

MOJ RTA PROCESS - MEDICAL EVIDENCE

THE NEW RULES IN PRACTICE FROM PREMEX SERVICES

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- WHERE DOES REHABILITATION FIT INTO THE NEW PROCESS?

Q DO MY MEDICAL REPORTS NEED TO BE IN THE TEMPLATE FORMAT AS LAID OUT IN THE NEW RULES?

A NO - whilst the rules and protocol do contain a medical report template, section 1.4 of the Pre Action Protocol (“PAP”) clearly states that the information required in Form RTA 3 (Medical Report Form) may be provided in a different format to that set out in the Form.

Further, the MOJ have confirmed directly to Premex that it is the content that is mandatory, not the format.

Q HAVE THE NEW RULES IMPOSED ANY ADDITIONAL REPORTING REQUIREMENTS ON MEDICAL EXPERTS?

A Although the new Medical Report Form does specify areas to be covered, these are no different to those areas covered in existing medical reports except for one new requirement for the expert to confirm whether the claimant was wearing a seatbelt.

Accordingly, it is now necessary for the expert to confirm whether the claimant was wearing a seatbelt and if not, whether the claimant was not legally obliged to wear a seatbelt due to an exemption. The expert is then required to state to what extent each of the claimant’s injuries would have been prevented altogether; have been less severe; or have been unchanged by the claimant’s failure to wear a seatbelt.

All of Premex’s experts have been informed of the change and the need to comply fully with this additional requirement in their reports.

Q DO PREMEX'S EXPERTS FALL WITHIN THE NEW DEFINITION OF "MEDICAL EXPERT" AS SET OUT IN THE NEW PRE ACTION PROTOCOL?

A YES - all of Premex's experts are registered with one of the following governing bodies:-

- General Medical Council
- General Dental Council
- Health Professions Council

Q CAN I INSTRUCT PREMEX DURING STAGE 1 OF THE NEW PROCESS?

A YES - there is nothing within the PAP that prohibits obtaining medical evidence during stage 1. Further, section 7.1 clearly states that the claimant should obtain a medical report at the start of stage 2 **"if one has not already been obtained"**.

Q WHAT INITIAL MEDICAL EVIDENCE CAN I OBTAIN?

A The PAP anticipates that a single initial report will be obtained but section 7.4 includes the flexibility for the claimant to obtain one additional report **from an expert of a different discipline** in circumstances where a single expert is unable to deal with all elements of the injuries sustained.

This second "initial" report is at the solicitor's discretion and does not require any pre-recommendation from any medical expert.

Q WHAT FURTHER MEDICAL EVIDENCE CAN I OBTAIN?

A The PAP deals with two distinct scenarios (1) further “initial” medical evidence and (2) “subsequent” medical evidence.

(1) Further “initial” medical evidence: section 7.5 provides that the initial experts (up to two) may each separately recommend that the claimant obtain a further initial medical report from an expert in a different discipline. Therefore, the PAP envisages that there may be up to four “initial” medical reports from four different disciplines.

(2) “Subsequent” medical evidence (re-examinations): the PAP is not particularly helpful in this area as section 7.6 states that a “subsequent” medical report can only be obtained in very limited circumstances and only from the medical expert who provided the initial report.

The only circumstances where such further evidence is allowed are where there is either (a) no prognosis given in the initial report or (b) where the claimant is receiving ongoing treatment.

However, in Premex’s experience, the most common reason for re-examination is that the claimant’s symptoms have continued beyond the stated prognosis in the original report; this scenario is not covered clearly by the PAP.

On the face of it re-examinations in circumstances other than as set out in section 7.6 would fall within section 7.24 - “**Medical reports obtained without recommendation**” with the risk that the cost may not be recovered – please see the following section for further details.

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Q WHAT FURTHER MEDICAL EVIDENCE CAN I OBTAIN?

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However, there is nothing in the PAP or rules to prevent or prohibit the second “initial” report, from an expert of a different discipline, being obtained some months after the first initial report, or even potentially at the expiry of the prognosis period in the first initial report.

Therefore, Premex’s view is there is a strong argument that any re-examination by an expert of a different discipline (for example, a Consultant Orthopaedic Surgeon examination following an initial GP report) could be obtained as the second “initial” medical report permitted under PAP section 7.4.

To minimise further any risk of non cost recovery and to assist in the obtaining of interim payments, Premex’s experts will now state in their report, when appropriate, that further medical evidence may need to be obtained if the symptoms stated in that report continue beyond the stated prognosis period.

Q CAN I OBTAIN MEDICAL EVIDENCE NOT COVERED BY THE PRE ACTION PROTOCOL?

A YES - as the PAP, in section 7.24 “**Medical reports obtained without recommendation**”, clearly envisages medical evidence being obtained outside the process set out in sections 7.1 - 7.6 (initial and subsequent medical evidence).

Section 7.25 gives the claimant the ability to explain the reasons for obtaining the additional medical evidence but there is no guarantee that these costs will be paid by the defendant insurer or agreed by the court at Stage 3.

Therefore, in practice, where such additional medical evidence is required the solicitor should attempt to reach agreement with the defendant insurer in advance of such evidence being instructed to minimise the risk of non cost recovery.

It is Premex’s view that the PAP and new rules have the potential to cause confusion and disagreement, therefore some flexibility and pragmatism from the insurers will be required over the next 12 months if unnecessary escalation of costs and protracted costs arguments are to be avoided.

Whilst the new PAP and rules appear to be “set in stone”, Premex takes comfort from the MOJ’s public commitment to review the operation of the new process in practice on an ongoing basis. Further, Premex has discussed its concerns directly with the MOJ and they have asked that a record is kept of situations where the new rules/process fail to deal with standard matters appropriately and effectively.

Q CAN I OBTAIN AN INTERIM PAYMENT WITHOUT DISCLOSING ANY MEDICAL EVIDENCE?

A NO - section 7.9 of the PAP is very clear and states that any initial medical reports must accompany the Interim Settlement Pack.

Further, it should be noted that the relevant medical report must contain a recommendation that a “subsequent” medical report is required. This may prove to be a block to obtaining any interim payment as, as set out above, the PAP only allows for “subsequent” medical evidence in very limited circumstances.

Whether or not this concern becomes reality depends upon how PAP section 7.9 is interpreted in practice. If the reference in 7.9 to “subsequent medical report” is taken to refer specifically to section 7.6 (which deals with “subsequent medical reports”) then it would appear that for an interim payment to be available, the initial medical report must contain a recommendation that a further report is required because of one of the stated two reasons in 7.6 and only from the same expert as provided the initial report. This is clearly a very strict interpretation of section 7.9.

A less strict interpretation of section 7.9 would allow for interim payments to be available in any case where, for whatever reason, no settlement is possible in the short term. Therefore, it could be argued that an interim payment should be possible where the initial report contains any recommendation that further medical evidence is required (which would include any recommendation for further evidence in the event symptoms continue beyond the stated prognosis period) rather than in only the very limited situations set out in section 7.6.

Q CAN I OBTAIN MEDICAL EVIDENCE AFTER SUBMITTING MY FINAL SETTLEMENT PACK AT STAGE 2?

A NO - PAP section 7.26 appears to rule this out as it clearly states the settlement pack must be accompanied by the final medical report. Further, there is an assumption that the claimant has not only approved but agreed to rely on the prognosis in that report, which clearly suggests that no further evidence will be required or considered, something the MOJ have confirmed to Premex directly.

The PAP and rules do not envisage any additional evidence being submitted should the case proceed to Stage 3.

As indicated above, the PAP does cater for medical evidence outside the process, but there are clearly cost recoverability risks attached.

Q DO THE NEW RULES PERMIT A REVIEW OF MEDICAL RECORDS?

A YES - the cost of obtaining medical records is a specified recoverable disbursement in terms of PAP section 7.40 and Rule 45.30(2)(a). The new rules and PAP envisage that medical records will be reviewed only where appropriate and necessary and whilst Premex expects the vast majority of cases falling within the new process to be GP examinations without a review of medical records, a small proportion of GP reports plus any non GP reports (Orthopaedic or other consultant discipline) are likely to require a review of medical records and should continue to be instructed on that basis.

Q CAN I AMEND ANY FACTUAL ERRORS IN THE MEDICAL REPORT ONCE IT HAS BEEN SUBMITTED TO THE DEFENDANT INSURER?

A NO - section 7.2 of the PAP states very clearly that the claimant must check the factual accuracy of the medical report before it is submitted and further, once it has been submitted there is no flexibility to alter it thereafter.

The MOJ have confirmed to Premex directly that this section relates only to factual matters and not to any medical opinion. Both the solicitor and the claimant must therefore check the report content carefully prior to its submission as Premex are unable to verify factual matters relating to either the claimant or the index accident.

Further, in terms of when any report is to be submitted to the defendant, section 7.2 needs to be read in conjunction with section 7.26 and the overriding principle of client privilege, in that the report can't be submitted until the claimant is satisfied not only with the factual content (under section 7.2) but that he has confirmed he approves the overall content and is willing to rely on the prognosis therein (under section 7.26).

Q WHERE DOES REHABILITATION FIT INTO THE NEW PROCESS?

A The existing duty to consider the claimant's rehabilitation needs remains under the new process. Section C of the CNF captures details of any recommended rehabilitation or plans to assess any such need.

Premex's early intervention triage service is designed to assess a claimant's rehabilitation needs quickly and cost effectively. Early triage followed, where appropriate, by swift referral into the Premex treatment network has proven to reduce client attrition and enhance the overall customer journey.

When you intend to instruct Premex to assess the claimant's rehabilitation needs Section C of the CNF should be completed as follows:-

- Section 2.1 – dependent upon the timing of submission of the CNF, completion of this section depends upon whether the claimant has been referred into treatment by their treating GP or hospital, or potentially recommended for treatment by Premex following the results of the Premex triage service.
- Section 2.2 - tick “Yes” and insert the following statement - **“Yes – we have instructed Premex Services Ltd to assess the claimant's rehabilitation needs”**.