

Final Report
Full investigation - *Return to Work Act 2014*

Complainant	The complainant
Compensating Authority	ReturnToWorkSA
Ombudsman reference	2016/09691
Compensating Authority reference	
Date complaint received	7 December 2016
Issues	Whether the ReturntoWorkSA Corporation breached the Service Standards by failing to resolve an issue by providing accurate and complete information

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Return to Work Act 2014*.

On 7 December 2016, [the worker] authorised [the complainant] to act on his behalf for the purpose of my investigation.

Investigation

My investigation has involved:

- assessing the information provided by the complainant
- seeking a response from ReturntoWorkSA (RTWSA)
- clarifying the response with RTWSA
- seeking more particulars from the complainant
- considering the RTW Act Schedule 5 Service Standards
- considering RTWSA's Complaint handling manual (updated February 2016)
- considering RTWSA's Complaints Management Framework (March 2017)
- considering Ombudsman SA's Complaint Management Framework (March 2016)
- providing RTWSA and the complainant with my provisional report for comment, and considering their responses
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance

with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.¹ It is best summed up in the decision as follows:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved ...²

Response to my provisional report

RTWSA responded to my provisional report on 22 May 2017 and advised that it accepted that it failed to undertake an independent assessment of the information the agent had provided which resulted in the complainant being provided with inaccurate information.

In response to my provisional report the complainant responded on 1 June 2017 commenting:

- the provisional report focusses on one issue only regarding complaints made to RTWSA despite the fact that multiple complaints were made to the Ombudsman's Office about the investigation of complaints about RTWSA
- the fact that RTWSA has made changes to its procedures does not negate the need to examine other complaints that have been made as the Ombudsman cannot be satisfied that the new procedures implemented by RTWSA address the matters raised in other complaints
- the response provided to my Office by RTWSA in relation to this complaint contradicts written notes made at the time and provided as part of the complaint
- the complaint made to RTWSA was not managed and investigated in accordance with the RTWSA complaint handling manual as RTWSA do not investigate complaints
- RTWSA simply taking the word of the agent is not investigating a complaint
- It is difficult to see how the changes to the new process for managing complaints will result in any effective change.

The matters raised by the complainant in his summary emailed to my Office on 5 December 2016 relate to:

- the actions of the rehabilitation consultant in advising the worker that he needed to sign an authority to obtain information in order to provide case conference notes to attendees, when there was no requirement to do so. The complainant alleges that RTWSA accepted the information provided by the agent in relation to this complaint and did not undertake any independent assessment
- the failure of RTWSA to instruct the agent to reimburse the worker's legal costs as a result of the decision by the agent to only communicate with the worker's legal representative
- despite the fact that complaints to RTWSA are substantiated or partially substantiated no satisfactory outcome is provided in relation to those complaints.

I have taken the complainant's response to the provisional report into account, however it has not caused me to change my views for the following reasons:

- I acknowledge that the complainant has raised a number of issues with my Office in relation to the management of complaints by RTWSA
- I have determined that the different issues raised by the complainant relate to the manner in which RTWSA assess and investigate complaints and whether that process was robust and provided the complainant with reliable and accurate information

¹ This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

² *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

- other complaints, although not directly referred to have been assessed and assisted to form a view in my provisional report that RTWSA was in breach of the Service Standards
- the complaint in relation to the matter of the worker's legal costs was the subject of a separate investigation by my Office, which is now closed
- complaints raised in supporting documents provided by the complainant are the subject of a separate investigation by my Office
- therefore I do not consider that any further assessment of the matters raised would produce a different result as I had already formed a view that RTWSA had breached the Service Standards.

Background

1. On 16 February 2015 Gallagher Bassett Services (**the agent**) received a claim for workers compensation from [the worker] in respect of an L4/5 disc protrusion. The claim was accepted by determination letter dated 24 February 2015.
2. On 3 September 2015 the agent received a claim for workers compensation from the worker in respect of an exacerbation of multi-level disc degeneration. This claim was accepted by determination letter dated 7 October 2015.
3. On 14 October 2015 the worker provided the agent with a statutory declaration declaring:

I give permission for my case and any issues arising to be discussed and disclosed with [advocate A], [advocate B], [advocate C] and [the complainant] who are all updated on my progress and case and at times will assist with advocating on my behalf by phone or in person.
4. On 18 February 2016 Senior Claims Officer emailed the worker's legal representative, advising:

As discussed 18/02/2016 via telephone, you are going to be the main and only point of contact on [the worker's] claim via email communication. As discussed all correspondence and queries etc. will filter through yourself and Gallagher Bassett will respond to your correspondence via email. As confirmed by yourself all emails from [the worker's] support people will be forwarded to yourself to finalise in a formal letter. Gallagher Bassett will respond at this point if necessary.
5. This email was copied to the worker and to his advocates, [advocate B] and [the complainant].
6. On or around 3 May 2016 the complainant emailed RTWSA's Service Improvement Team (**SIT**) with a number of complaints about the management of the worker's claim. As part of that complaint, the SIT sought information from the agent about the arrangement to communicate only with [the legal representative]. The response from the agent included the following:

Confirmation was made that all communication/queries are to go through [the worker's] legal representative, [the legal representative] and distribution of communications were the responsibility of [the legal representative] to distribute communication appropriately to all relevant parties and support people. Any emails sent from a support person to the Claim Officer (CO), [senior claims officer] would be forwarded to the legal representative to address and no correspondence was to occur between CO and support persons directly in light of previous issues and requests. This agreement was agreed upon by [the worker].
7. The SIT contacted the complainant on 23 May 2016 and, in part, advised:

I have been informed by Gallagher Bassett that on 18 February 2016 it was confirmed that all communications and queries in the future were to go through [the worker's] legal representative, [the legal representative] ...I understand that [the worker] agreed with this arrangement.

8. The complainant made further contact with the SIT on or around 25 May 2016 as he did not agree with the response that the agent had provided to the SIT. The complainant advised that the worker was not consulted and did not agree with the decision of the agent to communicate only with his legal representative.

9. Consequently the SIT sought further information from the agent who responded on 26 May 2016 stating:

[The worker] was advised of the arrangement on 18/02/2016 and no correspondence after this date was presented to Gallagher Bassett to say that [the worker] did not agree with this arrangement.

10. On 31 May 2016 the SIT emailed the agent, in part, stating:

Thanks for your recent response to complaint number 202985728 in relation to [the worker].

Unfortunately, this response conflicts with GB's response to an earlier complaint (202955636) which stated in paragraph 3 of answer 1:

"This agreement was agreed upon by [the worker]"

After receiving this response, the Service Improvement team communicated this to [the complainant] who advised that [the worker] was never consulted, let alone agreed to the actions of [the senior claims officer]. This has now put us in an embarrassing position.

Is there any evidence to suggest that [the legal representative] sought and received [the worker's] agreement? If not, to say that [the worker] agreed with the arrangement (because he hasn't said that he disagrees with it) is incorrect and confusing.

11. In response to the further follow up the agent reviewed the worker's claim file and acknowledged that the worker was not engaged with directly about the arrangement.

12. On 10 June 2016 the agent emailed the worker and the complainant stating:

In response to your recent concerns regarding Gallagher Bassett's communications we would like to apologise for the frustrations that you have encountered. Moving forward I would like to develop a new communication plan to ensure relevant parties are informed of the progress of the claim whilst maintaining a focus on [the worker's] recovery.

As requested we will cease directing communications that are not of a legal matter [sic] to [the worker's] legal representative, [the legal representative].

13. RTWSA's internal complaint form dated 24 May 2016 concludes that the complaint raised was partially substantiated on the basis that the worker did not agree to the arrangement between the agent and [the legal representative]. However, it is unclear what action RTWSA undertook given the complaint was partially substantiated.

14. On 5 December 2016 the complainant contacted my Office and complained that the SIT had failed to appropriately investigate his complaint. Further, the complainant was of the view that the SIT is merely a conduit for information, accepting undocumented assertions from the agent.

15. In response to the complaint, RTWSA advised my Office that:

- the SIT investigates and remedies breaches of the service standards in accordance with RTWSA's Complaint handling manual (**the Manual**)

- it has been recognised that RTWSA's complaint management processes are in need of improvement to ensure that the complaint management system conforms to the principles in the Australian/New Zealand Standard: Guidelines for Complaint Management in Organisations
 - a new complaints process has been designed and will be rolled out to relevant business units and the claims agents during February 2017
 - if a complaint is substantiated the SIT liaises with the Agent Assurance business unit within RTWSA which is responsible for managing the agent's performance and in some instances RTWSA will meet directly with the agent
 - RTWSA met with the agent given the number of complaints received from the worker's advocate with a view to moving the claim forward
 - RTWSA also met with the agent on several occasions since July 2016 with a view to establishing a more effective and service oriented claims management strategy
 - In relation to the complaint about the agent's decision to direct all communication to the worker's legal representative, RTWSA are of the view that the communication between the agent and the legal representative suggests agreement between the parties about the arrangement. Further, RTWSA considered the extent of the legal representative's authority to act on the worker's instructions to agree to such an arrangement.
16. On 16 March 2017 I met with RTWSA to discuss its new complaints management process. As part of that process, RTWSA advised that it will now separate the investigation of the complaint, the quality assurance of the report prepared in relation to the complaint and the decision regarding whether the complaint is substantiated or partially substantiated. Previously this determination as to whether the complaint was substantiated was undertaken by the SIT member investigating the complaint.
17. Further, clarification has been provided by RTWSA to confirm that the SIT do not make recommendations in relation to substantiated complaints. Rather, the SIT will meet with the relevant business unit within RTWSA to discuss the complaint and its findings and it then becomes the responsibility of the relevant business unit to identify what corrective action the agent needs to take.

Relevant law

18. Section 4(1) of the Act provides:

Corporation means the Return to Work Corporation of South Australia

19. Schedule 5, Part 2 Standard 4(f) of the Act provides:

4-The Standards

The Corporation will-

- (f) be clear about how the Corporation can assist a worker and an employer to resolve any issues by providing accurate and complete information that is consistent and easy to understand (including options about any claim, entitlements, obligations and responsibilities)
20. Schedule 5, Part 3 of the Act provides in relation to complaints about breaches of the standards:
- (1) A worker or an employer who has a concern about whether the Corporation has complied with any of these standards may-
 - (a) raise the issue or concern directly with the Corporation so that it can be dealt with in an immediate way.

21. Schedule 5, Part 3 of the Act provides in relation to the Corporation dealing with a complaint:

6-Procedures for the Corporation to deal with a complaint

- (1) The Corporation will work with a person who lodges a complaint to help him or her to address and resolve problems and concerns and to find a resolution to the matter in an effective way
- (2) As an important part of the steps to be taken under subclause (1), the Corporation will advise the person of-
 - (a) what steps have been taken in relation to the relevant problem or concern; and
 - (b) the procedure that can be followed to lodge a complaint with the State Ombudsman if the person is not satisfied with the resolution of the matter by the Corporation.
- (3) The Corporation will provide a response to the complaint within 10 business days after the complaint is lodged with the Corporation.
- (4) If a matter requires extended investigation, the person will, within 10 business days, receive an interim response and an indication of when a final response will be provided.

Work Instruction

22. The RTWSA Complaint handling manual:

2.4 Complaints resolution units

The complaints resolution units within our claims agents and ReturntoWorkSA's SI team are responsible for:

- managing complainant's expectations
- keeping complainants informed of the progress and outcome of investigations
- identifying opportunities for continuous improvement for consideration by senior management
- providing complainants with reasons for decisions made by our claims agents, EnABLE Unit or the operational team
- recording complaints in Curam
- conducting investigations
- monitoring progress of actions
- responding to complainants
- peer review of written responses when requested
- closing complaints
- advising complainants of the procedure that can be followed to lodge a complaint with the State Ombudsman if the complainant is not satisfied with the resolution of the matter by their claims agent or ReturntoWorkSA
- actioning tasks allocated to them within agreed time frames
- escalating complaints where appropriate
- identifying unreasonable complainant conduct
- escalating unreasonable complainant conduct
- providing advice to senior management on the status and conduct of complainants.

4.1 Definitions of complaint classification

Substantiated complaints

Complaints, that as a result of the investigation process and/or evidence provided demonstrate that processes were not followed in accordance with legislation and/or internal procedure and service standards.

Partially substantiated complaints

Complaints that, as a result of the investigation process and/or evidence provided, demonstrate that some processes were not followed in accordance with legislation and/or internal procedures and service standards.

“Partially substantiated complaints are handled in the same manner as “substantiated” complaints.

7. Investigation

The investigation process will include:

7.3 Action

There are three levels of action that can be undertaken to resolve substantiated or partially substantiated complaints:

7.3.1 Containment Action

Containment action is action taken to immediately address the issue that has resulted in the complaint being lodged. For example:

- treatment, transport or other support that has been ceased is re-instated while the complaint is under investigation

7.3.2 Corrective Action

Corrective actions involve additional activities that need to be undertaken to ensure the problem does not occur again for the complainant concerned. For example:

- actions put in place to ensure all future payments are paid on time

7.3.3 Preventative Action

Preventative actions seek to address systemic issues (same/similar complaints received from multiple complainants). Examples include:

- changes to policy or procedure to provide clarification or address an identified gap

Whether ReturntoWorkSA breached the service standards by failing to resolve an issue by providing complete and accurate information

23. The complainant alleges that:

After receiving that explanation from RTWSA [regarding the agent’s assertion that the worker had agreed to the arrangement with the legal representative] if it was not already abundantly clear then it should be by now that RTWSA do not investigate complaints according to how the word “investigate” is defined in general usage. An RTWSA “investigation” involves receiving the response to the complaint from their Agent and then conveying that explanation to the complainant and closing the complaint.

24. At the time that the complainant raised the matter with RTWSA, the management and investigation of the complaint was conducted in accordance with the Manual. While the Manual provided the procedures relevant to investigating a complaint it did not clearly outline that if the SIT determined that the complaint was substantiated or partially substantiated what action it would take to resolve the complaint.

25. Absent any evidence to the contrary, I am of the view that in relation to the complainant’s matter the SIT relied on the information that the agent had provided that the worker agreed with the arrangement to direct all communications to his legal representative and that it did not undertake any independent assessment of the information that the agent had provided.

26. The way in which the SIT investigated the complaint demonstrated that its investigation process failed to identify whether the agent had provided it with accurate and reliable information. Therefore the complainant could not have been satisfied that the SIT addressed the complaint in a robust way or gave proper consideration to the response provided by the agent and whether this information was likely to be correct.
27. Further, this complaint has highlighted that taking information from the agent in response to a complaint, particularly if that complaint is about the agent, can create a situation in which that information may not be able to be fully relied upon to form a view.
28. I note that at the time of the complaint the SIT investigated and remedied breaches of the service standards in accordance with the Manual. However, I am of the view that the Manual is not clear as to who has the responsibility to make recommendations or ensure implementation of corrective actions when a complaint is substantiated or partially substantiated.
29. Notwithstanding the above, RTWSA has implemented a new complaints process that addresses the issues identified by the complainant. In particular, the complaint has highlighted that there were deficiencies in the way complaints were investigated and whether an independent assessment was made of the responses provided by the agent to the SIT.
30. Therefore, I am satisfied that RTWSA has taken corrective action to prevent this type of complaint from occurring again by its new process for managing complaints.
31. However, on the basis of the information before me I am of the view that RTWSA breached service standard 4(f) by failing to provide accurate information to the complainant and as a consequence the complainant's complaint was not resolved.

Conclusion

In light of the above, my final view is that RTWSA acted in a manner that was in breach of clause 4(f) of the Service Standards set out in schedule 5 of the *Return to Work Act 2014*.

Recommendations

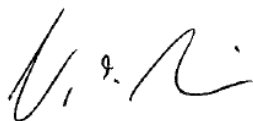
To remedy this error, I recommend in accordance with clause 7 under schedule 5 of the Return to Work Act that RTWSA:

1. Provide a written apology to the worker for the failure to appropriately investigate his complaint and provide a response that was accurate and supported by evidence.

In accordance with schedule 5, part 3 of the Return to Work Act 2014 RTWSA should report to the Ombudsman by **23 June 2017** on what steps have been taken to give effect to the recommendation above, including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendation.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

8 June 2017