

The
WorkCover Ombudsman
and
Review of Section 36 Decisions

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Seminar Overview

- **Introduction**
- **Functions of the WorkCover Ombudsman**
- **Review of Section 36 decisions**
- **Features of Section 36(1)(b)**
- **Common deficiencies of Section 36(1)(b) decisions**
- **Concluding comments and question time**



Introduction

The Office of the WorkCover Ombudsman

- **Established under Part 6D of the *Workers Rehabilitation and Compensation Act 1986***
- **An independent statutory officer who must act impartially and in the public interest**
- **Operating from 1 July 2008**
- **Currently, Wayne Lines is appointed as Acting WorkCover Ombudsman**

The WorkCover Ombudsman's Functions

- **Makes recommendations for improving the operation of the Act**
- **Receives and investigates complaints about administrative acts under the Act and seeks to resolve those complaints**
- **Assists WorkCoverSA and employers to establish their own complaint-handling processes**

The WorkCover Ombudsman's Functions

And...

- **Reviews decisions to discontinue weekly payments of the Act and suspends their operation if it appears that they are not reasonably open**



Review of Section 36 Decisions

■ **Some background**

- Before 1 July 2008:
 - The operation of a decision was suspended automatically if the worker lodged their dispute within time
 - The suspension would normally be extended by the Tribunal during the life of the dispute



Review of Section 36 Decisions

■ The 2007 Clayton Walsh Review

- Recommendation 25a
 - “Where weekly payments of income maintenance are discontinued under s36, that the weekly payments are not reinstated for the duration of the dispute”



Review of Section 36 Decisions

- Recommendation 26
 - That the office of the WorkCover Ombudsman have a role in monitoring the nature and quality of decision making in relation to key impact areas such as the 130 week review and termination of payments.

“...to provide a significant countervailing force to the prospect that such a change may provide an opportunity for unmeritorious claims determination decisions and practices...” Clayton Walsh Report at p141



Review of Section 36 Decisions

- Section 36 was amended effective from 1 July 2008
 - Decision takes effect even if worker lodges a notice of dispute
 - Decision may be suspended only if worker applies to the WorkCover Ombudsman and it appears to the WorkCover Ombudsman that the decision was not reasonably open having regard to the circumstances of the case



Review of Section 36 Decisions

- **Comments**

- The amendments represent a radical shift from the previous 21 years of claims management practice
- Decisions to discontinue payments will have a serious impact on people's lives even if they are eventually set aside by the Tribunal
- The need for sound, fair and objective decision making cannot be overstated



Review of Section 36 Decisions

■ **Preconditions:**

- Worker has received a notice of discontinuance under Section 36
- Worker has lodged notice of dispute



Review of Section 36 Decisions

- **Decision may be suspended if it appears to the WorkerCover Ombudsman that it is not “reasonably open” having regard to the circumstances of the case:**
 - “reasonably open” means arguable, having a valid basis, there is a case to answer
 - “reasonably open” does not mean that the decision is likely to be upheld by the Tribunal at hearing

Review of Section 36 Decisions

- **WorkCover Ombudsman will require decision maker to**
 - provide copies of documents on which decision is based
 - and any additional submission in writing
 - within 7 days of requesting them or within 7 days of receiving the copy notice of dispute from the Tribunal, whichever is the later

Review of Section 36 Decisions

- **WorkCover Ombudsman's decision**
 - will be made as expeditiously as is reasonably practicable
 - will be advised to the parties in writing
 - is not subject to review or appeal

Review of Section 36 Decisions

- **If the WorkCover Ombudsman's decision is to suspend the operation of the discontinuance, weekly payments must be reinstated (from the date they were ceased) and they continue until -**
 - the notice of dispute is withdrawn
 - the matter is resolved by reconsideration or settlement between the parties, or the
 - Tribunal otherwise orders



Review of Section 36 Decisions

■ Observations

- In terms of disputed Section 36 decisions, Section 36(1)(b) is the predominant ground
- In terms of ensuring discontinuances are reasonably open, Section 36(1)(b) has caused the most problems
- The rate of suspension of EML decisions was unacceptably high, but is now on the improve



Features of Section 36(1)(b)

- **A. “weekly payments to a worker who has suffered a compensable disability must not be discontinued unless”**
- **B. “the Corporation is satisfied”**
- **C. “on the basis of a medical certificate”**
- **D. “of a recognized medical expert”**
- **E. “that the worker has ceased to be incapacitated for work by the compensable disability”**



Features of Section 36(1)(b)

- **A. “weekly payments to a worker who has suffered a compensable disability must not be discontinued” presumes:**
 - weekly payments are payable to a worker, ie, the worker has an incapacity for work (Section 35(1))* and
 - the worker has suffered a compensable disability that has resulted in incapacity for work

* *S.A. Health Commission (Glenside Hospital) v Brown* [1993] SAWCAT 2



Features of Section 36(1)(b)

■ B. “the Corporation is satisfied”

- Requires the compensating authority to form a view that is genuine and bona fide*
- The decision needs to be based on sound and cogent evidence

* *Garton v State of South Australia* [1998] SAWCT 32



Features of Section 36(1)(b)

■ C. “on the basis of a medical certificate”

- Requires medical evidence (surveillance reports not enough on their own)
- An opinion expressed in a medical report will suffice*, but if the opinion in the report is unclear or ambiguous, why not obtain a certificate?

* *Zervos v Workcover/Mmi (Myer Stores Ltd)* [2000] SAWCT 59



Features of Section 36(1)(b)

■ D. “of a recognized medical expert”

- Defined as a legally qualified medical practitioner
- Does not have to have specialist qualifications for the specific disability suffered by the worker*, but whether medical practitioner has specialist expertise in respect of particular disability will affect the weight their opinion should be given (and whether compensating authority is genuinely satisfied)

* *WorkCover Corporation/GIO Australia (Olympic Aluminium Pty Ltd) v Karchinsky* [1997]
SAWCAT 11



Features of Section 36(1)(b)

- **E. “that the worker has ceased to be incapacitated for work by the compensable disability”**
 - Any contribution to incapacity from the compensable disability has to be ruled out
 - Could refer simply to the medical impact of the disability on the worker’s capacity to work*

**Mitsubishi Motors v Sosa* (SC 5084, delivered 8/6/95, unreported) per King CJ at 10-11




Features of Section 36(1)(b)

- **E. “that the worker has ceased to be incapacitated for work by the compensable disability”**
 - In practice, incapacity is still found to be present if:
 - worker has not regained full pre-injury capacity to sell his or her labour in the open market*
 - a return to work will probably produce the same symptoms which caused the worker to cease work**


* *Arnott's Snack Products Pty Ltd v Yacob* (1985) 155 CLR 171; *Gibson v MMI (Griffin Press)* [1999] SAWCT 69 at 6-7

** *Hadrill v Verco Workers Compensation (SA) Ltd (General Havelock Hotel)* [2005] SAWCT 91



Common Deficiencies of Section 36(1)(b) Decisions

- **Misunderstanding/misapplication of Medical Opinion**
- **Medical opinion denies compensability of accepted disability**
- **Medical opinion only covers one aspect of a compensable disability**
- **Sequelae disabilities are not addressed**




Common Deficiencies of Section 36(1)(b) Decisions

■ **Misunderstanding/misapplication of Medical Opinion**

- “Fit to return to pre-injury duties” does not necessarily mean that the worker has ceased to be incapacitated*
- “Substantially”, “mostly”, “virtually”, “should have” recovered is not sufficient
- Symptoms and incapacity due to “natural degeneration” does not rule out contribution from the compensable disability to the incapacity
- If a medical opinion is ambiguous, it is not a sufficient basis for being “satisfied” about the worker’s capacity for work

**Cristea v The Corporation (CCA Snack Foods Pty Ltd)* [1995] SAWCAT 95




Common Deficiencies of Section 36(1)(b) Decisions

■ **Medical opinion denies compensability of accepted disability**


- Section 36(1)(b) presumes the existence of an accepted compensable disability that has at some point resulted in an incapacity for work
- It is not permissible to use Section 36(1)(b) to revisit the question of whether the worker's disability is/was compensable or whether the worker was at some stage incapacitated by it*
- A medical opinion that denies that the worker ever suffered a compensable disability or was ever incapacitated by it does not provide a proper basis for a Section 36(1)(b) decision

**Garton v State of South Australia [1998] SAWCT 32; Holding's case [2000] SAWCT 111*



Common Deficiencies of Section 36(1)(b) Decisions

- **Medical opinion only covers one aspect of a compensable disability**
 - If the accepted compensable disability involves more than one condition or injuries to more than one body part, evidence of a recovery from all injuries and conditions is required
 - If the worker received surgery for the compensable disability, evidence of recovery from the affects of the surgery is required
 - If previous medical opinions indicate that the worker is “deconditioned” due to the compensable disability and length of time off work, evidence of the worker being “work ready” is required



Common Deficiencies of Section 36(1)(b) Decisions

■ **Sequelae disabilities are not addressed**

- If sequelae disabilities are accepted as compensable, I deem them to be part of the compensable disability for the purpose of Section 36(1)(b) even if the sequelae have been accepted for medical expenses or Section 43 entitlements only
- If previous medical evidence all points to the compensability of sequelae disabilities and the compensating authority has not taken issue with it, I will deem the sequelae to be part of the compensable disability for the purpose of Section 36(1)(b)
- Medical opinion must address the affects of sequelae disabilities to provide a sufficient basis for a Section 36(1)(b) decision

The WorkCover Ombudsman and Reviews of Section 36 Decisions

Concluding Comments

- Reviewing Section 36 decisions is but one of the WorkCover Ombudsman's functions in the context of generally reviewing the operation of the Act
- Now that Section 36 decisions automatically take effect unless suspended on review by the WorkCover Ombudsman, there is an increased responsibility on the decision maker to make good decisions
- Section 36(1)(b) has many aspects to it and considerable care is required to ensure that decisions based on it are defensible
- The rate of suspension of decisions by the WorkCover Ombudsman is decreasing and needs to be kept low in order to demonstrate that Section 36 is being utilized responsibly

The WorkCover Ombudsman and Reviews of Section 36 Decisions

Questions?

The End