



ONTARIO HEALTH LAW

INSIDE THE NEW OHIP AUDIT REGIME: A PREVIEW



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The Health System Improvements Act, 2006 (Bill 171) was recently passed by the Ontario Government. One of its central purposes was to overhaul the much-criticized medical audit process formerly operated by the Medical Review Committee (MRC) of the College of Physicians and Surgeons of Ontario. Before any new audits can be conducted, the relevant sections of the Act must be proclaimed in force, the Regulations which set out the procedural details must be drafted, and the members of the new Physician Payment Review Board (the “Board”) must be appointed. We expect this to take place over the summer, and the new audits to be commenced by autumn, 2007. Here’s what physicians can expect:

What’s good:

- no repayment required before a hearing
- hearings before an independent body, with rules of evidence and natural justice
- restriction on interest awards and on costs awarded against physicians
- shorter review period
- no more inspections
- no extrapolation except in extraordinary circumstances

What’s not so good:

- no limits on OHIP’s ability to select a physician for review
- the Board is obliged to report suspected misconduct to College
- the Board has the power to suspend a physician’s right to bill OHIP
- sanctions for “knowingly” making billing errors and for subsequent repayments
- challenging OHIP’s opinion may be costly and time-consuming, but failing to challenge it will impact all future billings

The New Audit Process in a Nutshell

The new audit process created by Bill 171 is improved in some respects. Whereas the old process began with an inspection at the physician's offices, the new process will begin with a request that the physician submits patient records to OHIP. As in the past, there are no limitations governing OHIP's selection of a physician for review. If, after this review, OHIP concludes that a physician's claims were not appropriate, OHIP can either inform the physician of billing concerns (which, if not rectified in future, will result in referral to the Board and in repayment orders) or in extraordinary circumstances, refer the physician for a hearing before the Board. Normally, OHIP will give the physician an opportunity to avoid a hearing, by notifying him or her of its opinion and inviting a response. The physician can then choose either: to accept the opinion and avoid a hearing; or to challenge OHIP's position by requesting a hearing before the Board. Through the hearing, the Board (an independent body) will assess whether the physician's claims were appropriate, and will determine whether any repayment is required. While the physician can avoid a hearing and potential repayment by accepting OHIP's position, by doing so, he or she will be acknowledging that OHIP's opinion is correct, and he or she will have to comply with that opinion in all future billings. If the physician believes he or she was billing appropriately, then a hearing will be necessary, in which case no repayment is required before a decision is rendered following a full hearing on the merits. The process is illustrated in the flow chart included with this article, and is more fully explained in the following paragraphs.

The New Audit Body: The Physician Payment Review Board

The new legislation will replace the MRC with a new, independent body comprised of between 26 and 40 members, at least 20 of whom must be physicians, selected by the Minister of Health and Long-Term Care or the OMA. The Board will sit in panels of four members (consisting of three physicians, one of whom is to be a peer of the physician whose claims are under review, and one public member) and will hold hearings to determine whether a physician's billings have been appropriate, or whether repayment to OHIP will be required. Physician members are to represent a broad range of practices. They must all be practicing physicians, who bill OHIP for medical services, and who have not been found guilty of fraud, been subject of a finding of professional misconduct, incompetence or incapacity, or been required to reimburse OHIP as a result of a previous audit.

Phase I: The OHIP Review

The audit process will commence with a request from OHIP that a physician submit copies of his or her patient records and billing information. OHIP will review these records to determine whether the services were: not rendered; misrepresented; not medically necessary; or not provided in accordance with accepted professional standards (collectively, the "Repayment Circumstances").



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No More Inspections

One positive change is that this internal review will take place without inspectors, who in the past could attend the physician's offices, make copies of records and interview staff. While a records review is a less intrusive and anxiety-provoking approach to the OHIP review, physicians must not take this process lightly. Physicians should be careful to provide OHIP with exactly what is requested, in a complete and organized manner. Health law counsel can assist with this important first step.

No Restriction on Selection of Physicians for Review

There is no restriction on the circumstances under which OHIP may select a physician for a review, and there is no duty on OHIP's part to provide reasons for such selection. This was one of the major flaws in the old regime, and it has not been addressed by Bill 171. If OHIP concludes from this review that a Repayment Circumstance exists, OHIP will typically communicate its position to the doctor, providing an opportunity for resolution without an audit. OHIP also has the power to refer a physician directly to the Board, but this can only occur where OHIP believes that the physician knew or ought to have known that the claims submitted to OHIP were false or otherwise not appropriate.

OHIP's Opinion

When the physician receives OHIP's initial opinion, he or she has two options: (1) seeking an opinion from the Joint Committee on the Schedule of Benefits with respect to the correct interpretation of a provision; or (2) making written submissions to OHIP. If OHIP gives notice of a decision to refuse to pay the full amount claimed or if a circumstance described in the payment correction list exists, then the physician can request a hearing immediately without further dealings with OHIP. The physician should seek the assistance of legal counsel before deciding, and with respect to the preparation of any submission to OHIP. OHIP will then review any opinions received from the Joint Committee, as well as any submission made by the physician, and will consider whether any Repayment Circumstance(s) still exists. If so, OHIP will notify the physician of its Final Opinion and will provide reasons.

Under the new legislation, OHIP's first line of attack is to review the physician's records and relevant opinions, and then to advise the physician of OHIP's position or interpretation. In other words, no independent audit will take place with respect to the first notice a physician receives and the physician may even get a "free ride", in that he or she may not be asked to repay any disputed claims this time. While accepting this opinion will enable the physician to avoid the stress and expense of an audit, it will impact on how the physician bills for the rest of his or her career. A resolution without a hearing will make sense in the event of a billing error, but if a physician believes he or she has billed appropriately, then it is important that he or she challenges OHIP's opinion through a hearing. Otherwise, if the physician submits future claims in the same manner as in the past, OHIP will likely determine that a Repayment



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Circumstance continues to exist and that the physician has knowingly made inappropriate claims. In addition to a referral to the Review Board for an audit and potential repayment, this finding could result in a costs award against the physician or even an order suspending the physician's right to submit claims to OHIP.

Phase II: The Review Board Hearing

If OHIP determines that the physician's claims were not appropriate and that repayment is owing, the physician has recourse that was not available to him or her in the past: a hearing before a panel of the Board, which must comply with rules of evidence, natural justice and procedural fairness – elements significantly lacking in the old MRC regime.

The evidence put before the Board will be recorded, just as in a trial. Preparation and expert representation will be crucial to success before the Board, as will be the evidence presented (both patient records and witness testimony). The panel's decision must be sent to the doctor 30 days after the hearing. A majority vote of the panel will determine whether the physician must repay OHIP or whether the physician billed appropriately in all cases. The panel will then order payment to or from OHIP (which may include interest) and may also make additional orders as described below .

New Rules for Costs Awards

The Board can award costs either to OHIP or the physician, where the other party's conduct has been unreasonable, frivolous or vexatious or the other party has acted in bad faith. Further, costs can only be awarded against a physician if he or she is found to have acted unreasonably or inappropriately, or failed to comply with a previous order of the Board. This is a significant improvement over the old regime, where physicians facing repayment orders were also hit with significant costs awards, but physicians could not be reimbursed for their costs.

Period of Review

Another positive change involves the period of review for reimbursement purposes. In the past, review periods were typically two years and ended years before the MRC proceedings began. Now in most cases, the physician will only be required to reimburse OHIP for services provided during a 12 month period, and that 12 month period cannot have started more than 18 months before the physician was notified of OHIP's initial opinion. For example, if a physician receives a notice in July 2007 from that OHIP believes that claims submitted were inappropriate, only claims submitted during 2006 can be the subject of a review. The only exception to this is the Board's power to extend the period of reimbursement where OHIP establishes that the physician knew or ought to have known that claims submitted were false.



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Extrapolation

One of the features of the old MRC process that was most offensive to physicians was the practice of extrapolation, whereby the MRC ordered reimbursement of thousands of claims after reviewing relatively few claims, by reducing across the board all of the physicians' claims for the service in question. Extrapolation is largely absent from the new audit process, but a Review Panel does have the power to order extrapolation where: (1) the physician is liable to reimburse OHIP; (2) there has been a previous finding or order that the physician reimburse OHIP and the physician has continued to make billing errors; and (3) OHIP establishes that the sample of charts reviewed was random and had a reasonable confidence interval. Only the first of these criteria was required for extrapolation under the former regime.

Interest Awards

Another problem with the old process was that a physician was required to pay interest on the repayment for the entire period between the review and the date of the decision – often four or five years. The new audit regime provides for interest accrual on amounts found to be improperly paid to a physician, but only from the date that the physician was notified of the dispute. Further, interest can now be paid by OHIP to a physician, where the physician requested the hearing and was found to have been correct.

Report to the College

Under the new process, the Board must file a report with the College where it determines, based on a hearing, that a physician may have committed an act of professional misconduct or may be incompetent or incapacitated. This means that, despite the Board's independence from the College, apparent misconduct or incompetence on the physician's part will still find its way to the College.

Phase III: Appeal from Decisions of Board

A physician who disagrees with the Board's decision can appeal to the Divisional Court of Ontario. The appeal will be based on the transcripts and evidence put before the Board, and may be made on questions of law or fact or both. This means that the record created at the hearing is crucial to success on appeal. The Divisional Court may substitute its opinion for that of the Board or exercise any powers of the Board. If a physician appeals a decision of the Board, the decision is stayed pending appeal, meaning that no repayment would have to be made until the appeal has been decided.

Conclusion

The new audit process significantly improves the former MRC regime in several respects: costs awards against physicians will no longer be automatic; interest awards should be much more reasonable because the interest period will be limited; and extrapolation will not be



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routinely used to extract enormous repayments from physicians. Instead of College inspectors appearing at physicians' doors, physicians will simply submit copies of their medical records to OHIP for review. Most significantly, no doctor will be required to repay OHIP without having had the benefit of a real hearing (with procedural fairness and natural justice) before an independent body. To be sure, flaws remain from the old regime and chief among these is the ability of OHIP to review any physician's billings without any grounds to believe that Repayment Circumstances exist. Any physician intent on challenging OHIP's opinion faces an arduous process that requires thorough preparation and the assistance of legal counsel experienced in these matters. Nonetheless, while there are opportunities for physicians to avoid a hearing by resolving matters with OHIP, physicians should be extremely cautious in doing so because acceptance of OHIP's position could impact on a physician's billings for the rest of his or her career. There is one feature of the old regime that remains unavoidable: careful and complete documentation of every patient visit still represents a physician's best hope for success in the audit process.

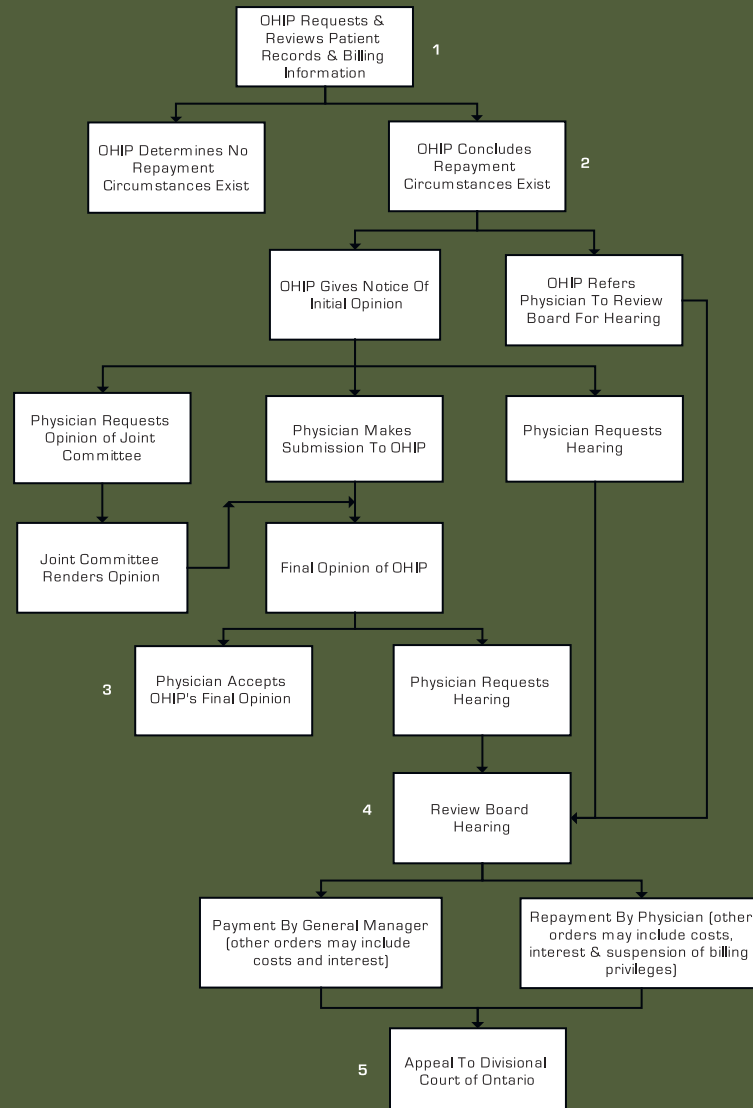
For more information about the audit process and how you can begin bullet-proofing your practice today, please contact any member of our health law group or visit www.ontariohealthlaw.com.



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THE NEW OHIP AUDIT PROCESS



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Notes

1. Records Review

- Physician may provide copies
- No inspections
- 12 month period of review

2. Repayment Circumstances

- Repayment of Claims where:
 - a) services were:
 - not rendered
 - not medically necessary
 - not provided in accordance with standards
 - misrepresented
 - b) a circumstance set out in OHIP's Payment Correction List applies

3. Consequences of Not Challenging OHIP Opinion or Repayment Order

- Physician must bill in accordance with final opinion or risk direct referral to Review Board and sanctions.

4. Review Board Hearing

- Full Hearing with decision based on evidence
- No extrapolation (except in special circumstances)
- Rules of Natural Justice apply

5. Appeal To Divisional Court

- 3 judge panel
- Appeal based on the record (no witnesses, no new evidence)
- Divisional Court can make any order the Review Board could make and/ or substitute the decision of the Review Board.
- Decision of Review Board stayed pending appeal