



## ILARS Industrial Deafness (Hearing Loss) Claims Practice Guide

### Introduction

This **Practice Guide** has been issued for the purpose of assisting Approved Lawyers (Lawyers) seeking to obtain a grant of funding to investigate and bring a claim for compensation arising out of injury to a worker's hearing resulting from exposure to excessive noise in the workplace over extended periods of time. This type of injury is commonly referred to as '**industrial deafness**'.

It is apparent from the following discussion that **industrial deafness claims** are significantly different to claims for other types of injuries arising out of or in the course of employment. The Office of the Independent Review Officer (IRO) considers industrial deafness claims require funding tailored to those requirements.

The IRO notes from its experience of funding **industrial deafness claims** that a substantial majority of such claims resolve without a formal dispute resolution process.

### Liability for industrial deafness claims

**Industrial deafness claims** encompass claims for compensation for injury to hearing as a result of exposure to high levels of noise in the course of employment. Section 17(1) of the *Workers Compensation Act 1987* (1987 Act) describes this type of injury as:

*"an injury is a loss, or further loss, of hearing which is of such a nature as to be caused by a gradual process"*

It is generally accepted that noise levels in employment will be sufficient to cause gradual hearing loss if the exposure is equivalent to greater than 85 decibels over an 8 hour working day. Although a worker can suffer an injury to hearing as a result of a single incident, or number of identifiable incidents, this Guide is confined to those claims to which section 17 of the 1987 Act applies.

In order to achieve a successful outcome in an industrial deafness claim a worker must prove:

1. Employment in which they were exposed to noise at sufficiently high levels as to pose a risk of injury to hearing, and
2. A loss of hearing which is consistent with exposure to noise.

### Simplified process for establishing liability

Notably, a worker is not required to prove a particular period of employment did cause injury to their hearing, which differentiates such claims from other types of injuries arising out of or in the course of employment. In addition, section 17(c) of the 1987 Act provides that the employer liable to pay compensation is:

- “(i) where the worker was employed by an employer in an employment to the nature of which the injury was due at the time he or she gave notice of the injury--that employer, or*
- (ii) where the worker was not so employed--the last employer by whom the worker was employed in an employment to the nature of which the injury was due before he or she gave the notice,”*

This provision has the effect of simplifying the process of making a claim and proving liability for the injury.

### **Purpose of funding**

Industrial deafness claims funding is available to further investigate and pursue where possible:

- A claim for the cost of supply and fitting of hearing aids
- A claim for lump sum compensation for permanent impairment resulting from hearing loss
- A dispute about a claim or any aspect of a claim

### **How a grant is sought**

A grant of funding is sought by completion of the **Application Form ILARS Grant of Funding Industrial Deafness (Hearing Loss)** (Industrial Deafness Application Form).

The IRO may not grant funding unless the Lawyer completes all relevant parts of the Industrial Deafness Application Form and provides any information required to be provided.

Stage 1 funding is not available for industrial deafness claims. Where funding is granted the initial grant will be made as Stage 2 funding to investigate and pursue a claim for compensation.

### **Requirements for funding**

Funding is available for Lawyers to investigate and pursue a claim for compensation if the claim has some merit.

The following is required to demonstrate 'merit':

#### ***For all claims with a date of injury prior to 1 January 2002:***

- Proof of employment

#### ***For claims for hearing aids:***

- The worker provides a history of employment that is considered to be sufficiently noisy to cause a risk of damage to hearing
- An audiogram demonstrates hearing loss between 2000Hz and 4000Hz

- An audiologist provides an opinion that the worker would be assisted by the provision of hearing aids.

#### **For claims for lump sum compensation:**

- The worker provides a history of employment that is considered to be sufficiently noisy to cause a risk of damage to hearing
- An audiogram demonstrates hearing loss between 2000Hz and 4000Hz
- For all claims with a date of injury on or before 31 December 2001, the Lawyer provides a calculation of binaural hearing loss (based on an audiogram) of at least 6%
- For all claims with a date of injury on or after 1 January 2002, the Lawyer provides a calculation of binaural hearing loss (based on an audiogram) of at least 20.5%. For the purpose of calculating binaural hearing loss the IRO will accept the addition of up to 3% to total hearing loss if the worker claims to suffer from severe tinnitus. This must be specified in the Industrial Deafness Claim Form, including any attachment thereto

#### **Evaluation of hearing loss**

When calculating binaural hearing loss the IRO will only consider losses suffered between 2000Hz and 4000Hz unless the Lawyer is able to demonstrate exceptional circumstances.

Exceptional circumstances exist where the audiogram reports hearing loss between 1500Hz and 4000Hz and the worker has a history of employment, with exposure to noise sufficient to cause a risk of damage to hearing, that is in excess of 10 years in total.

The IRO will not consider hearing losses at frequencies of less than 1500Hz unless the worker has a history of noisy employment of greater than 35 years and the audiogram demonstrates an upward slope to 2000Hz.

The IRO will not consider hearing losses at frequencies higher than 4000Hz unless the worker is able to demonstrate a need to hear at those frequencies for the purposes of ongoing employment (reference: NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment 4<sup>th</sup> Edition, paragraph 9.9).

#### **Disbursements**

Pre-approval is generally not required for the incursion of disbursements or expenses, except as provided by Part 4.2 and Part 5 of the ILARS Funding Guidelines and this Guide.

If there is any doubt about whether the IRO will meet the cost of a disbursement, the Lawyer should seek confirmation by contacting the ILARS team member dealing with the grant before proceeding to incur the fee.

Lawyers are referred to Part 4.2 of the ILARS Funding Guidelines for disbursement funding principles and restrictions and Part 5 of the ILARS Funding Guidelines for the categories of disbursements and expenses.

In addition to those principles and restrictions the following applies:

- Fees for medico-legal reports are fixed by SIRA in the *Workplace Injury Management and Workers Compensation (Medical Examinations and Report Fees) Order*. Schedule 2 of the Order specifies maximum fees for such reports utilising a payment classification code (fee code) for each fee
- Where the claim to be investigated is a claim for hearing aids only, funding is limited to the IMS003, IMS 301 and IMS031 fee codes
- Where the claim to be investigated is a claim for lump sum compensation, funding is limited to the, IMS004, IMS304, IMS005 and IMS305 fee codes
- Pre-approval is required for incursion of a medico-legal report fee other than as provided for in this Guide

### **Extensions of funding**

Extension of funding to pursue dispute resolution in the Personal Injury Commission for Appeals or Reconsiderations or to a Court are available in accordance with the ILARS Funding Guidelines.

### **Conflicts with other Parts of the ILARS Funding Guidelines**

To the extent to which any part, or parts, of this Guide conflict with the provisions of the ILARS Funding Guidelines, the latter prevail.

### **Forms**

#### **Application Form ILARS Grant of Funding Industrial Deafness (Hearing Loss)**