

Welcome

CHANGES to COSTS in NSW workers' compensation matters

By Phillipa Alexander

Practitioners will be pleased to have confirmation that from 1 November 2006 the current *Workers' Compensation Regulation 2003* schedule 6 compensation costs table will be replaced with an entirely new costs regime for workers' compensation matters. The costs changes reflect procedural changes in the Workers' Compensation Commission and are contained in schedule 6 of the *Workers' Compensation Amendment (Costs) Regulation 2006*. There will be an eight-week transitional period while the changes are implemented.

The new regulated costs have been agreed by WorkCover in consultation with members of the legal profession. The new lump-sum, event-based costing system will determine the amount payable for legal services according to the nature of the claim and the point at which resolution is achieved. For example, a litigated s66 and s67 claim will attract a higher rate than a straight s66 claim. Differing amounts are payable where the matter settles without litigation, or is settled or determined with litigation at the teleconference, conciliation or arbitration stages. A maximum 30% additional loading will apply where there are multiple respondents. Additional fixed amounts are payable for appeals from medical assessment or arbitration. The costs will also vary according to whether the client is an applicant or a respondent, with applicants' solicitors receiving higher amounts. The new lump sums will be easier to determine, so there should be little, if any, dispute as to the amount claimable.

The new maximum costs amounts are not unattractive and will provide far fairer remuneration than schedule 6 has done to date, and should be well received by practitioners.

WORK INJURY DAMAGES COSTS

Costs for legal services in work injury damages matters remain regulated and unchanged. They are calculated in accordance with three work injury costs tables, set out in schedule 7 of the *Workers' Compensation Regulation 2003*. The tables list the activities and events for which costs are payable and the maximum costs for legal services payable for each stage. Costs are also calculated according to a percentage of the settlement amount or award.

Practitioners may contract out of the maximum costs in schedule 7 for practitioner:client costs, provided they adhere strictly to the procedure set out at clause 88; namely:

- (a) make disclosure under division 3 of part 3.2 of the *Legal Profession Act 2004*;
- (b) enter into a costs agreement with the client (other than a conditional costs agreement that provides for the payment of a premium) in accordance with division 5 of part 3.2 of the Act;¹ and
- (c) before entering into the costs agreement, advise the party (in a separate written document) that, even if costs are awarded in favour of the party, the party will be liable to pay the amount set out in the costs agreement so far as it exceeds what would have been payable under the *Workplace Injury Management and Workers' Compensation Act 1998* had there been no costs agreement.

Where there is any prospect of a work injury damages claim being instituted, even where the claim is not ultimately pursued, disclosure must be made at the outset of the matter, as required by s311 of the *Legal Profession Act 2004*, in order to comply with clause 88. If disclosure is not made until the client formally elects to take this course, the disclosure may be held not to comply with s311 and therefore the solicitor may not have effectively contracted out of the schedule 7 costs.

So long as they comply with clause 88, practitioners may recover fair and reasonable costs in accordance with their costs agreement for legal services provided in relation to work injury damages matters. ■

Note: 1 Prior to the *Legal Profession Act 2004*, which commenced on 1 October 2005, practitioners could enter into a conditional agreement that provided for the payment of a premium of not more than 10%. However, under the 2004 Act, a premium can no longer be charged under a conditional costs agreement in relation to a claim for damages.

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