

September 19, 2013

Senior Manager  
Automobile Insurance Policy Unit  
Industrial & Financial Policy Branch  
Ministry of Finance  
95 Grosvenor Street, 4th floor,  
Toronto, Ontario M7A 1Z1

Attention: The Hon. Douglas Cunningham

**Re: Ontario Automobile Dispute Resolution Process Review**

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Economical Mutual Insurance and its affiliated companies are taking the opportunity to respond to the recent request for submissions on the noted subject and offer recommendations as it relates to both the mediation and arbitration process currently administered by FSCO.

When no-fault benefits were first instituted on June 22, 1990, it was anticipated that disputes arising from the payment of these first-party benefits would be dealt with in an expedient and cost effective manner for all concerned. While this did occur over the first few years, it quickly became apparent that the majority of disputes flowing through the system are the result of third-party providers utilizing the mediation process as a forum for collection of insurer-denied treatment and assessment accounts.

In April 2013, FSCO included in its submission to the Standing Committee on General Government that as of February 28, 2013, Health Claims for Auto Insurance (HCAI) confirmed there was a total of 9,310 clinics staffed by 30,531 healthcare providers delivering services to victims of motor vehicle accidents in Ontario. For the 62,412 motor vehicle accidents in the province in 2012, as reported by GISA, there were on average 6.7 clinics and two healthcare providers to service each accident that occurred. It is reasonable to conclude that the over-saturation of service providers and clinics has resulted in over-assessment and over-treatment.

It is our view that when mediation is properly applied and managed, it is a useful tool in the resolution of disputes within the current accident benefit scheme, and should remain mandatory but with suggested revisions as outlined below.

It is our view that the implementation of following recommendations would result in a more expedient and efficient mediation process:

- Amend the Dispute Resolution Practice Code to require that copies of mediation applications be delivered to the insurer by the applicant to the insurer concurrent with its submission to FSCO. The insurer would then have the opportunity to review the issues in dispute, and address those issues in a timely manner, including possible resolution of the matter without the need for mediation.
- Mediation hearings should only occur when the dispute is related to the payment of a specified benefit directly to the insured under the policy, i.e. income replacement, non-earner, caregiver or housekeeping, or attendant care.

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Disputes that relate to an insurer's refusal to fund a clinic's treatment plan or assessment request should be streamed through the system without the need for mediation. Given that insurers generally have a medical opinion in support of its refusal to fund and that mediators have no authority to make orders, the matter should be dealt with in a forum where decision-making authority exists.

The decision to advance the dispute remains solely the discretion of the insured, not the healthcare provider. This approach will positively impact the number of required mediation hearings, and would allow mediators to deal with more appropriate disputes that can be addressed by way of compromise if necessary.

- Currently, there are mediation disputes that fail to get resolved, which results in applications for arbitration that require preliminary hearing applications to address the insured's ability to proceed due to his/her failure to participate in an insurer examination. Disputes that are procedural or relate to interpretations of coverage under the policy should not be allowed through the mediation stream.
- In situations where coverage is in dispute, such as whether the definition of "accident" has been met, subjecting the matter first to mediation is an unnecessary step in the process. Situations like these should be allowed to move directly before a judge for a ruling, which would provide the insured with an expedient hearing on coverage, potentially leading to faster access to financial resources to mitigate his/her loss. It would also serve to allow binding case law that can be relied on by all concerned. This will be touched on later in this submission.

Mediators do not exercise authority to reject mediation applications despite non-compliance with Section 55 of the SABS. FSCO should mandate mediators to exercise their authority to prevent mediations from proceeding without full compliance with Section 55 of the SABS.

As noted earlier, the dispute resolution system has become inundated with numerous frivolous disputes. It is our view that the arbitration process remains a useful tool and could be a more expedient and efficient process if the following revisions were implemented:

- Insured claimants who are pursuing litigation in relation to their tort claims should only be allowed to advance a dispute in respect of their accident benefit claim through the same forum.

Presently, insurers wishing to settle claims in dispute through arbitration are at the mercy of plaintiff counsel who decline to engage in discussion so as not to prejudice their client's tort claim. This results in delays in the FSCO arbitration proceeding and inflates the expense of managing the accident benefits claim. Having all disputes addressed in the same forum would expedite the process for claimants and reduce costs of the system.

- There appears to be a disconnect between FSCO's dispute resolution arm and FSCO as a regulator, as evidenced by several recent FSCO arbitration decisions where FSCO applied its own interpretation to guidelines it issued as the regulator. A case in point is the recent *Scarlett v. Belair* case which addressed the Minor Injury Guideline.

In addition, the case of *Parveen v. Aviva*, which dealt with the issue of the Settlement Disclosure Notice (SDN) drafted and issued by FSCO, was ruled inadequate by a FSCO arbitrator. Economical consequently approached the regulator seeking approval to utilize its own disclosure notice and was advised no changes were required. A revised SDN was subsequently issued by the regulator, which noted that insurers are free to provide additional information to their insureds in conjunction with the disclosure notice in order to satisfy the notice provisions of the regulations. FSCO Arbitrators must be held accountable to apply its regulations.

- FSCO should reinforce the need for early and timely exchange of documents prescribed in the dispute resolution practice code. FSCO's statistics confirm that, on average, 90% of cases settle without the need for a hearing. This is generally the result of compromise between parties following documentary exchange. Unfortunately, this does not occur soon enough, and often results in higher file handling expenses for both sides. Parties that do not comply with the requirement for timely exchange should bear the cost consequences imposed by the arbitrators.
- Currently, arbitration responses are to be submitted by the insurer 20 calendar days from receipt of the application for arbitration. This does not provide the insurer with sufficient opportunity to undertake meaningful settlement discussions to resolve the file prior to incurring the \$3,000 filing fee.

It is our recommendation that, similar to the judicial system, the insurer should be allowed to respond by filing an "intent to defend," followed thereafter by a formal response to arbitration, as in court proceedings. The additional time will enhance the probability that some disputes could be resolved and files settled in a timelier manner.

Consideration should also be given to amending the structure of the current filing fee system. In our view, staggering of the filing fee would be a reasonable solution. A nominal fee could be levied on filing the initial "intent to defend" and another at the pre-hearing stage, with the balance of the filing fee payable at the conclusion of the pre-hearing.

- Arbitration decisions were never intended to make policy or establish precedent and therefore should not be published. Publishing arbitrator decisions has resulted in two streams of precedent decisions, namely at FSCO and from the courts. There have been instances in which arbitrators have stated that the decisions of fellow arbitrators are not binding. Consequently, it is our further recommendation that appeals of arbitrator decisions should be heard by a judge in Divisional or Superior Court, which would result in only one body of case law.
- Arbitrators have made awards in situations where there is no actual out-of-pocket expense. Awarding compensation in excess of out-of-pocket losses is an invitation for abuse and fraud. Arbitrators should be held accountable for compliance with the SABS as they are in a unique position to identify, address and combat such behavior. By adopting a principled approach of compensation for actual reasonable and necessary losses, as opposed to compensation based on a notion of entitlement, the motivation for fraudulent and other egregious behavior would diminish.

FSCO's focus should be to ensure the ADR system is efficient to ensure real disputes are advanced quickly with no incentive for over inflating claims costs.

Should you require further clarification we welcome the opportunity to meet with you in person.

Yours truly,

A handwritten signature in black ink, appearing to read "Rocco Neglia", with a long horizontal flourish extending to the right.

Rocco Neglia, BA (Hons), CIP  
Vice-president, claims