Queensland Government

Department of Justice and Attorney-General

Review Unit procedure

Procedure - Procedural Fairness during the Review Process

Purpose:

To outline:

- the principles to be considered by Review Officers where new information is received during the review process, the disclosure of information to affected parties and allow the affected parties an opportunity to respond to the new information prior to the review decision being made
- the principles to be considered by Review Officers where the applicant requests an extension of time to provide additional information in accordance with section 545(4) of the *Workers' Compensation and Rehabilitation Act 2003* (the Act)
- how a review applicant is heard during the review process.

Background:

One of the Workers' Compensation Regulators (the Regulator) functions under section 330 of the Act is to undertake reviews of insurer decisions under chapter 13, part 2. The objective of this part, stated in section 539, is to provide a **non-adversarial system for prompt resolution of disputes**.

To help facilitate procedural fairness and prompt resolution of disputes, the Act prescribes a number of key processes and time limits:

- the applicant to lodge their application for compensation (6 months from injury)
- the Insurer (original decision maker) to make their decision on the application (20 business days)
- a decision to reject an application for compensation or to terminate compensation is required to be reviewed by a more senior officer of the insurer
- the insurer to provide written reason for their decision (5 days from request)
- **the applicant to lodge an application for review (3 months from receiving the insurers reasons for their decision)**
- **the Regulator is to make a review decision (25 business days from receiving the review application)**
- **Section 543 of the Act provides an applicant the opportunity to have a 'right of appearance' to further explain their case to a Review Officer, generally in person or by telephone.**
- the Regulator is to provide the review decision and reasons for the decision to the applicant (10 business days after the decision).
- any party aggrieved by the review decision has 20 business days to lodge an appeal with the Queensland Industrial Relation Commission (QIRC) for an appeal by hearing 'de novo'.
- any party aggrieved by the QIRC decision has an opportunity to appeal to the Industrial Court.

When the review and appeals process was first introduced under the WorkCover Queensland Act 1996 an application for review was required to be made within 35 calendar days. Many applicants reported that this time limit did not help to achieve resolution of the dispute as they did not have sufficient time to prepare a proper application for review. Representative groups subsequently petitioned the government to extend the time frame. Following consulting with relevant parties in 1999 the government amended the legislation to provide for the current 3 month timeframe to enable applicants to make a complete application for review.

The relatively long timeframe of 3 months gives the applicant sufficient time to:

- formulate their grounds for review
- obtain independent advice if they wish
- obtain additional information to support their grounds for review
- assess their prospects of having the decision overturned on review
- provide an application for review accompanied by any supporting submissions they wish to ensure their 'case' is heard in the review decision making process.

Policy:

The Regulator is committed to complying with the Act and its intent. The Regulator has a duty to observe procedural fairness when making review decisions. Fundamentally this means the Regulator will avoid bias in making review decisions and will provide the review applicant and the other party to the review with an opportunity to be heard.

The statutory framework within which the Regulator, as the decision-maker, exercises its statutory power to make review decisions is critically important when considering our duty to provide procedural fairness. The Act as a whole – and Chapter 13 in particular, are relevant to the framework of a Review Officer. **Chapter 13 envisages a review process that is prompt and non-adversarial in nature.** It is **essentially a review on the papers with the applicant for review afforded the opportunity to be heard by submitting grounds for the review application along with any accompanying submissions**.

In our statutory context procedural fairness does not require an ever-revolving set of 'round robin' hearings, submissions or other opportunities to be heard. Procedural fairness principles do recognise that there is an end-point and that time limits imposed by a statutory decision making framework validly apply to ensure a matter does not continue on ad infinitum. The review process in Part 2 of Chapter 13 of the Act is a desktop administrative review process. It is not an administrative inquiry nor does it represent the conduct of a hearing in the sense of an applicant and Respondent in an adversarial sense.

Our statutory context does enable an inherent application of procedural fairness by:

- ensuring independence in the decision making tree – an Insurer makes the original decision, a different body, the Regulator, makes the review decision and finally the QIRC is the decision maker on the appeal decision
- ensuring an aggrieved person can receive written reasons for a decision from an Insurer initially, then the Regulator upon a review decision and the appeal body upon an appeal
- enabling an applicant for review up to 3 months to lodge an application for review with the grounds for their application AND accompanying submissions to put forward their view

- allowing a comprehensive right of appeal of a review decision to the QIRC with de novo rights and opportunities for full disclosure between the parties without the burden of limiting timeframes
- allowing a further appeal to the Industrial Court for an aggrieved party to the appeal at the QIRC

It is for the review applicant to put themselves inside the legislation and marshall his/her evidence, reports, material and submissions prior to lodging the application for review. The review applicant has up to 3 months after receiving the insurer's decision to develop their submissions. The Review Officer is entitled to determine the application on the basis of information before him/her.

Section 542(5) requires for the application for review to be supported by grounds for review and accompanied by material which a review applicant wants considered. Whilst affording the review applicant and the other party an opportunity to be heard (which the review applicant has done by the lodging of a s542 application for review) the Regulator is entitled to proceed and determine the matter on the basis of what has been received from the review applicant and material received from the other party. Neither the review applicant, nor the other party is entitled to have continual opportunities to incrementally grow or expand its case at times of its choosing or convenience.

Section 543 provides an applicant the opportunity to have a 'right of appearance' to further explain their case to a Review Officer, generally in person or by telephone. Review officers try to arrange for this to occur within the 25 days allowed for making a decision. There are situations where the appointment proposed by the Regulator is unsuitable to the applicant and in those cases the Regulator will request a suitable extension of time to accommodate the applicant's availability for the right of appearance.

We see a most fundamental tenet of procedural fairness is that **adverse information which is credible, relevant and significant to the decision to be made should ordinarily be disclosed and an opportunity given to respond to it**. **The Regulator does not have to disclose for comment *all* the material before it**. The reason why only credible, relevant and significant information needs to be disclosed is clarified by the High Court Of Australia (*Applicant VEAL of 2002 v Minister for Immigration & Multicultural &Indigenous Affairs* (2005) 225 CLR 88 ; 80 ALJR 228 ; 222 ALR 411; 87 ALD 512;[2005] HCA 72, the Court at [17]):

> "Administrative decision-making is not to be clogged by inquiries into allegations to which the repository of the power would not give credence, or which are not relevant to his decision or which are of little significance to the decision which is to be made."
> "Credible, relevant and significant" should therefore "be understood as referring to information that cannot be dismissed from further consideration by the decision-maker before making the decision"

Whilst the Regulator does provide adverse information which it considers credible, relevant and significant to a party to a review application for response, **we seek to avoid prolonging the review decision by a continual or prolonged disclosure process** back and forward to the applicant and the other party. We note that the case law authorities indicate that procedural fairness does not require *"a potentially open-ended process of disclosure by the decision maker to an interested person of material which may bear upon the decision-making process, so that*

comment and counter-comment can be made and considered." (*Tuch v South Eastern Sydney & Illawarra Area Health Service* [2009] NSWSC 1207, Johnson J at [312]).

Time to respond to material disclosed during the review process

The Regulator's capacity to meet its obligation to make a prompt review decision is underpinned by its own practices and the commitment of the review applicant and the other party to a prompt, non-adversarial process.

As a decision maker, the Regulator does impose processes, procedures and time limits in order to effectively discharge its functions under Part 2 of Chapter 13 of the Act in a timely and efficient manner.

The Regulator takes steps to limit delays in the review decision making process whilst meeting our procedural fairness obligations by consideration of the following factors:

- generally the law does not provide a specific period for a response by a person affected by relevant and potentially adverse information. The law does, however, require that the person affected should be given a reasonable opportunity to do so. What is reasonable will depend on the circumstances of each case.
- the statutory time limit in section 545(1) of the Act of 25 business days to make a review decision is relevant to the issue of what is a reasonable time to respond or to enable an applicant or other party to be heard.
- relevant factors to consider regarding the time to respond include the complexity of the matter, seriousness of the consequences, time since the accident/incident occurred, and the amount of material to be considered by the party.
- generally the Regulator practices allow a **period of five (5) business days to respond** to disclosed documents/information. It is recognisedthat this time may sometimes be **shorter** for a response to subsequent information, or when the information provided is clear, small and simple.
- there are circumstances where complex and/or large amounts of new information may have been submitted. In these circumstances a period of **greater than 5 days** may be provided for a response. It is also open for the Regulator to make a decision in accordance with s545(1)(d) to refer a matter back to the insurer when substantial amounts of new information are provided during the review process by either the applicant or the other party.

Section 545(4) of the Act provides that the Regulator may extend the timeframe for making a review decision when either the applicant requests an extension to submit further information, or when the applicant consents to an extension. When deciding extension requests the Regulator recognises it has a responsibility to **all** parties to provide a prompt and non-adversarial process. Extensions granted under this section are more likely to be for short periods given that the applicant has already had potentially 3 months for lodgement of the review application and submissions, and the time that has already elapsed since lodgement of the review.

Section 542 allows an applicant three months to gather their information to lodge an application for review. Accordingly once a review application has been lodged the Regulator is unlikely to grant extensions to obtain appointments with doctors that are speculative in nature, i.e. not from the treating doctors/specialists, rather an independent doctor that the applicant is hoping will provide information that is supportive of their application. Any extensions granted will be considered on a case by case basis and have regard to:

- the medical evidence on the insurer file, available to the Regulator from the applicants treating medical practitioners and independent specialists;
- the submissions and materials already provided with the review application;
- the object of this Chapter of the Act for a prompt and non-adversarial process.

Staff assisting responding to enquiries from potential review applicants, are required to encourage potential applicants to use as much of the 3 month timeframe as they need to enable them to make a complete application with submissions. It has been found that applicants who use the 3 month timeframe to gather supporting information before lodging their review application, rarely seek further extensions during the review process and subsequently their review decision is made promptly.

Please direct any enquiries to the Review Unit on 1300 739 021

Procedure Owners: Executive Manager, Review & Appeal Unit; Team Leaders, Review Unit

Review Date: 30 November 2014