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COMPENSATION LAWYERS

# My Comcare claim has been rejected because I didn’t give my employer adequate notice in writing of my injury - what can I do?

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If your Comcare claim has been rejected because Comcare says you didn't give "adequate" written notice of your injury, it can feel like the end of the road. Section 53 of the Safety, Rehabilitation and Compensation Act 1988 does set a notice requirement, but it's not as rigid as most rejection letters make it sound. Below, we break down what the courts and the Administrative Review Tribunal (ART) actually require, and the circumstances where late or informal notice can still be accepted.

## The three-part test under section 53

Section 53 requires written notice of the relevant "injury" to be given as soon as practicable, and it's treated as a "threshold jurisdictional issue" - meaning it has to be satisfied before Comcare will even get to the substance of a claim. The section raises three separate questions:

What is the relevant "injury"?

What counts as sufficient "notice in writing" of that injury?

Was that notice given to the relevant authority as soon as practicable after the employee became aware of the injury?

Each is considered below.

# What counts as the "injury" for notice purposes?

The leading decision on what is, or isn't, the relevant "injury" for section 53 purposes is Abrahams v Comcare [2006] FCA 1892. The Federal Court held that the ART has considerable power to consider a reformulated claim - even where it's based on a different description of injury to the one originally notified in the Application for Compensation form completed by the injured worker - and takes a ‘broad, generous and practical’ approach to what counts as "notice in writing" of an injury.

Importantly, the Court recognised the beneficial purpose of the SRC Act and the reality that laypeople - with differing levels of education, medical understanding and legal advice (in most cases, none at all) - are the ones giving this notice. As the Court observed, "nothing is more common than that medical diagnoses change and evolve."

In practice, this means lodging the actual claim form is, on its own, will usually be enough to satisfy the section 53 notice requirement.

# What counts as sufficient notice in writing?

If Comcare is the "relevant authority" - meaning your employer isn't a self-insurer - notice given to your employer is treated as sufficient for section 53 purposes, because the employer is considered Comcare's "agent". In practice, this means an email with enough detail about your injury sent to a manager, supervisor, HR representative or WHS officer will generally satisfy the notice requirement.

# When must notice be given? "As soon as practicable" explained

Respondents (Comcare or self-insured employers) tend to focus on this third limb when defending a claim before the ART, and the words "become aware" carry a lot of weight - often more than respondents give them credit for.

The requirement is to give notice as soon as practicable after you become aware of the injury - not as soon as practicable after the incident that caused it. This matters because:

> If you only become aware of a possible causal link between your condition and a previous work incident, and you give written notice around the time you become aware of that link, this will generally be treated as sufficient notice.
>
> The same applies to becoming aware that the injury is the cause of your incapacity or impairment, which can occur well after the injury itself.
>
> Becoming aware of the true diagnosis of a work-related condition, with notice given around the time you learn the correct diagnosis, will also generally satisfy section 53.

Because of this, the timing of when you actually became aware of the true nature and extent of your condition is critical - not simply the date of the original injury or incident.

## The safety net: section 53(3) and non-complying notice

Separate to the three-part test above, section 53(3) provides an important safety net. Even where written notice is, on its face, "non-complying" - whether in terms of the information it contains or when it was given - it will still be treated as valid notice under section 53 if the relevant authority wasn't prejudiced by the non-compliance, or if the failure was due to absence from Australia, ignorance, mistake, or any other reasonable cause.

In practice, section 53(3) can operates as a kind of catch-all: if you can show Comcare or your employer wasn't genuinely prejudiced by any non-compliance with the strict notice requirements, your notice can still be treated as valid.

It's generally difficult for a respondent to establish real prejudice, and taking steps such as providing complete medical records will usually be enough to counter most attempts to claim it. That said, prejudice has been successfully argued in cases involving very long delays - for example, a six-year delay in notifying a mental injury claim was found to have prejudiced the respondent, because it had lost the opportunity to interview key witnesses while their recollections were still to be considered reliable.

## What counts as "any other reasonable cause" under section 53(3)(c)?

Decided cases can provide some guidance on what will, and won't, count as "any other reasonable cause" for a delay:

Generally accepted as a reasonable cause:

> The claimant delayed because they genuinely believed their condition would improve on its own.

> The delay was excused because the injured worker's medical needs had already been met by the employer, outside the compensation scheme.

> The claimant could point to a number of other stressors in their personal life that meant they had more pressing concerns at the time.

Not accepted as a reasonable cause:

> A fear of "rocking the boat" with an employer.

## Related reading

- Case review: Tribunal accepts two injured worker's Comcare claims but rejects a third claim
- Appealing a Comcare Worker's Compensation Decision

# What should you do if your Comcare claim has been rejected for late notice?

A rejection on s53  grounds very rarely ends your claim. As set out above, section 53 has real flexibility built into it - particularly where you can point to a reasonable explanation for any delay, or show that Comcare or your employer wasn't actually prejudiced by it. Getting your specific circumstances properly assessed is the first next step  in dealing with a s53 based rejection.

Cameron Hall Compensation Lawyers has helped injured workers challenge Comcare decisions like this. Get in touch for a free, no-obligation assessment of your notice-related rejection.

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