

## ORDERS IN COUNCIL

### Accident Compensation Act 1985

#### WORKCOVER (PRE-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 (pre-litigated claims) Legal Costs Order 2010.

#### 2. Application

This Order applies to applications instituted by a worker in accordance with section 134AB brought or made on or after the date of commencement of the Order pursuant to section 134AG(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 application under section 134AB 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 an application, or a section 134AB(12) conference 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**;

'**advice**' means the advice of the Authority or self-insurer referred to in section 134AB(7) of the Act;

'**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**;

**'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;

**'section 134AB(12) conference'** means a meeting, discussion or series of meetings or discussions commenced in accordance with section 134AB(12) of the Act;

**'statutory offer'** and **'statutory counter offer'** means the statutory offer and statutory counter offer respectively referred to in section 134AB(12) of the Act;

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

**'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 worker settles or compromises a claim and recovers damages after making an application and after a section 134AB(12) conference has commenced, but where no application referred to in section 134AB(16)(b) has been made and prior to commencing proceedings in accordance with section 134AB(12) of the Act, the worker's legal practitioner is entitled to be paid by the Authority or a self insurer the professional costs of the application and the section 134AB(12) conference as follows:

1. If an application is for both pecuniary loss and pain and suffering damages and the worker recovers damages for both pecuniary loss and pain and suffering the legal practitioner's professional costs are \$13,500 (inclusive of Counsel's fees); or
2. If an application is for both pecuniary loss and pain and suffering damages, and the worker recovers damages for pain and suffering damages only, the legal practitioner's professional costs are \$12,000 (inclusive of Counsel's fees); or
3. If an application is for pain and suffering damages only, the legal practitioner's professional costs are \$13,500 (inclusive of Counsel's fees); or
4. If before an application is made, an assessment of the degree of whole person impairment of the worker made under section 104B of the Act as a result of the injury is 30 per centum or more, the legal practitioner's professional costs are \$13,500 (inclusive of Counsel's fees).

**Part B.** Where a worker settles or compromises a claim and recovers damages after making an application and after a section 134AB(12) conference has commenced and where, after an application referred to in section 134AB(16)(b) has been made, a worker is granted a certificate by the Authority or a self-insurer or a Court gives leave to bring proceedings, and prior to commencing proceedings in accordance with section 134AB(12) of the Act, the worker's legal practitioner is entitled to be paid by the Authority or a self insurer the professional costs of the application and the section 134AB(12) conference as follows:

1. If an application is for both pecuniary loss and pain and suffering damages and the worker recovers damages for both pecuniary loss and pain and suffering the legal practitioner's professional costs are \$9,600 (inclusive of Counsel's fees); or
2. If an application is for both pecuniary loss and pain and suffering damages, and the worker recovers damages for pain and suffering damages only, the legal practitioner's professional costs are \$8,034 (inclusive of Counsel's fees); or
3. If an application is for pain and suffering damages only, the legal practitioner's professional costs are \$8,034 (inclusive of Counsel's fees).

**Part C.** In addition to the items referred to in Part A or Part B above, the worker's legal practitioner is 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 treator's notes and records relied upon and exchanged on behalf of the worker, the reasonable cost of:
  - (a) obtaining a copy of all treator's notes and records (excluding medico legal reports).
  - (b) one medico legal report per specialty relevant to the injury or injuries alleged to be and accepted as or determined to be serious injury or serious injuries. The Authority or self insurer may allow the cost of more than one medico legal report per speciality. Payment for medico legal reports shall only be made where a worker settles or compromises a claim and recovers damages after making an application and after a section 134AB(12) conference has commenced, and prior to commencing proceedings in accordance with section 134AB(12) of the Act.

**Part D.** Where a worker settles or compromises a claim and recovers damages, or obtains judgment and is awarded damages after instituting proceedings referred to in section 134AB(1) of the Act ('the proceeding') and if section 134AB(28)(b) of the Act applies, the worker's legal practitioner is entitled to be paid by the Authority or a self insurer professional costs and disbursements of the application and the section 134AB(12) conference in accordance with the amounts set out in Part A, or Part B and Part C and such amounts include any amount in respect of attendances or disbursements incurred prior to rejection of the statutory counter offer by the Authority or self-insurer or before the expiration of 21 days from receipt of the statutory counter offer, whichever is earlier.

**Part E.** Where a worker settles or compromises a claim and recovers damages prior to making an application (excluding claims made pursuant to sections 135BA and 135BBA), the worker's legal practitioner shall be entitled to professional costs and disbursements to be paid by the Authority or a self-insurer as follows:

1. legal practitioner's professional costs, \$4,000 (inclusive of counsel's fees);
  2. disbursements in accordance with Part C.
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