



Introduction

The Access to Justice Group (AJG) is a coalition of law firms advocating for reforms to Ontario's auto insurance product from a consumer perspective. We are pleased to submit our response to the FSRA Consultation Paper on the Attendant Care Hourly Rate Guideline (the "Guideline").

We commend FSRA for undertaking this long-overdue review of the Guideline. The recommendations arising out of this review should align with FSRA's stated objectives to ensure that:

- The quality of care that consumers receive is preserved.
- Services remain available for individuals injured in motor vehicle accidents.
- Payment rates for attendant care services are fair and reflective of market rates; otherwise, injured claimants may struggle to access necessary care from health service providers (HSPs).
- The rights and interests of auto insurance consumers are adequately protected.

As indicated in the consultation document, attendant care benefits cover reasonable and necessary expenses incurred for services provided to an insured individual by a caregiver, whether a personal support worker or a family member. The benefit amount is calculated using the Assessment of Attendant Care Needs (Form 1), which is the primary focus of this submission due to its critical role in addressing the challenges faced by injured claimants requiring care.

Current Hourly Rates for Attendant Care

Form 1 specifies maximum hourly rates corresponding to three levels of care needs:

- **Level 1:** Routine care - \$14.90
- **Level 2:** Basic supervisory functions - \$11.60
- **Level 3:** Complex health/care and hygiene functions - \$21.11

Issues with Form 1

Several concerns regarding Form 1 include:

1. The hourly rates in all three levels are below market rates and are not currently indexed.
2. The hourly rates create barriers to accessing the necessary level of care, resulting in inadequate support and poorer health outcomes.

3. Despite FSRA's Bulletin A-03/18 clarifying how the attendant care benefit is calculated and the rates payable to HSPs, insurers are often ignoring this guidance or are willfully blind to their obligations under the Guideline.

Form 1: Assessment of Attendant Care Needs

Form 1 is utilized to report the need for attendant care following an automobile accident, identifying both routine and non-routine care needs. The total monthly attendant care amount is calculated by multiplying the required daily care hours by the applicable hourly rate and the number of days in the month. This calculation determines the total monthly benefit amount that insurers are obligated to pay.

This submission addresses the interpretation of Form 1 in respect of attendant care hourly rates and the ongoing discrepancies between the expectations of health service providers and the positions taken by insurers. Specifically, it emphasizes that the Form 1 rates, as stated in FSRA's Revised Attendant Care Guideline Bulletin No. A-03/18 and Superintendents' Guideline No. 01/18, are not meant to dictate the actual hourly rates charged by health service providers. Instead, they serve as a calculation tool for determining the total attendant care benefits payable each month.

It is imperative to revise the language on Form 1 to clarify that it is intended solely as a calculation tool for the monthly care requirements within the attendant care monthly allowance caps. This clarification was previously noted in Revised Attendant Care Hourly Rate Guideline Bulletin No. A-03/18 and Superintendent's Guideline No. 01/18 issued by FSCO on April 11, 2018. The hourly rates in Form 1 should not govern the actual rates charged by service providers; they do not limit what HSPs can charge or what insurers are obligated to pay for their services.

The Superintendent's Guideline No. 01/18 establishes the maximum hourly rates used to calculate the maximum monthly attendant care benefit per subsection 19 (2) (a) of the Statutory Accident Benefits Schedule (SABS). It must be used alongside Form 1 but, as we have previously noted, it does not set a standard for the actual hourly rates that service providers can charge or insurers must pay. Bulletin A-03/18 explicitly states:

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 as strictly applying the maximum rates as the maximum payable for attendant care services, rather than using them to calculate a monthly benefit as originally intended.

Insurers appear to either intentionally disregard the clear directives in the Bulletin or are willfully blind to its guidance. They often assert that they are only required to pay amounts corresponding to the Form 1 rates, effectively treating these rates as the maximum allowable payment for attendant care services. This has two significant impacts:

1. Insurers treat the hourly rates in Form 1 as a cap on the actual costs incurred by service providers, preventing them from charging for the services rendered. Consequently, HSPs are often not compensated at market rates for their services.
2. Claimants frequently find themselves unable to obtain the necessary attendant care services because HSPs are unwilling to accept the hourly rates specified in Form 1, thus undermining their health recovery.

For example, ██████'s handling of a policyholder's attendant care claim in connection with a loss that occurred on ██████, illustrates how insurers typically ignore the intent of Form 1, causing irreparable harm to injured claimants. In this instance, ██████ cited the Divisional Court decision in *Malinskiy vs. Unica Insurance Inc.*, 2021 ONSC 4603 as support for its position. In that decision, the Court stated:

The award allowed for the payment of attendant care at rates in excess of the Guideline and in excess of the direction in the *Statutory Accident Benefits Schedule* at s. 19(2). Adjudicator Boyce found:

However, the overarching fact remains that the hourly rates are mandatory and were in effect when S. M.'s accident occurred. Insurers are not liable to pay for expenses related to attendant care costs rendered to an insured person that exceed the maximum hourly rates set out in the Guideline.

...

Adjudicators presented with reliable evidence of incurred attendant care should, where practicable, determine the specific amount of attendant care that is payable under the Guideline's mandatory rates. Where there is evidence of incurred attendant care, it is [an] error for adjudicators to simply order attendant care payable "up to" the amount identified by the Tribunal in the "issues" section or "up to" the amount identified by a specific section of the *Schedule*.

The simple answer is in the clear words of the Guideline. Under the heading "Maximum Fees" it says:

Automobile insurers are not liable to pay for expenses related to attendant care costs rendered to an insured person that exceed the maximum hourly rates set out below.

This interpretation does not conform to the current Guideline and is incorrect and, as we have noted, FSRA has clearly acknowledged how the hourly rates in the Guideline are to be applied.

On ██████, the injured claimant questioned ██████'s incorrect interpretation of the amount payable for attendant care services, stating:

I am sure you know I am on ODSP, and have severe psychological problems as a result of the accident. I have no means to supplement my income. I wish I could work and make a living but unfortunately I cannot, which makes it impossible for me to pay medical expenses out-of-pocket.

After the accident, there are things I can no longer do on my own and need help with. You agreed to pay for a PSW to help me, but the hourly rate you approved is not sufficient to cover

the expenses. You agreed to pay \$14.90, \$14.00 and \$13.95 an hour, but I cannot find anyone willing to work for such wages.

I do not have the funds to pay for a PSW out-of-pocket and the rates you approved are below the general minimum wage in Ontario and actually even less than the student wage, making it unrealistic for me to find a PSW to work for such money.

Me being injured and unable to work already puts me in a vulnerable position. The insufficient allowance from [REDACTED] puts me in an even worse position, in which I am unable to afford the help I need.

Please help me understand what I am supposed to do in this situation and where I can find hired help for \$13.95-\$14.90/hour.

On [REDACTED], [REDACTED] responded and maintained that it "pays the Attendant Care Benefit in accordance with the recommendations on the current Assessment of Attendant Care Needs Form 1 in conjunction with the Financial Services Commission of Ontario's Bulletin A-01/18 Attendant Care Hourly Rate Guideline," which specifies the three maximum hourly rates: \$14.90, \$14.00, and \$21.11.

[REDACTED]'s position is nothing less than a perversion of the intent of the attendant care benefit program under the SABS and is an all-too-typical illustration of how insurers routinely impact the right of claimants to appropriate care. Moreover, this interpretation of their obligation under the policy leads to barriers to accessing care, poorer health outcomes, longer recovery times and potentially more severe health issues.

Market Rates for PSWs

Personal Support Workers (PSWs) are essential in providing care to individuals in their homes, contributing significantly to the healthcare system in Ontario. Below we offer a summary of the payment structure for PSWs based on hourly rates from various organizations and highlights the discrepancies between market value and hourly rates paid to PSWs under the current Guideline.

Government Payments to Home Care Agencies:

- The government compensates home care agencies between \$35 and \$45 per hour for PSW services.
- This rate has remained relatively stable over the years, reflecting both the demand for and the importance of home care services.

Market Rates from Various Agencies:

Based on inquiries made to several home care agencies regarding their rates for private clients, the following hourly rates have been documented:

1. St. Elizabeth: \$46/hour (no HST), minimum 3-hour visit.
2. AGTA: \$39.50 + HST to \$42 + HST depending on the area, minimum 2-hour visit.
3. C-Care Health Services: \$30-\$35/hour.
4. Bayshore: \$39-\$42/hour + HST, minimum 3-hour visit.

5. Paramed: \$41.21/hour + HST.

Comparison of Rates:

- Agency Rate: \$35 - \$45 per hour charged to clients.
- Agency Pays to PSWs: Typically \$20 - \$30 per hour.
- Government Programs Paid to Agencies (2024): Average remains between \$35 - \$45 per hour.

Current Trends:

- As of November 11, 2024, the average hourly pay for a PSW in Ontario is \$28.14 according to ZipRecruiter.
- Home care agencies charge clients between \$25 - \$45 per hour for PSW services.

The current hourly rates under the Guideline presents significant challenges in retaining skilled caregivers while ensuring fair compensation for their essential services. A re-evaluation of the reimbursement rates under the Guideline is required.

We would also urge FSRA to increase the SABS monthly attendant care benefits. More specifically, we propose an increase from the current \$3000/\$6000 limits for non-catastrophic and catastrophic injuries respectively:

- The current maximum benefits have not been adjusted in line with inflation or the rising cost of living. As a result, the current benefits do not reflect the true cost of care and support.
- Individuals with catastrophic injuries often require extensive, specialized care that can encompass a range of services, including personal support, rehabilitation and therapy. The current monthly cap of \$6000 is insufficient to cover the comprehensive needs of these individuals, often leaving them without necessary support services.
- Many claimants with catastrophic injuries face lifelong care needs. The current monthly benefit does not adequately support the ongoing and evolving nature of these needs. Increasing the monthly benefit would provide claimants with the assurance that they can secure the necessary care without the burden of financial stress.
- As with the impact of inadequate compensation for HSPs and inadequate hourly rates, insufficient funding for attendant care needs can lead to delayed recovery, increased complications and a diminished quality of life for injured claimants. Increased monthly benefits would facilitate better recovery outcomes, reduce the long-term health care costs associated with poor recovery and improve the overall well-being of injured individuals.

Recommendations

In light of these issues, we urge FSRA to:

1. Clarify the intent of the Form 1 rates in clear and unambiguous language to ensure consistent interpretation among insurers and service providers, preventing injured claimants from being denied the necessary attendant care.
2. Align the attendant care hourly rates with market rates for similar services.

3. Index the rates to the Consumer Price Index to account for inflation and maintain their relevance over time.
4. Conduct an annual review of attendant care rates that considers market rates, inflation, cost of living adjustments, and feedback from stakeholders.
5. Increase the monthly attendant care benefits for the current maximum cap of \$3000 and \$6000.
6. Engage regularly with stakeholders to understand and address the impact of the Guideline and any necessary adjustments.

We urge FSRA to address these concerns so that injured claimants can receive the support and care they need.

Thank you for your attention to these critical issues affecting the lives of many injured claimants. We look forward to working with FSRA to enhance the support provided to those in need.

Respectful submitted,

Access to Justice Group