



WESTERN
AUSTRALIAN
GOVERNMENT

Gazette

ISSN 1448-949X

PRINT POST APPROVED PP665002/00041

4765



PERTH, THURSDAY, 10 NOVEMBER 2011 No. 216 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 3.30 PM

© STATE OF WESTERN AUSTRALIA

WORKERS' COMPENSATION AND INJURY
MANAGEMENT ACT 1981

**WORKERS' COMPENSATION
(LEGAL PRACTITIONERS
AND REGISTERED AGENTS)
COSTS REPORT 2011**

**WORKERS' COMPENSATION
(LEGAL PRACTITIONERS
AND REGISTERED AGENTS)
COSTS DETERMINATION 2011**

WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981
WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS)
COSTS REPORT 2011

Made by the Costs Committee under section 273 of the *Workers' Compensation and Injury Management Act 1981* ("Act").

PART 1—PRELIMINARY

1. Citation

(1) This report may be cited as the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Report 2011*.

(2) The costs determination set out in the Schedule to this report is referred to in this report as the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2011* ("Costs Determination").

PART 2—CONSULTATION

2. Consultation under section 272 of the Act

(1) The Costs Committee considered submissions made to it.

(2) Before making the Costs Determination the Costs Committee—

(a) Reviewed all submissions received

(b) Considered the—

(i) *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2007*;

(ii) *Legal Practitioners (Magistrates Court) (Civil) Determination 2010*;

(iii) *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2010*;

(iv) *Workers' Compensation and Injury Management Act 1981*;

(v) *Workers' Compensation and Injury Management Regulations 1982*;

(vi) *Workers' Compensation and Injury Management Amendment Bill 2011*;

(vii) Draft Conciliation Rules 2011;

(viii) Draft Arbitration Rules 2011;

(ix) *Workers' Compensation (DRD) Rules 2005*;

(c) Examined the report and recommendations of WorkCover WA's 2009 legislative review; and

(d) Consulted with officers of the Dispute Resolution Directorate.

PART 3—REPORT ON THE COSTS COMMITTEE'S CONCLUSIONS

3. Scale of costs established

(1) During the process of reviewing the scale of costs set out in the Table to clause 8 of the *Costs Determination 2007*, the Costs Committee was mindful that the Act is intended to—

(a) promote the early settlement of issues and disputes by agreement; and

(b) discourage unnecessary delay, excessive attendances and needless preparation of documentation.

(2) The Costs Committee is of the view that this Costs Determination, read in conjunction with the *Workers' Compensation and Injury Management Regulations 1982*, the *Conciliation Rules and the Arbitration Rules* (in draft form), gives effect to the intention of the legislation.

(3) The scale of costs is structured to create disincentives for over-servicing and reflects the philosophy of the Act with regard to expediting the resolution of disputes and introducing transparency and containment of legal costs in relation to disputes.

(4) Based on the consultation outlined in Part 2, the Costs Committee agreed to maintain an "event based" costs scale, with composite fees recoverable when specific milestones within the dispute resolution process have been achieved.

(5) The Costs Committee considered indexation options for the costs scale and is of the view that the Magistrates' Court costs scale contains the most appropriate rates with which to align hourly rates in this Costs Determination. The Costs Committee agreed to retain that relationship to enable hourly rates to be automatically adjusted in line with hourly rates applicable under the Magistrates' Court costs scale.

(6) The Costs Committee also considered the overall financial health of the workers' compensation scheme in revising the costs scale.

MICHELLE REYNOLDS, Presiding Member.
DAVID BRUNS, Member.
KARIN LEE, Member.
MARCUS COCKER, Member.

Schedule

WORKERS' COMPENSATION AND INJURY MANAGEMENT ACT 1981

WORKERS' COMPENSATION (LEGAL PRACTITIONERS AND REGISTERED AGENTS) COSTS DETERMINATION 2011

Made by the Costs Committee under section 271 of the Act.

1. Citation

(1) This determination may be cited as the *Workers' Compensation (Legal Practitioners and Registered Agents) Costs Determination 2011* ("Costs Determination").

2. Commencement

(1) This Costs Determination comes into operation on 1 December 2011.

3. Application

(1) This Costs Determination applies to the remuneration of legal practitioners and registered agents in respect of work carried out for the purposes of proceedings before a WorkCover WA dispute resolution authority.

(2) This Costs Determination does not apply to the remuneration of legal practitioners or registered agents in respect of business carried out before the commencement of this Costs Determination.

(3) This Costs Determination is to be read and applied in its entirety. The scale of costs applicable under this Costs Determination is to be interpreted in accordance with the notes set out in this Schedule.

4. Review

(1) This costs scale enables the hourly rates used to calculate costs to be adjusted consequent to any changes in the hourly rates available under the *Magistrates' Court costs scale*, based on determinations of the Legal Costs Committee established under the *Legal Profession Act 2008*.

(2) The Costs Committee may review this Costs Determination after the first year of operation.

(3) The Costs Committee may amend or revoke this Costs Determination at any time, pursuant to section 271(4) of the Act.

5. Terms used in this Determination

(1) Unless otherwise stated, all terms used in this Costs Determination have the same meaning given in the—

- (a) *Workers' Compensation and Injury Management Act 1981*;
- (b) *Workers' Compensation and Injury Management Regulations 1982*;
- (c) *Conciliation Rules 2011*; and
- (d) *Arbitration Rules 2011*.

(2) For ease of reference, the terms are reproduced hereunder. In this Costs Determination—

"agent service" means any service performed by a person—

- (a) in the person's capacity as an agent; and
- (b) in or for the purposes of a proceeding before a dispute resolution authority.

"application" means an application for a decision of a dispute resolution authority.

"approved form" means a form approved under the Conciliation Rules or a form approved under the Arbitration Rules.

"Arbitration Service" means the Workers' Compensation Arbitration Service established under section 182ZO of the Act.

"Arbitration Rules" means the rules made under section 293B of the Act.

"arbitrator" means an officer of WorkCover WA approved under section 182ZQ of the Act as an arbitrator.

"assessment of costs" means an application for assessment of costs under the Conciliation Rules or under the Arbitration Rules.

"conciliation officer" means an officer of WorkCover WA designated under section 182B of the Act as a conciliation officer.

“**Conciliation Service**” means the Workers’ Compensation Conciliation Service established under section 181 of the Act.

“**Conciliation Rules**” means the rules made under section 293A of the Act.

“**costs**” means—

- (a) costs of a party (including fees, charges and disbursements);
- (b) costs of a proceeding; and
- (c) such other costs as may be prescribed by regulation.

“**costs determination**” means a determination published under section 273 of the Act.

“**Director**” means the officer of WorkCover WA designated under section 182A of the Act as the Director, Conciliation.

“**dispute resolution authority**” means the Director, the Registrar, a conciliation officer, or an arbitrator.

“**legal practitioner**” means an Australian legal practitioner within the meaning of that term as defined in the *Legal Profession Act 2008*.

“**legal service**” means any service performed by a person—

- (a) in the person’s capacity as a legal practitioner; and
- (b) in or for the purposes of a proceeding before a dispute resolution authority.

“**Magistrates Court costs scale**” means the *Legal Practitioners (Magistrates Court) (Civil) Determination 2010* made by the Legal Costs Committee under the *Legal Profession Act 2008*, or any subsequent determination made in substitution for that determination.

“**proceeding**” means a proceeding before a dispute resolution authority.

“**registered agent**” means a person registered under regulations made under section 277 of the Act.

“**Registrar**” means the officer of WorkCover WA designated under section 182ZP of the Act as the Registrar, Arbitration.

“**serve**” has the same meaning as is defined in the Conciliation Rules or the Arbitration Rules.

“**taxing officer**” means the Director, a conciliation officer, the Registrar, or an arbitrator.

6. No minimum charge

In no respect is this Determination to be seen as providing a minimum number of hours for any work done. For example, item 2 provides for up to 3 hours for the work involved. The number of 3 hours is a maximum, but actual hours may need to be substantiated.

7. Maximum costs

(1) In accordance with section 274 of the Act, legal practitioners and registered agents are not entitled to be paid or recover an amount that exceeds the maximum costs for the service by this Costs Determination.

(2) The costs payable to a legal practitioner or registered agent at each milestone described in the Table to clause 9 must not exceed the maximum amount corresponding to that event.

(3) Further to this, in accordance with section 275 of the Act, an agreement is not to be made for a legal practitioner or registered agent to receive any greater reward than is provided for in this Costs Determination. Any agreement made contrary to section 275 of the Act is void.

(4) Subject to clause 8, registered agents are entitled to be paid or recover 50 per cent of the amount provided for Senior Practitioners in the Table to clause 8.

(5) Registered agents are entitled to recover 100 per cent of disbursements, in accordance with item 10 under “Stand-Alone Items” of the Table to clause 9.

8. Hourly Rates

(1) This clause is to be read in conjunction with clauses 4(1) and 5(2).

(2) The hourly rates set out in the Table to this clause are the maximum hourly rates, inclusive of GST, that shall be used to calculate the fixed amounts for each corresponding item in the costs scale set out in the Table to clause 9.

(3) The maximum hourly rates which a legal practitioner or registered agent may charge are not to exceed the amounts set out in the Table to this clause.

Table to Clause 8

FEE EARNER	MAXIMUM ALLOWABLE HOURLY RATE
Registered Agent	50 per cent of the hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale
Junior Practitioner (Admitted for less than 5 years)*	The hourly rate applicable to Junior Practitioners under the Magistrates Court costs scale
Senior Practitioner (Admitted for 5 years or more)*	The hourly rate applicable to Senior Practitioners under the Magistrates Court costs scale

* Where a local legal practitioner has held an interstate practice certificate, the length of admission in that other jurisdiction is to be counted in assessing that practitioner's years of admission for the purposes of this Determination.

9. Scale of costs

(1) The maximum hours for which a legal practitioner or registered agent may charge a client in relation to conciliation, arbitration and Stand-Alone Items are not to exceed the amounts set out in the Table to this clause.

Table to Clause 9

WORKERS' COMPENSATION SCALE OF COSTS 2011

Item	Description	Maximum Allowable Hours
1	Obtaining instructions from client and attempts to resolve the dispute by negotiation prior to involvement in a proceeding—may be claimed once only regardless of the point at which the practitioner or agent becomes involved.	4
Conciliation Service		
2	Preparation of and lodging an application to the Conciliation Service including relevant supporting documentation in approved form in accordance with the Conciliation Rules.	+3
3	Where the dispute is resolved after the lodging of an application and prior to a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules.	+2
4	Where the dispute is resolved at or after a conciliation conference, including all necessary preparation and documentation in approved form in accordance with the Conciliation Rules.	+5
	Add for each additional conference	+3
Arbitration Service		
5	Preparation of and lodging an application or reply to the Arbitration Service including all necessary documentation in approved form in accordance with the Arbitration Rules.	8
6	Where the dispute is resolved after the lodging of an application to the Arbitration Service and prior to the arbitration hearing, including all necessary preparation and documentation in the approved form and attendance at any directions hearing in accordance with the Arbitration Rules.	+5
7	Where the dispute is resolved at or after an arbitration hearing, including all necessary preparation and documentation in the approved form in accordance with the Arbitration Rules.	+7
	Add for each additional hearing day.	+7
Stand Alone Items—Applicable to conciliation or arbitration service as appropriate		
8	Settlement of the claim by agreement under Schedule 2 or redemption and filing a section 76 memorandum of agreement. (excluding disbursements which are to be paid in accordance with item10)	10

Item	Description	Maximum Allowable Hours
9	<p>Allowances for witnesses. The amount of any costs to be paid in respect of work done by a practitioner in conducting any proceedings in a dispute may include a reasonable allowance for—</p> <p>(a) witnesses called because of their professional, scientific or other special skill or knowledge; and</p> <p>(b) witnesses called other than those covered in paragraph (a).</p> <p>In fixing an allowance for witnesses under paragraph (b) the taxing officer may have regard to the amount of salary, wages or income (if any) actually lost by the witness, and any expenses in respect of meals, lodging and travel reasonably and necessarily incurred by the witness in attending the proceedings and justify by voucher.</p>	
10	<p>Disbursements (not to include counsel fee and must be justified by voucher).</p> <p>Such amount that is necessarily and reasonably incurred under the circumstances.</p>	

10. Methodology—Conciliation Service and Arbitration Service

- (1) References to “items” under this clause are in reference to those items under “Conciliation Service” and “Arbitration Service” of the scale of costs.
- (2) Items 1 to 4 inclusive of the scale are consecutive, cumulative milestones, subject to clause 10(3) and 10(4). For example, to seek payment or to recover for legal services or agent services provided under item 4, the legal practitioner or registered agent must first conclude the milestones, and thereby provide the legal services or agent services, described in items 1 to 3 inclusive of the scale.
- (3) Where the legal practitioner or agent did not provide services during the Conciliation Service stage of the process, the legal practitioner or agent cannot claim under items 2 to 4.
- (4) Where a dispute is not resolved in the Conciliation Service and an application is made to the Arbitration Service, and the legal practitioner or legal agent provided services during the Conciliation Service proceedings, the items 4 to 7 of the scale are consecutive, cumulative milestones to items 1 and 2. For example where legal or agent services were provided through the Conciliation Service and into the Arbitration Service, to seek payment or to recover for legal or agent services provided under item 7, the legal practitioner or agent must first conclude the milestones, and have provided the services described in items 1,2, 4 and 5 to 7.
- (5) This Determination applies to milestones attained and completed in the Conciliation and Arbitration Services. The Costs Determination 2007 will apply to transitional matters and milestones previously attained and completed in the Dispute Resolution Directorate (DRD).
- (6) This clause should be read in conjunction with clause 11.

11. Stand-Alone Items

- (1) References to “items” under this clause are in reference to those items under “Stand-Alone Items” of the costs scale.
- (2) The legal services described in items 8 to 10 may occur at any stage in the process and are additional to the milestone events (regardless of which event or events have been achieved) and are to be read as being in addition to the overall total remuneration.
- (3) Item 9—Allowances for witnesses—
- (a) Where a witness is summonsed under section 202 of the Act, in accordance with the Arbitration Rules, the summons must be served on the person whose attendance is required 7 days before the day on which the person is required to attend before an arbitrator.
- (b) If the summons is not served on the person in accordance with the Arbitration Rules and any witness allowance for the expenses of attendance is not paid or tendered to the person at the time of service of the summons, or not later than a reasonable time before the time at which the person is required to attend, then the person to whom the summons is directed is not required to comply with the summons.
- (c) In accordance with the Arbitration Rules, except with the leave of the arbitrator, medical evidence must be given in writing and a medical practitioner may not be called to give oral evidence.

(4) Item 10—Disbursements—

- (a) Reference to voucher in item 10 refers to copies of any vouchers, accounts and receipts relevant to the disbursements claimed.
- (b) Disbursements must be necessarily and reasonably incurred under the circumstances.
- (c) Medical reports—except with the leave of an arbitrator, parties may only use as evidence the medical reports of one doctor in each medical speciality, with a limitation of three areas of medical speciality overall. A report that contains observations from more than one area of medical speciality is to be taken to be one report from each of the specialities utilised within the report. Refer to the Arbitration Rules for more information.

12. Allowance for non-attendance

(1) An allowance can be made for attendance by a legal practitioner or registered agent in circumstances where, through no fault of the legal practitioner or registered agent, their client failed to attend a conference, arbitration or other proceeding before a dispute resolution authority.

13. Limitations with regard to exceeding the scale of costs

(1) The limitation in the Act with regard to legal practitioners and registered agents not exceeding the scale is only intended to cover work done within this jurisdiction.

(2) This costs scale does not apply to proceedings before the District Court or Supreme Court. Legal practitioners are entitled to recover an amount determined in accordance with the scale of costs applicable to those courts.

(3) Advice provided by a legal practitioner in relation to Part IV civil proceedings in addition to or independent of this Act is not covered by this Costs Determination (see section 274 of the Act).

(4) Regard should be had to section 87 of the Act when providing advice or representation to a client in relation to an action for damages independent of this Act.

(5) A legal practitioner cannot make any agreement, for appearing or acting on behalf of a person, where they will receive greater reward than is provided for by any legal costs determination (as defined in the *Legal Profession Act 2008*). In any case, agreements made contrary to section 87 of the Act are void.

14. Interpretation of item descriptions

(1) In interpreting item descriptors as set out in the Table to clause 8, regard should be had for the procedural requirements set out in the—

- (a) *Workers' Compensation and Injury Management Act 1981*;
 - (b) *Workers' Compensation and Injury Management Regulations 1982*;
 - (c) *Conciliation Rules 2011*; and
 - (d) *Arbitration Rules 2011*
-