



December 8, 2021

Ms. Ann MacKenzie
Senior Manager Policy Interpretation
Financial Services Regulatory Authority

Delivered by email

Re: Divisional Court ruling – Malitskiy vs. Unica

Dear Ms. MacKenzie,

The members of the Ontario Society of Occupational Therapists' (OSOT) Auto Insurance Sector Team wish to alert you to what we believe is insurer misconduct as observed by our members who work in this sector.

We have grave concerns about the recent interpretation regarding the rules for calculating the Attendant Care Benefit based on the Malitskiy vs. Unica ruling. In short, some insurers are denying payment of the full sum of the Form 1, stating that they are only obliged to pay according to the line items and the hourly rates for those line items. The result of this positioning is that claimants receive insufficient funds to access the required attendant care they have been assessed to require as reflected on the Form 1.

This recent insurer interpretation conflicts with the FSCO Bulletin A-03/18 prepared by Brian Mills, Chief Executive Officer and Superintendent of Financial Services Commission of Ontario (FSCO) which was effective April 14, 2018:

*"The Attendant Care Hourly Rate Guideline has been revised to require that the maximum hourly rates set out in the guideline be used with the Assessment of Attendant Care Needs (Form 1) **to calculate the monthly attendant care benefit** in accordance with section 19 (2) of the Statutory Accident Benefits Schedule – Effective September 1, 2010 (SABS).*

*Previous guidelines could be interpreted to strictly apply the maximum hourly rates as the maximum payable for attendant care services, **rather than using the hourly rates to calculate a monthly benefit as was originally intended.**"*

Occupational therapists (OTs), as the primary assessors of need for attendant care, have a unique insight into this issue. The need for attendant care is determined based on an assessment of a claimant's physical, cognitive, and mental health status and their ability to manage their basic activities of daily

living. The need for attendant care is to support function and to mitigate risks. When clients don't receive the help they need, they are put at risk in terms of medication management, falls, poor hygiene, meal management and emotional sequelae. Overall, this has the potential to cause physical and/or emotional decompensation and ultimately lead to an increase in their medical and rehabilitation needs.

We could compile a lengthy list of the potential risks, but herein are just a few examples to illustrate the point.

- Clients who have sustained a head injury and cognitive impairments may need prompting and reminders to do simple everyday tasks, and may be unable to solve everyday problems, or may wander from their homes if unattended.
- Clients with spinal cord injuries who experience mobility impairments are prone to pressure sores requiring them to be turned frequently by an attendant/PSW
- Clients with multiple and/or open fractures are not sufficiently mobile to manage their self-care or make their meals independently and rely on a PSW.

Many injured claimants have been unable to return to work, hence have a significantly reduced monthly income. Consequently, they would be unable to contribute to their attendant care costs. While we understand that, historically, the monthly AC benefit quantum has never been sufficient to meet the claimant's full attendant care needs as per the Form 1, it at least provided for a modicum of care. If these new insurer practices are allowed to further erode funding for this benefit, the claimant will be left with such limited funding that, in today's market, the claimant will be left with little or no care at all. Market rates for personal support workers are significantly higher than the approved rates and, in fact, Level 1 and Level 2 maximum hourly attendant care rates will be below the minimum wage of \$15 which comes into force in January 2022. We assert that this severe restriction of access to the benefit is not the intention of the SABS nor the Superintendent's Guideline No. 01/18: Attendant Care Hourly Rate Guideline.

Members of OSOT working in the auto insurance sector urgently request that FSRA take action to protect consumers from insurers who choose to deny payment of the attendant care benefit based on the monthly quantum thus, de facto, denying the insured access to the benefit entirely. We request that FSRA provide clarification guidance to remind insurers of their obligation to pay the attendant care benefit as outlined in FSCO's Superintendent Bulletin A-04-18.

We are happy to discuss this further at any time. Thank you for your assistance.

Sincerely yours,



Karen Rucas, B.Sc., OT Reg. (Ont.)
OSOT Government Lead/Auto Insurance Sector



Marnie Lofsky, OT Reg. (Ont.)
Executive Director