

To: All New York PIP Arbitrators

Re: Summary of May 11, 2011, Loss Transfer Advisory Committee Meeting

The following discussion points from the May 11, 2011, Loss Transfer Advisory Committee meeting are being shared to help ensure consistency in understanding and application.

1. Insurance Department representatives opened the meeting to advise the committee that they were still in the process of reviewing revisions to Regulation 68 and that information on possible revisions may be found at (secure link from Larry or Chris).
2. AF recommended the addition of language to the Rules (5. Arbitration Decisions (vii)) to allow an Applicant to seek legal fees and costs if an award is not paid and the Applicant is forced to file a motion to confirm the award. Such language would be consistent with the language found in Rule 5-2 of the voluntary forum rules. After some discussion as to whether or not the language would be enforceable and/or appropriate, the Insurance Department adjourned discussion on the issue so they could research further and determine if the language would be needed in the rules or in the regulation. There was also some discussion about adding an additional 30 day time frame (Applicant would write to the non-paying party 30 days after decision publication and then be free to pursue award in litigation 30 days after this contact), however, consensus was that this would further delay payments and not resolve problem of certain companies who do not pay awards.
3. There was a discussion as to whether or not an arbitrator could raise an affirmative defense (or objection to jurisdiction) if it was not asserted in the Respondent's answer. The example being a case where two vehicles are involved in an accident, the arbitrator notices that no involved vehicles meets the 6,500 lb. weight threshold nor is a vehicle for hire, and the Respondent does not assert the affirmative defense to jurisdiction. The committee agreed that the rules precluded an arbitrator from raising the defense since it was not raised by the respondent. Per (2) Initiation of Arbitration (iv)(c) – the respondent must raise and support any affirmative defense in the Affirmative Defense section. If not asserted, the arbitrator will not consider such defenses (it is deemed waived).
4. A concern was raised about arbitrators going online to gather information about a case rather than simply rendering a decision based on the contentions and evidence submitted by the parties. While the committee agreed with the example of an arbitrator going online to get E-Law information (to rule on a deferment challenge) would be inappropriate, the committee did believe it would be appropriate for an arbitrator to access information on Vehicle Traffic laws and/or statutes, for example, if needed, to ensure decisions were accurate.
5. The issue of 50/50 decisions was again discussed. AF advised that their arbitrator training was consistent with the current NY PIP FAQ item on the subject. Simply, if a decision of 50% liability versus the Respondent is determined, the arbitrator must explain the negligence of each party. If the rationale for the 50% decision is not clear, AF will return the decision to the arbitrator for further clarification. The decision will be binding and AF has no authority to void a decision based on the liability apportionment.

6. Supplemental filings were discussed – where an Applicant has to re-file arbitration because the Respondent does not pay supplemental damages based on the original liability decision. Quite often the Respondent does not dispute the supplemental payment(s) and arbitration is unnecessarily filed to recover these payments, causing an unnecessary backlog of cases to hear. Some representatives argued that Applicants file too fast or that they should wait to file until treatment is completed and/or all payments have been made as multiple filings cause inefficiencies, errors (duplication/overlapping) and delays. Other representatives argued that payments should simply be made by the Respondent since liability is resolved; that they have to file simply because of the Respondent’s inefficiencies. No solution was reached.
7. A question was asked about how AF handles cases where a personal appearance is noted but the case is not heard. Does AF contact the representative and advise them of the new hearing date? AF responded that the representative is responsible for advising them of the cases they are there to represent on the day of the hearing. If they are there and the case is not heard, AF will reschedule the hearing and/or notify the representative of the new date. If the representative does not indicate the case that they are there to represent and the case is not heard as scheduled, then AF will consider it a non-represented case and have it heard as quickly as possible without further notice to the parties.
8. The issue of damages was again discussed. Per the rules, a payment ledger is sufficient as ‘minimal’ proof of damages should the Respondent not dispute damages. If the Respondent does dispute damages, then additional evidence may be needed to support the amount claimed/sought. In addition, if specific damages are disputed and the arbitrator believes the Respondent’s argument is valid, the arbitrator may adjourn the hearing to require the Applicant to provide the Respondent with a copy of their proofs, specific to the damages disputed.
9. A new FAQ item was approved and added to AF’s Web site regarding the applicability of loss transfer arbitration to accidents involving motorcycles.