

DMD Policies and Procedures

WORKSAFE GUIDELINES FOR COSTS ORDERS AND COSTS RECOVERY

# DISPUTE MANAGEMENT DIVISION

## WORKSAFE GUIDELINES FOR COSTS ORDERS AND COSTS RECOVERY

<b>Version:</b>	3.1
<b>Release Date:</b>	22 July 2008
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<b>Effective Date:</b>	11 February 2008

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**WORKSAFE GUIDELINES FOR COSTS ORDERS AND COSTS RECOVERY**

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## 1 Application

- 1.1 The following guidelines set out the circumstances where WorkSafe will seek recovery of costs after obtaining a costs order in its favour. These guidelines are effective immediately and are applicable to all outstanding costs orders made on or after 1 January 2001. WorkSafe will not seek to effect recovery pursuant to any costs orders made prior to 1 January 2001 except in cases of fraud.

## 2 Adjudgments

### 2.1 Applications for WorkSafe costs “thrown away”

- 2.1.1 Where a plaintiff succeeds on an application for a case to be adjourned and the application was caused by the plaintiff or plaintiff solicitor, WorkSafe should make an application for the costs “thrown away” by reason of the adjournment.

- 2.1.1.1 Subject to paragraph 3.1.1 and unless notification of the need for adjournment is notified at least 3 court sitting prior to hearing, WorkSafe should seek certification of the costs of all counsel engaged, preferably at \$4,950 for senior counsel and junior counsel’s fees as marked.

- 2.1.1.2 Where a plaintiff succeeds on an application for a case to be adjourned and the application was caused by WorkSafe, the defendant, or defendant’s solicitor, then there should be no opposition to any application for a certificate for two counsel at the above fees, subject to paragraph 3.1.2 and the need to have regard to the date prior to hearing that the application for adjournment was notified.

- 2.1.2 If WorkSafe’s application is successful, any application by the plaintiff for a stay of the costs until the end of proceedings will not be resisted.

- 2.1.3 It needs to be recognised that there is a difference between costs “thrown away” and costs “of the day” which are governed by Item 25.

- 2.1.4 At the time the application for costs is made, an application for certification of WorkSafe’s counsel’s fees is also required on the same day.

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- 2.1.5** Where a plaintiff makes an application for a case to be adjourned prior to the date of hearing, the above guidelines still apply. If the plaintiff does not consent to a costs order (including an order of certification for counsel's fees, subject to paragraph 3.1.1) WorkSafe shall make the application for costs to the court. If the court does not make an order in favour of WorkSafe's application and makes an order that WorkSafe's costs be reserved, the certification of counsel's fees is still required.
- 2.1.6** An estimate of the costs thrown away should be made within 14 days of obtaining the costs order. Instructions from WorkSafe need to be obtained as to which WorkSafe Approved Cost Consultant [See Section 7] is instructed to prepare the costs estimate. The costs estimate must be forwarded to WorkSafe and instructions obtained to forward the costs estimate to the plaintiff's solicitors with a demand for payment.
- 2.1.7** If WorkSafe has provided instructions to forward a demand for the estimated costs to the plaintiff's solicitor and the requested sum is not paid, or a satisfactory response not received, within 21 days then a bill of costs is to be drawn. Further instructions from WorkSafe need to be obtained as to which WorkSafe Approved Cost Consultant [See Section 7] is instructed to prepare the taxable bill of costs. Should the bill not be paid within 28 days, or a satisfactory response not received, steps are to be taken to have the bill taxed. Following taxation of the bill, further instructions from WorkSafe need to be obtained prior to any steps being taken to commence enforcement of the order.
- 2.1.8** If the court makes an order that the costs "thrown away" be paid by the plaintiff's solicitor personally, the procedures detailed in paragraph 2.1.6 and paragraph 2.17 apply save that if taxation of a bill of costs is necessary the summons for taxation should be addressed to the plaintiff's solicitor only.

## **2.2 Interlocutory Applications**

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- 2.2.1** Where WorkSafe is successful in an interlocutory application and the application was opposed by the plaintiff, WorkSafe should make an application for the costs of the application.
- 2.2.2** Where WorkSafe successfully opposes an interlocutory application brought by the plaintiff, WorkSafe should make an application for the costs of the application.
- 2.2.3** Where WorkSafe is successful in an interlocutory application, or successfully opposes an interlocutory application brought by the plaintiff, application by the plaintiff for a stay on payment of the costs until the end of proceedings will not be resisted, save and except for with respect to final orders made with respect to an Originating Motion. In the case of any interlocutory application made or opposed during the course of an Originating Motion WorkSafe will not oppose an application for a "stay" on payment until the conclusion of the Originating Motion.
- 2.2.4** An application for certification of counsel's fees, subject to paragraph 3.1.1 is also required to be made on the same day.
- 2.2.5** If costs are ordered not in a fixed amount, then an estimate of the costs should be made within 14 days of obtaining the costs order. Instructions from WorkSafe need to be obtained as to which WorkSafe Approved Cost Consultant [See Section 7] is instructed to prepare the costs estimate. The costs estimate must be forwarded to WorkSafe and instructions obtained to forward the costs estimate to the plaintiff's solicitors with a demand for payment.

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**2.2.6** If WorkSafe has provided instructions to forward a demand for the estimated costs to the plaintiff's solicitor and the requested sum is not paid, or a satisfactory response not received, within 21 days then a bill of costs is to be drawn. Further instructions from WorkSafe need to be obtained as to which WorkSafe Approved Cost Consultant [See Section 7] is instructed to prepare the taxable bill of costs. Should the bill not be paid within 28 days, or a satisfactory response not received, steps are to be taken to have the bill taxed. Following taxation of the bill, further instructions from WorkSafe need to be obtained prior to any steps being taken to commence enforcement of the order.

**2.2.7** Where WorkSafe's costs have been reserved, or remain outstanding at the time of resolution of the claim, and the plaintiff ultimately obtains an order for costs of the action, then all costs owed to WorkSafe must be set off against the costs payable to the plaintiff.

**2.2.8** If the court makes an order that the costs of the interlocutory application be paid by the plaintiff's solicitor personally, the procedures detailed in paragraphs 2.2.4 and 2.2.5 apply save that if taxation of a bill of costs is necessary the summons for taxation should be addressed to the plaintiff's solicitor only.

## **2.3 Reserved Costs on Interlocutory Applications and/or**

### **Adjournments**

**2.3.1** If the court makes an order that WorkSafe's costs of an Interlocutory Application or costs "thrown away" by reason of an adjournment be reserved, then such reserved costs must be pursued at the conclusion of the case. In the County Court no further order is necessary as pursuant to Rule 63A.22 the Registrar is empowered to determine by whom and to what extent reserved costs are payable and, if necessary, a summons for taxation can be issued pursuant to Rule 63A.10(a). In the Magistrates' Court it is necessary to seek a further order from the court prior to, at the time of, the making of final orders.

**2.3.2** Where orders made in favour of WorkSafe, for WorkSafe's costs that have been reserved, remain outstanding at the time of resolution of

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the claim and the plaintiff ultimately obtains an order for costs of the action, then all costs owed to WorkSafe must be set off against the costs payable to the plaintiff.

- 2.3.3** There has been a trend, particularly in the Magistrates Court of WorkSafe agreeing to pay the plaintiff's costs of adjournments where a case has earlier been adjourned at the plaintiff's request and the question of costs of the adjournment has been reserved. WorkSafe is subsequently consenting to orders at the conclusion of the case (either at settlement or judgment) to pay the reserved costs of the plaintiff's earlier adjournments. It is not always appropriate for WorkSafe to bear these costs; the entitlement of the plaintiff to such costs should, where appropriate, be argued and denied.

## 3. Costs of Counsel

- 3.1** In matters where senior counsel is engaged by WorkSafe, certification of senior counsel's fees is to be sought only when the defendant's solicitor believes on reasonable grounds that the briefing of senior counsel would satisfy the test established in *Oldaker v. Currington* [1987] VR 712.

- 3.1.1** In matters where senior counsel is engaged by the plaintiff, certification of senior counsel's fees will only be opposed where the defendant's solicitor believes on reasonable grounds that the briefing of senior counsel would NOT satisfy the test established in *Oldaker v. Currington* [1987] VR 712.

### **3.2 Originating Motions for Serious Injury Applications**

*If WorkSafe obtains a costs order in its favour*

- 3.2.1** If the originating motion was a relatively standard application, WorkSafe should seek the costs of one junior counsel only on Scale D plus refreshers.

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**3.2.2** If the originating motion involved major credit issues, or material witting misrepresentations, some flexibility is required and, subject to the provisions of paragraph 3.1.1, instructions should be obtained from WorkSafe to ask for either (a) senior counsel at approximately \$4,950 and junior counsel at Scale D or slightly higher (up to half senior counsel's fee) depending upon the counsel engaged; or (b) senior counsel only at approximately \$4,950 [all with refreshers].

**3.2.3** In applying the provisions of paragraph 3.2.2 certification of counsel's fees is not to ever be sought at an amount greater than the barrister's actual pre-agreed fee.

*If the Plaintiff obtains a costs order*

**3.2.4** In cases that do not satisfy the test prescribed in paragraph 3.1.2, WorkSafe should oppose any application for the costs of two counsel (notwithstanding that WorkSafe might have engaged two counsel) and concede the costs of one counsel on Scale D plus refreshers.

**3.2.5** In cases that do satisfy the test prescribed in paragraph 3.1.2, WorkSafe should either concede the costs of two counsel at, up to \$4,950 for senior counsel and junior counsel at Scale D, or slightly higher (up to half senior counsel's fee) depending upon the counsel engaged; both plus refreshers.

### **3.3 No Counsel Fees Payable When Case "Not Reached"**

**3.3.1** Where cases are marked "not reached", no fees are payable to either the plaintiff's or WorkSafe's counsel. Should WorkSafe's counsel consider they are entitled to mark a fee where a matter has not been reached specific instructions should be obtained from WorkSafe to allow a fee. It is highly unlikely that these instructions will be provided.

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## 4 Hearings/Trials

- 4.1** Where WorkSafe has been successful at a hearing or trial, a costs order in favour of WorkSafe should be sought, together with certificates for counsel (subject to section 3 above) in accordance with the applicable law.
- 4.2** WorkSafe will generally seek to recover costs from a plaintiff arising from a hearing or trial involving material witting misrepresentations. If the plaintiff has insufficient financial resources to meet the order, WorkSafe may decide not to institute recovery proceedings.
- 4.3** In cases involving material witting misrepresentations where WorkSafe has been successful and a costs order obtained, the panel member should write to WorkSafe advising of this and seeking instructions to enforce the costs order and arrange for the preparation of a bill of costs in taxable form.
- 4.4** If a panel member considers there is an “exceptionally good reason”<sup>1</sup> as to why WorkSafe should recover costs in a matter in which a plaintiff’s credit has not been impugned and where WorkSafe has been successful, the panel member should contact WorkSafe and the circumstances will be considered.

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<sup>1</sup> *Without limiting the scope of the definition of “exceptionally good reason”, WorkSafe prescribes that “exceptionally good reason” includes Serious Injury Originating Motion cases where WorkSafe has put the worker’s legal representative/worker on notice that the worker’s application for serious injury is unlikely to succeed and should the worker subsequently fail to obtain a serious injury certificate, WorkSafe will seek an order for costs and, subject to satisfying the approval process outlined in the governance structure, WorkSafe will seek to execute on the orders obtained*

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- 4.5** Plaintiff fails to obtain a judgment or verdict of the required amount for Section 98 Claims or Common Law Claims in regard to WorkSafe's Statutory Offer
- 4.5.1** The provisions of sub-sections 50(2A)(b), 134AB(28)(c) (new common law), and 135A(13A)(c) (old common law) of the Accident Compensation Act 1985 impose a mandatory requirement that the worker pay the party and party costs of WorkSafe or self-insurer in these specific circumstances. Costs orders must be obtained in WorkSafe's favour. The same reasoning applies in regard to the statutory offer process with lump sum claims. WorkSafe generally intends to pursue plaintiffs for recovery of costs under these subsections whether or not plaintiff's credit has been impugned. If the plaintiff has insufficient financial resources to meet the order, WorkSafe may decide not to institute recovery proceedings.
- 4.6** Plaintiff fails to obtain the statutory threshold under section 135A(7)(a)(i) and/ or 135A(7)(b)(i) (old common law) or Section 134AB(22)(a)(i) and/ or 134AB(22)(b)(i) (new common law)
- 4.6.1** Costs orders should be obtained in WorkSafe's favour; however, WorkSafe generally only intends to pursue plaintiffs for recovery of costs under these sub-sections in matters involving material witting misrepresentations.

## 5. Non-Common costs of separate contemporaneous.

- 5.1** Where a plaintiff has conducted separate but contemporaneous proceedings, for example a statutory benefits claim and a litigated common law claim, in the event that settlement or judgment is obtained in one claim and not the other, which is thereby extinguished, WorkSafe will generally not allow the payment of the plaintiff's non-common costs of the unsuccessful action. In such cases, WorkSafe should make an application for WorkSafe's non-common costs of the action in which the plaintiff failed and ensure that the order for costs made in the plaintiff's successful action excludes the non-common

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costs of the failed action, unless the extinguished action is settled on a withdraw and bear own costs basis.

## 6 Offset of costs orders

**6.1** If WorkSafe is liable to pay a worker's costs of one legal proceeding and also has costs orders against the worker, whether or not made in the same proceeding, then all efforts should be made to set off the costs orders made in favour of WorkSafe against the costs payable to the worker. In this regard, WorkSafe would seek to rely on:

- (a) In the Supreme Court jurisdiction, Rule 63.55 of the Supreme Court (General Civil Procedure) Rules 1996.
- (b) In the County Court jurisdiction, Rule 63A.55 of the County Court Rules of Procedure in Civil Proceedings 1999.
- (c) In the Magistrates' Court jurisdiction, this must be done either by written agreement between the parties or by an application, which must be made to a Magistrate.

**6.1.1** In cases where recovery of costs is appropriate pursuant to these guidelines consideration should also be given to obtaining 'set off' orders either by consent or otherwise against a common law judgment amount awarded in favour of a plaintiff to satisfy payment of WorkSafe's costs by a plaintiff where the plaintiff has been ordered to pay WorkSafe's costs.

There is to be no attempt to set off costs against any amount received by the worker in respect of statutory benefits. These are inalienable.

**6.1.2** If the costs payable to the worker are in respect of a serious injury application or common law damages then, if necessary, any balance still owing after set off against the worker's costs should be set off against the worker's common law damages. A court order will be necessary in such circumstances or alternatively this will need to be the subject of a written agreement between the parties at the time of settlement of the serious injury application or common law claim. If, at the time of settlement, the plaintiff refuses to agree to a set off of costs against common law damages, then application for an order to set off

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the costs payable by the plaintiff to the defendant against both the costs and the damages payable by the defendant to the plaintiff will need to be made.

## 7 Costs Consultants

7.1 There are currently six costs consultants retained by WorkSafe as follows:-

- Locus Costing Pty Ltd (Christine M. Ashby B.Juris, LL.B)  
DX 20505  
EMERALD HILL  
Phone: (03) 9699 3347  
Fax: (03) 9696 2493  
Email: [cmashby@ozemail.com.au](mailto:cmashby@ozemail.com.au)
- GS Corporation Pty Ltd (Deborah Wiggett)  
DX 34066  
LILYDALE VICTORIA  
Phone: (03) 9726 0314  
Fax: (03) 9726 0648  
Mobile: 0412 721 267  
Email: [dwiggett@bigpond.net.au](mailto:dwiggett@bigpond.net.au)
- McClurg Legal Costing Pty Ltd (Cheryl McClurg)  
DX 81118  
FOOTSCRAY VICTORIA  
Phone: (03) 9396 1453  
Fax: (03) 9396 1478  
Email: [cmclurg@bigpond.com.au](mailto:cmclurg@bigpond.com.au)
- In-House Costing  
DX 98404  
HEIDELBERG  
Phone : 03 9850 3862  
Email: [carolepdunn@hello.net.au](mailto:carolepdunn@hello.net.au)
- Grace Costs Consultants

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DX 480

MELBOURNE VICTORIA

Phone: (03) 9629 1948 or (03) 9629 3107

Fax: (03) 9629 8595

Email: [gracecosts@bigpond.com.au](mailto:gracecosts@bigpond.com.au)

- Harris Cost Lawyers Pty Ltd

DX 32404

KEW

Phone: 03 9261 8500

Fax: 03 9261 8599

Email: [liz@harcosts.com](mailto:liz@harcosts.com)

[harris@harcosts.com](mailto:harris@harcosts.com)

**7.2** Prior to instructing a costs consultant to prepare an estimate of costs or to draw a bill of costs in taxable form, instructions must be sought by the panel from WorkSafe, who will nominate which costs consultant is to be instructed.

**7.3** No other costs consultant should be used without WorkSafe approval for WorkSafe statutory benefits, serious injury or damages litigation costs matters.

**7.4** The costs consultants will draw the appropriate claim for costs or bill of costs in taxable form and seek to negotiate settlement in consultation with the panel firm and WorkSafe.

## 8 Panel to Seek Instructions

**8.1** It is the practice of some panel firms to refer the costs recovery file to non-WorkCover debt recovery operators at the panel firm. If this occurs, instructions should be sought from WorkSafe and the managing WorkCover partner should maintain an awareness of the major steps being carried out by the debt recovery operator in regard to the file.

**8.2** WorkSafe wishes to be informed regularly of the progress of costs recoveries in matters against plaintiffs and instructions from WorkSafe must be obtained before taking steps such as requesting payment of

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costs, serving a bill of costs in taxable form, agreeing on an amount to be paid, institution of bankruptcy proceedings or sale of assets on a warrant of execution.