



## SUSPENSION OF COMPENSATION UNDER THE REHABILITATION PROVISIONS OF THE SAFETY, REHABILITATION AND COMPENSATION ACT 1988

### PURPOSE

To provide scheme guidance on suspending compensation when an employee fails to comply with the rehabilitation provisions of the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

### BACKGROUND

The SRC Act allows a rehabilitation authority<sup>1</sup> to arrange for an assessment of an employee's capability to undertake a rehabilitation program under section 36, and to provide or arrange for a rehabilitation program under section 37, to assist in their recovery and return to work.

Where the rehabilitation authority decides that the employee has, without reasonable excuse, failed to comply with one of these rehabilitation requirements, the employee's rights to compensation and to institute or continue any proceedings under the SRC Act must be suspended under:

- > section 36(4) in relation to an examination; or
- > section 37(7) in relation to a rehabilitation program.

This guidance sets out why these decisions are considered to be determinations under the SRC Act, what should be considered when assessing what is a reasonable excuse for non-compliance, and what impact determinations to suspend compensation have on employees who have more than one compensation claim.

### GUIDANCE

A decision to suspend an employee's compensation for failure to engage in a rehabilitation examination or program should not be taken lightly. The rehabilitation authority may be able to effectively reduce the incidence of non-compliance by:

- > clearly explaining the purpose of a section 36 examination to the employee and, where possible, consulting with them regarding their availability before scheduling an appointment time for the examination
- > effectively consulting with the employee and their medical practitioner to develop and implement rehabilitation programs that are tailored to the employee's individual circumstances. Regular and effective communication throughout the process will assist in ensuring compliance with the program.

Before proceeding with issuing a determination to suspend compensation, the rehabilitation authority should make every attempt to assist the employee comply with the examination or program<sup>2</sup>.

<sup>1</sup> Rehabilitation authority is defined under section 4 of the SRC Act

<sup>2</sup> Further information on the rehabilitation process can be found in Comcare's *Rehabilitation case manager handbook*.

## Rehabilitation determinations

A decision to suspend compensation for an employee that fails to comply with a rehabilitation examination or program is a determination under the SRC Act<sup>3</sup>. The suspension provisions are not self-executing, they require a rehabilitation authority to consider whether there has been a refusal or failure to undertake an examination or a program, in addition to also assessing the reasonableness or unreasonableness of that refusal or failure<sup>4</sup>.

## Making the determination

### Delegation

As suspension decisions under the rehabilitation provisions constitute determinations, the rehabilitation authority should ensure that powers to make determinations under sections 36 and 37 of the SRC Act are appropriately delegated<sup>5</sup>. The delegate must be an officer of, or person employed by the rehabilitation authority. This power cannot be delegated to an employee of an outsourced service provider<sup>6</sup>.

### Considerations

Before making a determination to suspend compensation under section 36(4) or 37(7) of the SRC Act, the rehabilitation authority must consider:

- > whether the employee refused or failed to:
  - undergo (or obstructed) an assessment examination
  - undertake a rehabilitation program
- > whether the employee has a reasonable excuse.

The rehabilitation authority must ensure that before making any determination it informs the employee in writing that it believes that circumstances exist for suspension<sup>7</sup>. The employee must be given the right of reply, including the opportunity to provide their reasons for refusing or failing to undergo (or obstructing) an assessment examination or refusing or failing to undertake a rehabilitation program<sup>8</sup>. There are no legislated timeframes setting out how long a rehabilitation authority must provide an employee for the right of reply. The time period provided is at the discretion of the rehabilitation authority, however it should be reasonable and take into consideration an employee's individual circumstances.

### Assessing reasonable excuse

A reasonable excuse requires more than just a rational explanation from the employee<sup>9</sup>. It is directed to 'physical or practical difficulties in complying'<sup>10</sup> or 'the capacity of the person concerned'<sup>11</sup> and must relate to an employee being unable, rather than unwilling to undergo an examination or undertake a rehabilitation program.

A request for the reconsideration of a section 36 or section 37 determination made by the rehabilitation authority is a parallel process which does not give the employee a reasonable excuse for not participating in the rehabilitation examination or program. An employee should participate in the examination or program pending the outcome of their request for reconsideration. As such, the reconsideration should occur in a timely manner.

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3 Section 60 of the SRC Act.

4 *Re Australian Postal Corporation v Forgie* [2003] FCAFC 223

5 See also section 7 of the *Safety, Rehabilitation and Compensation (Guidelines for Rehabilitation Authorities) Instrument 2019*.

6 Section 41A of the SRC Act

7 Section 11 of the *Safety, Rehabilitation and Compensation (Guidelines for Rehabilitation Authorities) Instrument 2019*

8 Section 11 of the *Safety, Rehabilitation and Compensation (Guidelines for Rehabilitation Authorities) Instrument 2019*

9 *Re Comcare v Singh* [2012] FCA 136

10 *Re Corporate Affairs Commission v Yuill* [1991] 172 CLR 319

11 *Re R v John (Graham)* [1974] 2 All ER 561

Examples of a reasonable excuse include, but are not limited to:

- > an unexpected medical condition requiring medical attention or hospitalisation
- > a critical and unforeseen incident including urgent family matters
- > transport issues – last minute flight cancellations, traffic delays or unavailability of suitable transport.

### Example

An employee based in Melbourne suffered a compensable psychological injury in the course of their employment and has a partial incapacity for work. To support the employee in their return to work, the rehabilitation case manager developed a rehabilitation program in consultation with the employee and in line with medical evidence provided by the employee's treating practitioners. This was issued to the employee as a determination under section 37 of the SRC Act.

Following commencement of the program, the employee moved to Queensland to be closer to their family. As such, they were unable to participate in the rehabilitation program that had been provided by their employer as the business does not have a presence in Queensland.

The rehabilitation case manager requested reasons from the employee regarding the failure to comply with the rehabilitation program. The employee reiterated that they wanted to be located closer to their family for additional support and would not be returning to Melbourne.

Upon receipt of the employee's response, the rehabilitation case manager considered whether moving to another state constituted a reasonable excuse for failing to comply with the rehabilitation program (section 37(7) of the SRC Act). The rehabilitation case manager noted that:

- > the employee was not compelled to move to Queensland, their decision to move was personal preference
- > there was no medical evidence supporting a finding that the employee's relocation was necessary to improve their compensable injury.

The rehabilitation case manager acknowledged that there were clearly practical difficulties in the employee complying with the rehabilitation program due to their new location. However, these difficulties were of the employee's own making and were more aligned with them being unwilling to participate in the rehabilitation program, as opposed to any difficulty in their capacity to comply with the program. The employee's decision to remove themselves from the location of employment was their own personal preference and, as a rehabilitation authority, the rehabilitation case manager was not required to provide a rehabilitation program in a different location<sup>12</sup>.

### Suspending compensation

If a rehabilitation authority decides that an employee's failure to comply with an examination or program was without reasonable excuse, the rehabilitation authority must make a determination that the employee's rights to compensation, and to institute or continue any proceedings in relation to compensation, in relation to that claim are suspended until the section 36 examination takes place or the employee begins to undertake the rehabilitation program provided under section 37 of the SRC Act. Like all determinations, this must be provided to the employee in writing, together with the reasons for the determination and a statement informing the employee that if they are dissatisfied, they can request a reconsideration of that determination<sup>13</sup>. The suspension applies from the date of the determination.

Medical expenses continue to be payable during a suspension, as long as the requirements contained in section 16 of the SRC Act regarding compensation for medical expenses are met.

Compensation, other than medical expenses, cease for the duration of the suspension period and may only recommence from the day that the examination takes place, or the employee begins to undertake the rehabilitation program. Compensation for the period of suspension is not back paid once an employee becomes compliant.

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<sup>12</sup> Re *Galbraith and Comcare* [2006] AATA 762

<sup>13</sup> Section 38 or section 61 of the SRC Act

A rehabilitation authority should put in place measures to regularly review any claims to which a suspension has applied to ensure it reinstates compensation as required. A further determination is not required to reinstate compensation, although documenting this in writing for the employee and for administrative purposes would be considered better practice.

### Suspension and multiple claims

If an employee has more than one workers compensation claim, a suspension in relation to one of those claims does not impact the remaining injury claims. An employee's rights to compensation and their rights to institute or continue proceedings under the SRC Act, in relation to other injury claims, will continue<sup>14</sup>. For example, a claim for permanent impairment in relation to another injury (one not subject to the rehabilitation suspension) must be actioned.

#### Example

A rehabilitation case manager determines a rehabilitation program for an employee under section 37(7), taking into consideration their medical capacity and the suitable employment that is available with the employer. The program is determined on the employee's claim for a lower back injury, however the employee also has a second, separate workers' compensation claim for bursitis. This claim was recently denied by the decision maker, with the decision affirmed through the reconsideration process as no employment related contribution could be identified.

The employee does not engage in the rehabilitation program for the lower back injury and, after being provided with an opportunity to provide a reasonable excuse by the rehabilitation case manager, states that they now have carer responsibilities for their children given that their partner works full-time. The rehabilitation case manager assesses the employee's response as not constituting a reasonable excuse and issues a determination to suspend the employee's rights to compensation (excluding medical treatment) and the rights to institute or continue any proceedings in relation to compensation.

The employee telephones the rehabilitation case manager and asks whether the suspension precludes their ability to seek a review of their bursitis claim at the Administrative Appeals Tribunal (Tribunal). The rehabilitation case manager explains that the suspension can only apply to the lower back injury claim and that the employee is free to continue the appeals process at the Tribunal for the bursitis claim.

## MORE INFORMATION

Further information on managing rehabilitation can be found in:

- > The *Safety, Rehabilitation and Compensation (Guidelines for Rehabilitation Authorities) Instrument 2019*
- > The [Rehabilitation case manager handbook](#)

[Comcare's Learning Management System \(LMS\)](#) also has scheme e-guidance on other rehabilitation topics including:

- > Rehabilitation case management – first steps
- > Return to work case conferencing.

For more information, please contact Comcare's Scheme Policy team on 1300 366 979 or email: [scheme.policy@comcare.gov.au](mailto:scheme.policy@comcare.gov.au).

<sup>14</sup> Re *Australian Postal Corporation v Sinniah* [2013] FCAFC 98