Australian Government
Department of Education, Employment and Workplace Relations

Your Ref
Our Ref

Dr Shona Batge
Secretary
Senate Standing Committee on Education, Employment
and Workplace Relations
Parliament House
CANBERRA ACT 2600

Dear Dr Batge

Please find attached the Department's response to the questions which were asked on notice by members of the Senate Standing Committee on Education, Employment and Workplace Relations at the hearing into the provisions of the Occupational Health and Safety and Other Legislation Amendment Bill 2009 on 18 February 2010.

The responses have been provided in consultation with Comcare.

The Department would also like to correct the record in relation to an answer provided to a question from Senator Cash at page 8 of the Proof Committee Hansard. Senator Cash asked how many claims had been made since 2007 in relation to off-site recess injuries. Ms Baxter replied that the Department had been advised by Comcare that no such claims had been made.

Further analysis of the data has revealed that since 2007, a total of 43 claims have been received by Comcare in relation to ordinary recess breaks. Of these, 5 claims were in relation to off-site recess injuries, and these have been rejected. The 38 accepted claims were in relation to on-site recess breaks, or for off-site injuries that on first examination appeared to occur during an ordinary recess break, but on closer examination were found to be work-related (eg returning from a meeting during the usual lunch period).

Please contact me if you have any questions about the attached responses or require further information.

Yours sincerely

Flora Campbell

for Michelle Baxter
Group Manager
Safety and Entitlements Group

19 February 2010

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Education Employment and Workplace Relations Legislation Committee
18 February 2009

Questions on Notice

Question 1 (p2 Proof Hansard)

How many self-insurers provided submissions to the Comcare review?

Nine submissions were received from self-insured licensees under the Comcare scheme, however four of these submissions were made on behalf of a number of licensees within the relevant groups of companies, as follows: John Holland group of companies (3 licensees), Linfox (2 licensees), National Australia Bank (2 licensees) and Commonwealth Bank of Australia (6 licensees). Effectively, 18 licensees made submissions to the review.

Question 2 (p3)

Are there examples which highlight the need for the reinstatement of off-site recess break coverage?

'At place of work'/ 'not at place of work' examples are set out below.

- Since the passage of the *Safety Rehabilitation Compensation and Other Legislation Amendment Act 2007* (SRCOLA) there has been concern expressed by Comcar drivers in relation to their coverage under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) whilst taking required breaks away from the depot - in practice Comcar drivers are required to take regular / scheduled breaks during the day. These breaks often occur at a variety of locations away from the depot. The drivers are not allowed to consume food or drink within their vehicle – they must remove themselves from their vehicle (place of work) to have any refreshments. They must also remove themselves from their vehicle to use toilet facilities. However if they were at the depot they could have the same required break and either have refreshments or a toilet break and remain in the place of work and be covered by the SRC Act.

- When line haul drivers are on the road and must take a rest break (ordinary recess) they are clearly at their place of work when they are in, or in the immediate vicinity of, the truck. However it is not certain how far 'at their place of work' would extend to, eg: the 24 hour diner within the truck stop? (probably); the organic food café 70 metres up the road? (possibly not); the picnic shelter-shed on the other side of the road to the truck stop? (probably not).

- A university employee who works at the physics department at the southern corner of the campus injures herself during her lunchtime (ordinary recess) between the physics building (clearly her place of work) and the student hub where she bought her lunch and went to the bank. The employer submits that as she was still on campus she was 'at her place of work' when the injury occurred.

Lack of equity example

- Both Department A and Department B have adopted healthy life-style programs and encourage their respective employees to have healthy meals at lunchtime and to get away from their desks for fresh air and exercise.

  Department A has arranged for the lessee of its in-house canteen to provide such healthy meals and has constructed a walking track and exercise points within the perimeter of its place of work. It also has an in-house and supervised gymnasium. Injuries sustained in these circumstances would ordinarily be covered.

  Department B, on the other hand provides no such canteen facility. Consequently, its employees have to leave their place of work to buy such food, indeed any food, and the employer's only exercise facility is the fire stairs used by its employees when its lifts break down. So while its employees would be covered in the fire stairs, any exercise taken outside of the building or venturing out to buy food during recess would not be covered.

Are there examples which demonstrate the need for not suspending payment of medical expenses?

A hypothetical case is set out below.

Employee suffers from post traumatic disorder and is under the care of a psychiatrist, psychologist (cognitive therapy) and GP and requires daily medication to stabilise the effects of the disorder. Employee does not comply with the return to work program and does not provide a reasonable excuse.

If compensation, including medical treatment, is suspended the employee might be unable to afford to continue to take medication and undergo cognitive therapy by the psychologist, as these are not Medicare funded. As a result, the employee's symptoms worsen and employee may be at risk of rapid deterioration in her condition including the possibility of self harm which would jeopardise, or at least further delay, any chance of return to work, not to mention the employee's health and wellbeing.

How many claimants have been suspended under the suspension provisions which the proposed amendment is directed at?

Numbers of suspension by SRC Act section – 2007-08 and 2008-09

Fin Year	**S36** (Rehab assessment)	**S37** (rehab program	**S57** (medical examination)	**Total**
2007/08	4	13	5	22
2008/09	3	2	2	7

Notes: *The numbers are low and show year to year variation. One of the reasons for the variation between 2007-08 and 2008-09 in relation to s37 rehabilitation programs may be as a result of the Federal Magistrates Court finding in McGuinness v Comcare (2007) which went to the reasonableness of McGuinness's refusal to*

participate when the rehabilitation decision had not fully taken account of her views as the program had not been discussed with her prior to its commencement.

Comcare communicated this decision to all rehabilitation authorities to guide them in making better rehabilitation program decisions and to provide guidance on considering reasonableness prior to suspension actions.

Question 3 (p7-8)

What is the evidence relied upon to support the restoration of coverage for off-site recess breaks? If there are submissions to the Comcare review that provide this evidence please provide the names of the submissions.

There were a number of submissions to the Comcare review which raised concerns about the lack of coverage for off-site recess breaks. These submissions were from the following peak bodies and unions:

- Law Council of Australia;
- Australian Rehabilitation Providers Association;
- Australian Council of Trade Unions (ACTU);
- (Joint submission) Construction, Forestry, Mining and Energy Union (CFMEU), Communications Electrical Plumbing Union (CEPU), Community and Public Sector Union (CPSU), Maritime Union of Australia (MUA), Australian Rail, Tram and Bus Industry Union (ARTBU));
- Australian Workers Union (AWU);
- Amalgamated Metal Workers Union (AMWU);
- Queensland Council of Unions (QCU); and
- Transport Workers Union (TWU).

The submission from the John Holland group of companies identified the lack of cover for recess breaks as a gap in the Comcare workers compensation benefit design as one which most affects their employees. John Holland advised that it has taken out a private insurance policy to provide coverage for all John Holland employees.

In addition, Australia Post and Optus advised in their submissions that they provide rehabilitation services including providing suitable employment to their employees for recess injuries, notwithstanding that these injuries are not compensable.

Question 4 (p8)

How many self-inflicted injuries result in claims being made to Comcare?

In respect of off-site recess break claims, there were no decisions made in 2004-05 and 2005-06 rejecting liability through applying the exclusionary provisions in s6(3), s14(2) and s14(3).

Question 5 (p11)

What case law is there to give guidance in respect of 'reasonable excuse'?

Examples of case law are available to all Comcare delegates from the on-line annotated SRC Act. Such examples are provided at Attachment A.

In addition, Comcare has provided advice and guidance to case managers on this issue. Firstly, through the Safety, Rehabilitation and Compensation Commission's Principles - Independent Legally Qualified Medical Practitioners which are relevant to the issue of "reasonable excuse" under s 57. Secondly, through a Jurisdictional Policy Advice [No.2005/2 – Suspension of Compensation under subsections 36(4) and 37(7)] which is available on Comcare's website. Both are set out at Attachment B.

Question 6 (p11)

What is the process used to determine whether a reasonable excuse has or has not been provided?

Comcare's Claims Policy and Procedure Manual (CPPM), which is an on-line tool, contains relevant topics and procedures to assist delegates in making decisions in relation to suspension provisions and what constitutes 'reasonable excuse'. Extracts from the online tool are provided at Attachment C.

Question 7 (p11)

In terms of the provisions on payment of medical expenses, do the laws of other states or territories contain a similar provision? If so, which ones.

No other state or territory legislation specifically allows for continued payment of medical expenses when the worker's right to compensation and/or weekly payments is suspended.

Question 8 (p12)

How many claims has been suspended under the existing provisions.

The following table contains the number of claims currently subject to suspension under s36(4), s37(7) and s57(2) as at 18 February 2010.

Year	S36	S37	S57	Total
2007/08	2	3		5
2008/09	1			1
2009/10		6		5

Note: The data shows that there are two types of reactions to suspension decisions. The first type is where the employee is suspended for a relatively short period of time before complying with the rehabilitation assessment program or a medical examination, with the second type being where the employee 'walks away' effectively surrendering any further compensation. In 2007-09, of the 22 suspensions in that year,

five did not comply and return to benefits. In 2008-09, of the seven suspensions, one did not comply and return to benefits.

What is the average time period for suspension?

The average period of time on suspension is 7.8 weeks.

What is the cost to the Commonwealth of the provision?

An estimate of the average medical costs which would be paid during a period of suspension, should the OHSOLA Bill 2009 amendment be passed, is $122 per week per claim.

Attachment A

Case Law – sourced from the Annotated SRC Act.

Reasonable excuse, s37(7)

Mental state: In *Re Perrin and Telstra Corporation Limited (1994)* the applicant refused to cooperate with his rehabilitation providers. The Tribunal found that, while he was physically capable of fulfilling the requirements of the program, his failure to continue it was a product of his mental state (anxiety, depression, hostility towards the employer) and could not be characterised as unreasonable and the decision to cease payment of workers compensation was set aside.

Physical state: In *Re Corrie and Comcare (2009)*, the Tribunal held that the applicant had a reasonable excuse for failing to perform a program because certain physical activities, including the rehabilitation program exercises, increased the intensity of her chronic pain from her condition of coccydynia.

Suitable duties: In *Re Ferreira and Comcare (1995)*, light duties ("bench duties") offered by Australian National Railways did not constitute a reasonable rehabilitation program as there were many aspects of the duties which were beyond the applicant because of the pain and discomfort he would suffer.

Communication: In *Re Oakes and Comcare (1995)* the applicant had a "reasonable excuse" because he was unaware that the Department had established a rehabilitation program. In *Re Wilkinson and Australian Postal Corporation (1998)*, the Tribunal identified a "classic failure of communication" (at [101]) over both the development and implementation of the rehabilitation program. It concluded that the applicant had a reasonable excuse for not undertaking the program.

No Reasonable Excuse, s37(7)

In *Re Martiniello and Comcare (1994)*, an employee failed to undertake a rehabilitation program without reasonable excuse. The Tribunal found it is not a case where the employee refused to undertake a rehabilitation program but rather a case where the employee failed, without reasonable excuse, to undertake such a program. The evidence clearly establishes that the rehabilitation program was offered to the applicant. The applicant accepted that offer but she made no real attempt to complete the program.

In *Re Chowdhary and Comcare (1998)*, the Tribunal found that there was no reasonable excuse for failure to undertake a RTW plan:

> 41. The applicant did not seek to argue that the rehabilitation plan was unsuitable. Her submission was rather that her reasonable excuse for not undertaking the plan was that on the day before she was due to commence work her GP, Dr Brown, in line with views he had expressed only shortly before, told her that she was not fit to participate in the plan because Comcare would not meet the costs of physiotherapy and home help which in his view she required in order to be able to cope with a RTW.
>
> 46. We find then that what moved the applicant to refuse to commence the RTW which was required of her by the rehabilitation plan was her entrenched belief that she should not be required to work except under conditions which she accepted, and by May 1996 we think that her attitude was that she should not be required to work at the National Library. The advice she obtained

from Dr Brown was simply a pretext for acting on her attitude. Thus, we do not consider that the applicant had a reasonable excuse for her refusal to undertake the rehabilitation plan.

Reasonable excuse s57(2)

Medical evidence available to determining authority: In *Re Leonard and Comcare (2000)*, the Tribunal, referring to *McKinnon*, determined whether the applicant had a reasonable excuse for failing to attend two medical examinations. In relation to one appointment, the Tribunal held that an examination by an orthopaedic surgeon was unnecessary as the applicant had recently been examined by an orthopaedic surgeon and there were several other specialists' reports on file.

In *Re Twaddell and Comcare (2001)*, the applicant attended a psychiatric examination with a friend. The psychiatrist had previously said that he would only allow her to be accompanied by a medical practitioner. The examination did not take place. The Tribunal held that compensation should not be suspended under s 57(2):

29. The Tribunal finds that the Applicant had a reasonable excuse for obstructing the examination. The Tribunal is impressed by the authority in *Ryan*'s case [*Ryan v Regent Enterprises* (1991) 3 WAR 552] which provides, in the Tribunal's view, a starting point for consideration in all matters involving the referral of an applicant or plaintiff to a medical practitioner nominated by the respondent. The Tribunal takes into account the following considerations in reaching this conclusion:

- The context of a medico-legal examination organised by the opposing party is almost always going to be an uncomfortable and potentially unpleasant experience for an applicant. It is not surprising that an applicant undergoing such an examination might desire a person to be present offering moral support. Indeed, for some applicants the beneficial presence of such a person might facilitate a more thorough examination because the examinee may be more forthcoming.
- Where, as here, there is evidence that a particular applicant has particular reservations about presenting alone for an examination, a factor in *Ryan* (supra) also, there is a stronger case that it would be reasonable for such an applicant to have a support person. In the present case there was evidence that the Applicant can be subject to panic or anxiety attacks (Exhibit 2) and that she distrusted medico-legal psychiatrists because she considered that they had misunderstood and misrepresented her in the past.
- Dr Alcorn's uncompromising attitude may, in itself, be unreasonable. He had suggested in correspondence that the examination might take up to four hours and that it was multi-faceted. There was no suggestion that a support person might be present for some of the examination but that he would prefer the Applicant to be alone, for example, for certain more sensitive discussion that might be necessary.
- There was no evidence presented that all reputable psychiatrists would adopt Dr Alcorn's uncompromising attitude to the presence of a lay support person.
- In argument Ms Gabriel said that, with the aborting of the examination scheduled for 7 August 2001, it may be necessary to refer the Applicant to a different psychiatrist because Dr Alcorn may not be able to accommodate her for a replacement examination in the near future. This suggests that the Respondent is prepared to consider referrals to psychiatrists other than Dr Alcorn. In the Tribunal's view it might be prudent for the Respondent to attempt to locate an appropriate psychiatrist who would be prepared to permit the Applicant to bring with her a lay support person who could be present for a substantial part of the examination. Should it prove impossible to find such a psychiatrist after reasonable efforts have been made, then a future Tribunal may take a different view of the reasonableness of Ms Twaddell's requirements.

Not Reasonable excuse s57(2)

Medical evidence not available to determining authority: However in hearing the same matter: *Re Leonard and Comcare (2000)* a refusal to attend for examination by a psychiatrist was unreasonable as the applicant had previously made substantial claims for treatment by a clinical psychologist and there were strong indications in the evidence of emotional problems. The Tribunal also noted that there was no requirement upon the respondent to provide an agreed list of questions for the medical practitioner or to seek the applicant's agreement to any such list of questions.

Obstructing examination: In *Re Leonard and Comcare (2000a)*, the applicant attended an interview with a psychiatrist but withdrew from the examination "for what can only be described as a specious reason" (at [12]). The Tribunal dismissed the application for review under s 42B of the AAT Act as vexatious because the applicant was frustrating the proceedings in the Tribunal by her actions.

Attachment B

Publications

In February 1997, the Safety, Rehabilitation and Compensation Commission approved Principles - Independent Legally Qualified Medical Practitioners which are relevant to the issue of "reasonable excuse" under s 57.

PRINCIPLES ENDORSED BY THE SAFETY, REHABILITATION AND COMPENSATION COMMISSION TO APPLY WHEN USING INDEPENDENT LEGALLY QUALIFIED MEDICAL PRACTITIONERS

At its meeting of 11/12 February 1997, the Safety, Rehabilitation and Compensation Commission (the Commission) endorsed the following jurisdictional principles to apply when using Independent Legally Qualified Medical Practitioners:

1. The practice of "doctor shopping", which means the seeking of an opinion from a doctor who is known to hold particular views (adverse to claimant or employer) on specific medical conditions or issues, is not condoned by the Safety, Rehabilitation and Compensation Commission.

2. An independent legally qualified medical practitioner's (LQMP's) opinion should only be sought where, in the opinion of the delegate:

- the claimant does not receive treatment from a LQMP with relevant qualifications; or/and
- the treating medical opinion/s is/are inconclusive; or/and
- further specialised opinion is reasonably required; or/and
- conflicts of opinion between treating doctors must be resolved.

3. An independent LQMP should first be sought within the city or state in which the claimant resides or is employed. Where the claimant lives in a rural or non metropolitan area, they should be referred to a LPMP with relevant qualifications in the nearest major city or capital.

4. Referral to a non-rural LQMP with relevant qualifications should only arise where the doctor with the speciality required is not available locally, where there would be substantial delay in the local LQMP examining and reporting on the claimant or where a conflict of interest might apply.

5. Where circumstances require the use of an interstate LQMP, it would be preferable, (subject to the claimant's fitness to travel) to send the claimant to that doctor rather than bring the doctor interstate. (This practice would diminish the perception of bias, as well as substantially reduce the administrative cost.)

6. Where a claimant is referred to an independent LQMP, they should be informed of the date, location and any travel arrangements. This information should also include reference to a "reasonable excuse" for refusal or failure to attend and obstruction of the examination as set out in section 57 of the SRC Act.

Where a claimant believes they have a reasonable excuse, they should notify the authority as soon as possible so that if that excuse is accepted as reasonable, then alternative arrangements can be made.

Where a claimant does not provide a "reasonable excuse" or communicates their belief that they have a "reasonable excuse" and the delegate does not consider this is the case, then no action should be undertaken until the date of the examination has passed and the claimant has not attended.

Once this has occurred then the claimant should be requested to provide a "reasonable excuse" as set out in section 57 of the SRC Act within a specified (reasonable) time. If the delegate considers this excuse unreasonable, then compensation should be suspended.

Jurisdictional Policy Advice 2005/2 – Suspension of Compensation under subsections 36(4) and 37(7) published on www.comcare.gov.au at: http://www.comcare.gov.au/forms_and_publications/jurisdictional_policy_advices/juridictional_policy_advices_january_1999_-_december_2006

and set out as follows:-

Jurisdictional Policy Advice No. 2005/2
Safety, Rehabilitation and Compensation Act 1988
Suspension of Compensation under Subsections 36(4) and 37(7)

Introduction

This advice has been developed by Comcare in response to a recent Federal Court decision about determinations regarding suspension of compensation following the refusal or failure of an injured employee to undergo an assessment of their capability to undertake a rehabilitation program, or to undertake a rehabilitation program.

Purpose of the advice

The purpose of this advice is to provide rehabilitation authorities and relevant authorities with guidance concerning

- the suspension of compensation under subsections 36(4) and 37(7) of the *Safety, Rehabilitation and Compensation Act 1988* (the Act)

- where responsibility sits for making the necessary determinations which give rise to the suspension of compensation under those subsections.

Rehabilitation authority and *relevant authority* are defined in Part I, Section 4 of the Act. Generally speaking, for the purpose of this advice, the rehabilitation authority is the employer of the injured worker, and the relevant authority is the licensee (for employees of licensees) or Comcare (for all other employees).

Background

The Federal Court in its decision in *Australian Postal Corporation v Forgie* [2003]FCAFC 223 (*Forgie*) has ruled that decisions to suspend rights under subsection 37(7) *are* determinations for the purposes of the Act.

Based on the Court's decision it is clear that decisions made under Sections 36 and 37, are reviewable under Sections 38 or 62, and are for the rehabilitation authority to make. Further, a determination must be made and a review conducted by the relevant authority under the appropriate section of the Act prior to any review by the AAT.

Legislation

Section 36 of the Act deals with the assessment of an injured employee's capacity to undertake a rehabilitation program:

(4) Where an employee refuses or fails, without reasonable excuse, to undergo an examination in accordance with a requirement, or in any way obstructs such an examination, the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the examination takes place.

Section 37 of the Act deals with the provision of rehabilitation programs for injured employees:

(7) Where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation program provided for the employee under this section, the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the employee begins to undertake the program.

Sections 38 and 62 deal with the review of determinations by the relevant authority, including decisions made under Sections 36 and 37.

Issues

The *Forgie* decision has a number of implications for rehabilitation authorities and relevant authorities:

- The rehabilitation authority is required to issue formal determinations in relation to Sections 36 and 37

- These determinations need to include the reasons supporting the determination and advise the employee of his or her rights to review

- Procedures need to be in place to ensure the employee is given natural justice and that the rehabilitation authority fulfils procedural fairness obligations

- The rehabilitation authority will need to consider who holds the specific delegation to suspend compensation.

Making the determination

If after considering the evidence the rehabilitation authority decides that rights to compensation should be suspended, it must give a formal notice in accordance with the requirements of subsection 38(1) or section 61 (for licensees). The notice must set out the terms of the determination and the reasons for the determination.

The rehabilitation authority will need to provide a copy of the determination simultaneously to the relevant authority to effect suspension of rights to compensation under the Act, or the rights to institute or continue any proceedings under the Act.

Review rights

Formal determinations made by rehabilitation authorities under sections 36 and 37 must be accompanied by a notice of the rights the employee has to seek a review of the decision.

Natural justice

Before making a determination under subsections 36(4) or 37(7) there are two matters to consider:

- whether the employee refused or failed to undergo an assessment examination, or to undertake a rehabilitation program

- if the employee has refused or failed, whether the employee has a reasonable excuse.

The rehabilitation authority should ensure that before making any determination it informs the employee in writing that it believes that circumstances exist for suspension. The employee should be given a right of reply including the opportunity to provide their reasons for refusing or failing to undergo an assessment examination or to undertake a rehabilitation program.

A reasonable excuse is one which is directed to "physical or practical difficulties in complying" [per Dawson J in *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 326] or "the capacity of the person concerned" [per Roskill LJ in *R v John (Graham)* [1974] 2 All ER 561 at 565]. That is to say " a reasonable excuse" must relate to an employee being unable, rather than unwilling to undergo an examination or undertake a rehabilitation program.

What constitutes "reasonable excuse" depends on the facts of each case, however, the following would normally be examples of a "reasonable excuse":

- medical inability or risk to the employee in undertaking the rehabilitation program
- urgent family matters, for example life and death situations.

Supporting medical evidence would be required if medical reasons are in issue.

On the other hand, the following excuses would not usually be considered reasonable:

- resignation
- travel
- relocation
- a current request for reconsideration under subsections 36(1) or 37(1).

A request for reconsideration of a decision by the rehabilitation authority to require an assessment of an employee's capability to undertake a rehabilitation program (section 36) or a determination that an employee should undertake a rehabilitation program (section 37) is a parallel process which does not give the employee an excuse for not participating in the assessment or program. An employee should participate in the assessment or program pending the outcome of their request for reconsideration. The relevant authority should ensure that finalisation of the reviewable decision is not unduly delayed.

Delegations

The rehabilitation authority should ensure that powers to make determinations under sections 36 and 37 are appropriately delegated. It is recommended that powers to suspend compensation be delegated to a senior level similar to those at which *fitness for duty* provisions are exercised.

The delegate for decisions to suspend rights to compensation must be an employee of the rehabilitation authority. This power cannot be delegated to the employee of an outsourced service provider.

Further information

Any issues relevant to this advice may be discussed with Comcare's Compensation and Injury Management Policy Group, telephone 6275 0663.

Compensation and Injury Management Policy Group
1 March 2005

What guidelines and processes do delegates follow when deciding what constitutes reasonable excuse in cases of non-compliance with rehabilitation?

Non-compliance with Rehabilitation

Introduction

If an employee refuses, fails or obstructs a rehabilitation assessment, or refuses or fails to undergo a rehabilitation program without reasonable excuse, their rights to compensation under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) may be suspended.

The determination to suspend compensation under s36 and s37 of the SRC Act is the responsibility of the rehabilitation authority.

This topic explains the process that is followed when the rehabilitation authority decides to suspend compensation to an employee.

See also: Ss36(4) and ss37(7) of the SRC Act for the provisions regarding suspensions relating to rehabilitation assessments and rehabilitation programs.

See also: S41A of the SRC Act for the provisions regarding delegation by the rehabilitation authority.

Considerations when suspending a claim

The rehabilitation authority may decide to suspend compensation where an employee has refused, failed or obstructed an assessment or a rehabilitation program and where the employee has not provided what the rehabilitation authority considers to be a reasonable excuse.

The rehabilitation authority should ensure that the person (usually a Senior Manager) authorising the suspension has valid delegations under s41A of the SRC Act. Ensuring that the delegate is at a senior level and separate from the day to day management of an employee's claim will assist in preserving the employer relationship with the employee, should they begin to comply with the rehabilitation process.

Before issuing a suspension, the rehabilitation authority must provide the employee with a reasonable opportunity, usually 14 days, to explain their alleged refusal or failure to attend or participate in a rehabilitation assessment or program. The employee stating that they did not wish to participate would not be considered a reasonable excuse.

Examples of a reasonable excuse may be where:

- supporting medical evidence has been provided to show the physical inability or restriction of the employee to attend, or
- urgent family matters have arisen.

Examples that may not be considered reasonable:

- the employee recently resigned
- travel issues, or

- the employee has requested a reconsideration of a determination under ss36(1) or ss37(1).

Process for non-compliance with rehabilitation (s36 and s37)

The following describes the recommended process to follow if an employee is considered to be non-compliant with a rehabilitation assessment or program.

Stage	Who	Action
1	Rehabilitation Authority	writes to the employee giving them 14 days to provide a reasonable excuse for the non-compliance.
2	Rehabilitation Authority	makes a decision on the reasonableness of the excuse provided by the employee and advises the employee of the outcome in writing and includes a Notice of Rights. **Note:** The person who makes the decision to suspend must be a delegate. It is recommended that a Senior Manager makes this decision instead of the Case Manager because the Case Manager will still need to be able to work with the employee once the suspension is lifted.
3	Rehabilitation Authority	notifies Comcare in writing that they are suspending the employee's claim for compensation, including the reasons for suspension.
4	Claims Services Officer (CSO)	the CSO then activates the suspension. **Note:** If compensation is suspended, all benefits for all of the employee's claims under the SRC Act are suspended.

See: Rehabilitation Suspensions (s36 and s37) for the procedure on how to activate a suspension.

TOP

Last Updated 21/09/09

What guidelines and processes do delegates follow when deciding what constitutes reasonable excuse in cases of non-compliance with medical examinations?

Non-attendance or Obstruction of Medical Examination (s57)

Introduction

If an employee cancels, refuses to attend, fails to attend, or obstructs a medical examination process, without a reasonable excuse, their rights to compensation under the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act) may be suspended until the medical examination takes place.

Where an employee fails to attend or obstructs a medical appointment, the Claims Services Officer (CSO) must provide the employee with an opportunity to give a reasonable excuse within 14 days. The CSO is then responsible for deciding whether the employee's excuse is in the CSO's view, reasonable.

If the CSO considers the excuse is not reasonable, the CSO must suspend the employee's rights to compensation. The suspension will apply to all claims the employee has regardless of the claim status.

See also: S57 of the SRC Act for provisions about independent medical examinations.

What is a reasonable excuse?

What constitutes a reasonable excuse depends on the facts of each case. To be reasonable an excuse must show that an employee was physically, mentally or emotionally unable to participate in or attend the examination rather than unwilling to do so. Examples of excuses that may be consided reasonable includes but are not limited to:

- medical inability, supported by medical evidence
- a risk of injury or aggravation (supported by medical evidence) to the employee in undertaking the medical examination
- urgent and unforseeable family matters, and
- other unforseen circumstances about which the employee was not able to notify Comcare in advance of the appointment.

The following may not be considered reasonable, remembering that the employee should have been given sufficient notice of the examination:

- resignation
- travel overseas, and
- relocation interstate.

Procedure on how to action suspension of compensation as a result of an employee's failure to attend or obstruction of a medical examination

The following procedure describes what to do if an employee fails to attend or obstructs a medical examination without reasonable excuse.

Step	Action
1	Has the employee provided reasons in writing? • If no, ask the employee to provide the reason in writing • If no, send standard letter 'S57 failure to attend- Empl' (CMIV37E), to the employee requesting reasons for non-attendance or for obstruction.
2	In Pracsys, open Manage Action Plan (MAP) and create and action plan diary: • select 'New' from the side menu • select 'Core Activities' from the catagory drop down menu • select 'Medical Review' from the type drop down menu • note in the description field to follow up on employee's written response in 14 days. **Note**: If you are waiting for a written reason, end procedure.
3	Was the non-attendance or obstruction supported by a reasonable excuse? • If yes, continue • If no, go to step 6
4	Was the non-attendance or obstruction supported by medical evidence? • If yes, go to step 7 • If no, continue
5	Was the non-attendance or obstruction due to unforseen circumstances? • If yes, go to step 7 • If no, **see:** Medical Examination Suspension (s57)
6	Make a new appointment with the specialist and send standard letter 'S57 new appointment accepting reason - Empl' (CMIN39E), to the employee. Include in the letter: • the excuse the employee has provided and the fact that you consider it was reasonable • the date of the original letter • the new appointment details

	Send a copy to the employer using 'Letter Template to Case Manager' (CMIN97E).
7	Enter comment in Pracsys, go to Manage Claim Comment (MCOM) screen: • select 'new' button • select 'general' catagory from the drop down menu • select 'fact finding model' from the drop down menu • enter comment noting: • o the non-attendance or obstruction of the medical examination o the excuse provided for the non-attendance or obstruction and that you found the excuse reasonable in the circumstances, and o the new appointment details.
8	Create and finalise standard letter 'S57 appointment details specialist - Prov' (CMIV36P), send to the LQMP advising of new appointment details. **Note:** If you have sent a letter to the LQMP previously, refer to this in your new letter.

TOP

Last updated 5 January 2010 GJC

Reasonable Excuse – what guidance/processes are considered by delegates in deciding what does and what does not constitute *reasonable excuse* in the context of suspension of benefits?

Note: *Delegation to consider 'reasonable' under rehabilitation provisions (s 36 and 37) lies with the rehabilitation authority (employer case manager) while delegation under medical examination (s57) lies with the claims administrator (Comcare or self-insurer).*