

Accident Compensation Act 1985

WORKCOVER (LITIGATED CLAIMS) LEGAL COSTS ORDER 2010

Order in Council

The Governor in Council, under section 134AG(1) of the **Accident Compensation Act 1985**, makes the following Order:

Dated 26 October 2010

Responsible Minister

TIM HOLDING MP

Minister for Finance, WorkCover

and the Transport Accident Commission

MATTHEW McBEATH
Clerk of the Executive Council

1. Citation

This Order may be cited as the WorkCover (litigated claims) Legal Costs Order 2010.

2. Application

This Order applies to proceedings issued by a worker in accordance with section 134AB(16)(b), following a section 134AB(4) application where that application was made on or after the date of commencement of the Order pursuant to section 134AGA(1).

This Order specifies the professional costs and disbursements that may be paid by the Authority or a self insurer to a legal practitioner acting on behalf of a worker in respect of any claim, or proceedings pursuant to section 134AB(16)(b) of the **Accident Compensation Act 1985**.

The entitlement to professional costs and disbursements under this Order replaces any other entitlement of a worker or a legal practitioner to be awarded legal practitioners' professional costs and disbursements payable by the Authority or a self insurer for and incidental to a proceeding under section 134AB(16)(b) of the Act, and has full force and effect notwithstanding anything to the contrary in the **Legal Professions Act 2004**, the **Supreme Court Act 1986** or the **County Court Act 1958** or in any regulation, rules, order or other document made under any of those Acts.

3. Definitions

Unless the context otherwise requires, or the contrary intention appears, terms defined by the Act have the same meaning.

In this Order:

'**Act**' means the **Accident Compensation Act 1985**;

'**application**' means an application in the form referred to in section 134AB(5)(a) of the Act;

'**application for pecuniary loss and pain and suffering damages**' means for the purposes of section 134AB(38)(b) of the Act the worker relies on consequences with respect to pain and suffering and loss of earning capacity as specified in accordance with Ministerial Directions 5.4(b)(iii).

'**application for pain and suffering damages only**' means for the purposes of section 134AB(38)(b) of the Act the worker relies on consequences with respect to pain and suffering as specified in accordance with Ministerial Directions 5.4(b)(iii).

'**certificate**' means a certificate in writing as referred to in Section 134AB(16)(a)(ii) of the Act.

'**claim**' means the proposed claim at common law, in respect of each cause of action which the worker seeks to maintain;

'County Court Rules' means the County Court Civil Procedure Rules 2008 made under the **County Court Act 1958**;

'Day 1 of hearing' means the day on which the application for leave referred to in section 134AB(16)(b) is listed to be heard before the Court. Where a hearing date lapses due to an adjournment or the case is not reached, 'Day 1' is the day when the application for leave referred to in section 134AB(16)(b) is next listed to be heard before the Court.

'legal practitioner' has the same meaning as the term 'Australian lawyer' in the **Legal Profession Act 2004**;

'medical report' means a medical report as defined in section 134AB(37) of the Act;

'professional costs' means professional costs payable in respect of the items referred to in the scale of costs to the County Court Rules or the Scale of Costs contained in Appendix A and B of Chapter 1 to the Supreme Court Rules;

'Scale of Costs' means the Scale of Costs contained in Appendix A to the County Court Rules or the Scale of Costs contained in Appendix A and B of Chapter 1 to the Supreme Court Rules;

'Supreme Court Rules' means the Supreme Court (General Civil Procedure) Rules 2005 made under the **Supreme Court Act 1986**;

'The Notice' means the Notice referred to in section 4 Part A which notifies a worker's legal practitioner that the worker satisfies the requirements of section 134AB(38)(b)(i) but not the requirements of section 134AB(38)(b)(ii);

'Time of Resolution' means that point in time, at which the issue as to whether the injury suffered by the worker constitutes a 'serious injury' within the meaning of section 134AB(37) is certified by the Authority or self insurer or determined by the Court;

'treater's notes and records' means any notes, records, correspondence and/or medical reports held by or of any medical practitioner, hospital, health service provider, or any other person concerning any medical treatment provided to the worker.

4. **Professional Costs and Disbursements**

Part A. Where a proceeding is instituted by a worker pursuant to section 134AB(16)(b) of the Act, and the professional costs of such proceedings are awarded to the worker, the worker's legal practitioner shall be entitled to be paid professional costs by the Authority or self insurer for the proceeding, for whichever time of resolution category A,B,C or D applies, as follows:

1. For a proceeding issued pursuant to section 134AB(16)(b) following a section 134AB(4) application for both pain and suffering damages and pecuniary loss damages as follows:

Time of resolution*		Serious Injury granted by the Authority, self Insurer or determined by the Court pursuant to section 134AB(16)(b) or (17)		
		Pain and suffering and pecuniary loss	Pain and suffering only	Pain and suffering only, after the Notice [#]
A	Less than or equal to 120 days after notice of appearance is filed at court	\$8,400	\$3,886	\$2,496
B	Between 120 days after the notice of appearance is filed at court and 14 days prior to day 1 hearing	\$15,400	\$5,431	\$2,496
C	Greater than 120 days after the notice of appearance is filed at court and less than or equal to 14 days prior to day 1 hearing	\$19,900	\$7,606	\$2,496
D	Day 1 of hearing	\$22,900	\$9,106	\$2,496
E	Every subsequent day or part day after day 1 of hearing	Additional \$2,000	Additional \$300	Additional \$0

* If the time of resolution can be either A or D, then the time of resolution which produces the larger dollar amount is payable.

If the Authority or a self-insurer gives Notice (the Notice) in writing to the worker's legal practitioner that the Authority or the self-insurer is satisfied that a worker's injury satisfies requirements of section 134AB(38)(b)(i) but not the requirements of section 134AB(38)(b)(ii), then subject to the worker abandoning that part of the application seeking the leave of the Court to bring proceedings for pecuniary loss damages, the professional costs payable above is the sum payable at the time the Authority or the self-insurer gives the Notice in writing to the worker's legal practitioner.

2. For a proceeding issued pursuant to section 134AB(16)(b), following an application for pain and suffering damages only, as follows :

Time of resolution*		Serious Injury granted by the Authority, self Insurer or determined by the Court pursuant to section 134AB(16)(b)
A	Less than or equal to 120 days after notice of appearance is filed at court	\$6,366
B	Between 120 days after the notice of appearance is filed at court and 14 days prior to day 1 hearing	\$11,966
C	Greater than 120 days after the notice of appearance is filed at court and less than or equal to 14 days prior to day 1 hearing	\$15,566
D	Day 1 of hearing	\$17,966
E	Every subsequent day or part day after day 1 of hearing	Additional \$1,600

* If the time of resolution can be either A or D, then the time of resolution which produces the larger dollar amount is payable.

Notes: The notes below apply to Section 4 Parts A1 and A2.

Conference in relation to proceedings issued pursuant to section 134AB(16)(b)

In addition to the fees payable in Part A if a conference in relation to proceedings issued by a worker pursuant to section 134AB(16)(b) is held between the parties to that proceeding less than or equal to 120 days after the Appearance in respect of such a proceeding is filed, the professional costs of the worker's legal practitioner in respect of such a conference are fixed in the sum of \$1,000 (including Counsel's fees).

Adjournments

If a court orders the defendant/respondent to pay the plaintiffs/applicant's professional costs of an adjournment of the hearing of a proceeding in which the plaintiff/applicant seeks leave of the Court pursuant to section 134AB(16)(b), the professional costs are fixed in the sum of \$2,000 plus any sum for counsel fees calculated in accordance with item 31 in the Scale of Costs or any other sum which is agreed or ordered by the Court to be paid by the defendant/respondent.

Re-Hearings

Separate from the final professional costs orders made on the first hearing of a proceeding pursuant to section 134AB(16)(b) on a re-hearing ordered by the Court of Appeal of a proceeding pursuant to section 134AB(16)(b), where the worker obtains a professional costs order from a court in respect of such a re-hearing, then the worker's legal practitioner is entitled to be paid by the Authority or self-insurer the professional costs of the re-hearing of such proceeding at 50% of the day 1 of hearing costs referred to in Part A1 or A2 plus any additional sum payable under item E in Part A1 or A2 together with reasonable disbursements as described in Part B hereof, together with Counsel's fees as described in the notes applicable to Section 4 Part B hereof.

Interlocutory Proceedings

In addition to the fees payable under Part A1 or A2 a fee of \$400 is payable for professional costs for any contested objections hearing or \$650 for any other related practice court application plus any sum for counsel fees calculated in accordance with item 31 in the Scale of Costs or any other sum which is agreed or ordered by the Court to be paid by the defendant plus any disbursements as described under Part B.

Part B. In addition to the sums specified in Part A above, the worker's legal practitioner shall be entitled to be paid as a disbursement:

1. reasonable fees for relevant and necessary non medical expert reports;
2. reasonable interpreters' fees and travel allowances payable in accordance with the Scale of Costs contained in the County Court Rules; and
3. in respect to medical reports and treaters' notes and records relied upon which were necessary or proper to be obtained on behalf of the worker, the reasonable cost of:
 - (a) obtaining a copy of all treaters' notes and records (excluding medico-legal reports).
 - (b) the reasonable cost of medico-legal reports relevant to the claim. The Authority or Self-Insurer may allow the cost of more than one medico-legal report per specialty.
4. the cost of counsel's fees (including brief fee) incurred not more than 28 days prior to day 1 of the hearing. The counsel fees payable will be calculated in accordance with item 31 in the Scale of Costs or any other sum which is agreed or ordered by the Court.
5. the reasonable cost of any court fees and related services payable.

Part C. If a dispute arises in relation to the allowance of an item claimed or the reasonable cost of the item contained in Part B, the County Court Rules of Civil Procedure will apply to the dispute resolution process.

5. Indexation

The amounts in dollars specified in section 4, Part A of this Order will be varied in respect of the financial year beginning on 1 July 2011 and each subsequent financial year in accordance with the formula –

$$A \times \frac{B}{C}$$

where –

- A. the amount in dollars specified in section 4, Part A or, if that amount has been varied in accordance with this paragraph, that amount as last so varied.
- B. is the all groups consumer price index for Melbourne as at 15 June in the preceding financial year last published by the Australian Statistician in respect of the December quarter of that financial year.
- C. is the all groups consumer price index for Melbourne as at 15 June in the year preceding the preceding financial year published by the Australian Statistician in respect of the December quarter preceding that 15 June.

The amounts varied on 1 July 2011 in accordance with this clause will apply to proceedings issued pursuant to section 134AB(16)(b) on or after 1 July 2011 and before 1 July 2012.

The amounts varied each subsequent financial year in accordance with this clause will apply to proceedings issued pursuant to section 134AB(16)(b) during that subsequent financial year.
