessary and why pre-approval was not obtained.

However, repeatedly failing to seek pre-approval, where required, is not appropriate conduct by an Approved Lawyer. Conduct of this nature will be a relevant factor when IRO considers whether to exercise its discretion to provide retrospective funding.

Conditional funding – successful outcome

In conditionally funded grants, for a disbursement to be considered reasonably necessary, there must also be a **successful outcome** 'where a worker achieves a benefit from the conditionally funded matter or action' (see clause 2.6).

Example

Examples of reasonably necessary disbursements, the information required, and consideration given by ILARS are set out below. The list of disbursements below is a guide to the most common disbursement requests and is not meant to be exhaustive.

Interpreters

Interpreters are generally considered a reasonably necessary disbursement at all funding stages provided the fee charged is in accordance with Translating and Interpreting Service (TIS National) adopted by the Office of The Independent Review Officer.

However, IRO expects Approved Lawyers to use interpreter services efficiently. At all times Approved Lawyers must be prepared to provide reasons why the use of an interpreter is reasonably necessary showing that the matter cannot progress fairly without the assistance of an interpreter.

Disbursements in excess of a Fee Order

For disbursements where the service provider refuses to comply with the gazetted rates set by SIRA, the Approved Lawyer must seek pre-approval and should support the request with details of the attempts to resolve the discrepancy with the provider (clause 5.1.3).

The Lawyer should also provide submissions setting out why the evidence, or service, is reasonably necessary notwithstanding it does not comply with the Fee Order. This may include issues such as the inability to obtain the evidence or service from any other provider (eg a very small number of accredited medicolegal specialists, all of whom refuse to comply with the Fee Order, or clinical notes which are expected to provide crucial evidence in support of the injured worker's claim or dispute).

Stage 1

Reasonably necessary disbursements which relate to the investigation of the injured worker's claim or dispute are approved under Stage 1 funding.

Clause 3.1.5 sets out that only the following disbursements are available:

Clinical Notes

- Health records (clinical notes) from the worker's treating health service providers
- Health records (clinical notes) from public or private hospitals attended by the worker for treatment of the injury
- Fees for an interpreter, if required (see Part 5.4).

Clinical notes obtained from service providers outside the scope of the injury the subject of the grant, will not be considered reasonably necessary.

If the clinical notes exceed the gazetted rate, the IRO **may** consider requests for a non-compliant fee only after it is satisfied that:

(a) Attempts have been made to resolve the issue with the service provider, and

(b) There is no reasonably available alternative provider capable of providing the same service.

Stage 2 – Industrial Deafness

Approved Lawyers should consult the ***ILARS Industrial Deafness (Hearing Loss) Claims Practice Guide*** available on the IRO website.

Hearing aids only

IRO considers IMS003 as the appropriate fee code for medicolegal examinations and reports.

The following information should be provided for IRO to consider whether a report is reasonably necessary:

- Evidence that hearing aids are required, eg such as a referral for hearing aids.
- Audiological testing and recommendation
- The injured worker's employment history
- The injured worker's description of noise exposure

An ENT Report is considered reasonably necessary to investigate a hearing aid claim where the above information is provided, as the injured worker must be assessed by an ear, nose and throat surgeon to substantiate a claim for hearing aids.

Permanent impairment assessment

IRO considers IMS004 as the appropriate fee code for a medicolegal examination and report where the only issue is assessment of permanent impairment of one body system. All reports require the medicolegal expert to comment on causation. Such comment will not add to the complexity of the report unless causation is in issue.

The following information should be provided for IRO to consider whether a report is reasonably necessary:

- The date of injury: Table of Disabilities or Permanent Impairment claim
- Reasons why the evidence establishes the claim as ***having some merit*** – ie the impairment will reach the relevant threshold
- An audiogram demonstrating hearing loss between 2000Hz and 4000Hz.

- The requirements of a calculation of impairment as set out on page 3 of the ***ILARS Industrial Deafness (Hearing Loss) Claims Practice Guide***.
- Confirmation of the last date of employment with a noisy employer by such records as ATO records or records of employment.

Stage 2 generally

IRO will not grant funding for a medicolegal report to investigate an injury or condition where there is no material provided in support, from a medical professional, indicating treatment has been provided for that injury or condition.

Not MMI

Approved Lawyers should consider the principles of assessment as set out in the 4th edition of the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment*, part 2 and clause 5.1.2 of the Guidelines **before** arranging for an evaluation of an injured worker's impairment.

Where an Approved Lawyer seeks funding for a medicolegal assessment that concludes an injured worker has not reached maximum medical improvement, submissions in support of the request are to be provided in accordance with clause 5.1.2 of the Guidelines.

When considering whether to grant funding for a report indicating the injured worker is not MMI, IRO will consider matters including whether:

- The report was obtained prematurely
- The report confirms that surgery was imminent or significant treatment is ongoing

Where it is clear the injured worker was not MMI before the report was obtained, IRO will not consider the report to be reasonably necessary.

Second opinions

IRO will **not fund** a second opinion from a medicolegal expert unless there are exceptional circumstances or a clear basis for providing such a report in order to progress the claim noting the restrictions in the Regulations. Approved Lawyers must seek pre-approval for such a report.

The restriction on obtaining a second opinion applies to stage 2 (and above) funding, where an injured worker transfers their instructions to a different Lawyer. That is, where an opinion was obtained from a medicolegal expert in the first grant, IRO will consider a request for the worker to be examined by a different medicolegal expert as a request for a second opinion.

Further medicolegal report for different specialty

IRO will consider a medicolegal report from a different specialty where supporting information for the nature of that injury is provided. This may include an opinion from the medicolegal expert engaged to assess the injured worker that some aspect of the injury will require assessment by a medical practitioner with a different specialty. It will not include matters where the original medicolegal expert selected by the Approved Lawyer did not have the expertise to undertake a part of the assessment.

For requests which relate to assessments of permanent impairment, this information should include details relevant to the requirements of the Permanent Impairment Guidelines. For example, a request to fund a report from a gastroenterologist requires documentation evidencing pathology (such as a colonoscopy or endoscopy report) and a report from a sleep specialist with evidence of a sleep study and examination by an ear, nose and throat specialist is mandatory.

Supplementary report

IRO will not consider a supplementary report reasonably necessary where the Approved Lawyer is seeking clarification due to ambiguity in a report or the report did not answer questions previously posed (see the definition in the Fees Order).

Submissions are required regarding any additional information to be provided or requested, and why such information was not previously provided to the medicolegal expert. Where information was available before the initial report, IRO may not consider a supplementary report reasonably necessary.

Treating specialist and general practitioner reports

Where Stage 2 funding is granted, one report from a treating specialist and/or general practitioner is generally considered reasonably necessary and pre-approval is not required.

A supplementary or further report will require pre-approval from IRO and submissions provided as to why an updated report is required.

Where such reports are above the gazetted rate, pre-approval is required.

Medical examination cancellation fees

Payment of cancellation fees for a medicolegal appointment arranged by the Approved Lawyer (and any associated travel expenses) is at the discretion of the IRO and will not be met by the IRO unless there is a reasonable explanation for the incursion of the fee (see clause 5.1.6).

IRO will not pay the fee where the non-attendance is because of action or inaction of the Approved Lawyer. Approved Lawyers are expected to confirm appointments with the injured worker to ensure they attend the appointment.

Information must be provided as to why the injured worker did not attend the appointment and why it is reasonably necessary for IRO to pay the disbursement. For example, the injured worker's unforeseen illness on the day of the appointment may be an acceptable reason for failure to attend an appointment.

Travel to medicolegal expert appointments

Travel is only available to attend a medico-legal appointment arranged by the Approved Lawyer but is **not** available for travel for the purpose of receiving treatment. Information must be provided as to date and time of the appointment.

Travel by the most convenient and reasonably accessible method available to the injured worker will be covered and includes public transport, private vehicle (being the injured worker's or a friend's private vehicle), taxi, ride sharing service and air. Information must be provided as to why a particular form of transport is reasonably necessary.

IRO may decline to pay taxi or ride share fees, where there are no reasons provided as to why public transport cannot be used. For example, where the worker is undergoing a hearing loss assessment and seeks to use a ride share service when public transport may be a more appropriate form of transport, a ride share fee may not be considered reasonably necessary.

An Approved Lawyer **must** seek pre-approval for fees for *chauffeur-driven vehicles* as these are an unregulated expense under the Guidelines.

Other expenses where fees are not fixed

The Approved Lawyer **must** provide information as to why the expense is reasonably necessary and provide quotes from at least one provider where the cost of the disbursements are not fixed. For

example, where funding is sought for a neuropsychiatric assessment, an Approved Lawyer will need to provide a quote from the expert to support the request for funding.

Stage 3 and Stage 4

Counsel's fees

No pre-approval is required for counsel to appear at a conciliation **conference/arbitration hearing** (see clause 5.2.3).

An experienced Approved Lawyer should not require assistance from counsel on fundamental aspects of law and practice (see clause 5.2.1). 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 will generally reduce the professional fees payable at the conclusion of the matter.

In relation to **teleconferences**, please see the IRO **Practice Note *Counsel at Teleconference*** on the IRO website.

Pre-approval must be obtained for an **early advice from counsel** and submissions should be provided regarding how the matter is complex, requiring the assistance from counsel. IRO will generally not fund an early advice from counsel once proceedings have been commenced in the Personal Injury Commission.