TRACEY TREMAYNE-LLOYD

ttl@gardiner-roberts.com
T: 416-369-4336
F: 416-865-6636

SUBMISSIONS BEFORE THE RED TAPE COMMISSION REGARDING REGULATORY CHANGES TO THE MRC PROCESS

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INTRODUCTION

Today I propose to discuss selected regulatory changes to the Medical Review Committee that have reduced the MRC to a process-driven vehicle devoid of any sense of justice and fairness. Together we will review the three provisions that are, in particular, undermining the democratic process and demoralizing the province's physicians. They are: the imposition of tens of thousands of dollars of costs on physicians for the conduct of the audit, the imposition of interest on a retroactive basis, and the manner in which these repayments are collected by the General Manager prior to the physician having an opportunity to be heard on the merits. I will conclude by proposing certain regulatory and policy changes to help ensure that the MRC functions in a manner that is consistent with natural justice and the duty to act fairly.

Let me begin by explaining just what the MRC is.

The Medical Review Committee is a creature of the Health Insurance Act R.S.O. c.H. 6 and it functions as the audit arm of OHIP.

Its mandate is to make recommendations to OHIP, which form the foundation for the General Manager's decision, on the basis of a statutory set of conditions, that an innocent overpayment has occurred and the physician should be required to reimburse. In principle there is nothing objectionable to a system that requires physicians to reimburse OHIP by the amount the Plan overpaid them. These provisions have existed since the inception of the audit process and the enactment of OHIP. They have worked well in the past without trampling on the rights of physicians and without aborting our system of justice and fair play. In 1998 the effects of a new series of regulations began to be felt by the physicians that went through the MRC process.

These new regulations introduced elements of arbitrariness and unfairness

in the system. The current rules are fundamentally undemocratic and amount to a denial of natural justice. The unfortunate result has been to add layers of needless process and expense as government appointed officials conduct audits into physicians' record-keeping where no substantive billing error has occurred and the services billed for were rendered in an appropriate and medically indicated fashion. The result for our besieged physicians has been to undermine their professional judgment and demoralize their spirits.

This afternoon we will review some of the provisions that have created this arbitrary, dictatorial and embarrassing hole in our system of fairness and justice. They include:

- The provision imposed on physicians that requires them to pay the costs of an audit before the MRC at a rate of $1000 per day per committee member considering the matter;
- The imposition of interest on a retroactive basis so that interest begins to run years prior to the physician even knowing that an audit of their billing is underway much less that such audit will reveal an irregularity; and
- The provision that permits the General Manager to dry up a physician's OHIP billings to satisfy a recommendation of the MRC prior to the physician having an opportunity to exercise his or her right to be heard and have the case assessed on its merits.

UNFAIR IMPOSITION OF COSTS

- Section 18.1(15) (b) of the Act requires the physician to pay all the costs of the MRC audit even if only $1 in overpayment is found.
- The cost payment can reach as high as 35% of the amount alleged to be over billed and is therefore an express deterrent to the physician to object or deny that any overpayment has occurred (section 38.2.2(4) (b) of Regulation 552).
- Section 38.2.2 of Regulation 552 provides the calculation for this onerous cost provision: $1,000 per day per committee member considering the matter.
- A panel of the MRC is usually composed of 5 members. So, if the panel considers a matter over a period of 10 days, the total cost payable by the physician is $50,000.
- These costs are payable immediately upon demand and prior to the physician having exercised his or her right to be heard on the merits.
- The imposition of costs is a one way street: even if the physician is completely exonerated, the Health Services Appeal and Review Board has no jurisdiction to award costs against OHIP or the MRC.

UNFAIR IMPOSITION OF INTEREST

- Section 18.1(14) of the Act requires that interest be paid on the overpayment.

- This provision on its face is not unreasonable.
- Section 38.2.1(2) of Regulation 552 calculates interest retroactively from the 15th day of the month following the last date of the review period.
- In practice, this date is a minimum of three years prior to the physician being advised that an overpayment has occurred.
- Example: a physician is advised of an overpayment of $125,000 on January 15, 2002. The referral period, however, ended on December 31, 1998. Interest therefore has been accumulating since January 15, 1999 and amounts to $15,000 by the time the physician is advised of the alleged overpayment (assumes 4% rate of interest).
- Even if the physician were to pay the direction of $125,000 the next day after being advised of the alleged overpayment, this interest payment still applies.

UNFAIR IMPOSITION OF SENTENCE

Section 27.2 of the Act provides the following:

- The General Manager may obtain or recover money that a physician, practitioner or health facility owes to the Plan by set off against money payable to him, her or it under the Plan
- The General Manager may obtain or recover money by set off despite a review by the Medical Eligibility Committee, the Medical Review Committee or a Practitioner Review Committee or an appeal to the Appeal Board or Divisional Court concerning whether the money is owed to the Plan.

This section is interpreted and enforced by the Ministry of Health on the basis that payment in full must be made within one year following the MRC's recommendation.

The first opportunity for a hearing on the merits only occurs at the Health Services Appeal and Review Board. This can take a minimum of one year or longer to be heard. The result is that the physician is without funds to pursue a hearing or, if the physician finds the necessary funds, the question is moot before the hearing commences because the money has already been recouped by OHIP from the physician's current billings.

RELIEF SOUGHT

Accordingly, it is respectfully requested that the following regulatory and policy reforms be proposed to cabinet:

Gardiner Roberts LLP
40 King Street West Suite 3100 Scotia Plaza Toronto, ON, M5H 3Y2
T: 416.865.6600 F: 416.865.6636 **www.gardiner-roberts.com**

i. No cost orders should be made against or collected from physicians at the preliminary stage of an MRC review. Moreover, cost awards should be available to both parties at the level of the Health Services Appeal and Review Board in a similar manner as is available in our civil courts. In this way, if a physician proceeds on an unmeritorious appeal and loses the government may recover their costs on a party-and-party basis. But if OHIP pursues an unmeritorious claim, the physician has an opportunity to reclaim costs on a similar basis;

ii. The interest imposed on amounts payable to the Plan should commence from the date of the direction of the MRC. No physician should be liable for interest payments until a direction has been made by the MRC advising the physician that he or she must reimburse OHIP for the amount of overpayment made by the Plan; and

iii. Where a physician has taken steps to appeal a direction of the MRC in a timely manner, and there is no reasonable likelihood that the physician will not remain in practice in Ontario or will vacate the jurisdiction before the General Manager can collect this amount, then collection proceedings should be stayed pending the physician's right to be heard on the merits.

With the implementation of these recommendations, it is respectfully submitted that we can begin to restore a sense of justice and fairness to the MRC thereby securing the integrity of our public system of health care and enabling our physicians to practice in an environment that is both respectful of their professional judgment and free from undemocratic intervention.

Gardiner Roberts LLP
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