

NOTICE OF ADOPTION

Medical Fee Schedules

I.D. No. WCB-23-18-00005-A

Filing No. 1141

Filing Date: 2018-12-11

Effective Date: 2019-04-01

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 329-1.3, 333.2, 343.2 and 348.2 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 13, 117 and 141

Subject: Medical Fee Schedules.

Purpose: Update the fees paid for medical treatment in workers' compensation claims.

Text of final rule: Section 329-1.3 of Title 12 NYCRR is hereby amended to read as follows:

(a) The medical fee schedule for medical, physical therapy and occupational therapy services shall be the Official New York Workers' Compensation Medical Fee Schedule, updated [October] *December* [3]26, 201[2]8, prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Medical Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum360coding.com keyword New York or <https://www.optum360coding.com/Product/40508/>.

Section 333.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The psychology fee schedule for psychology services shall be the Official New York Workers' Compensation Psychology Fee Schedule, updated [October] *December* [3]26, 201[2]8, prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Psychology Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum360coding.com keyword New York or <https://www.optum360coding.com/Product/40508/>.

Section 343.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The podiatry fee schedule for podiatry services shall be the Official New York Workers' Compensation Podiatry Fee Schedule, updated [October] *December* [3]26, 201[2]8, prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Podiatry Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by telephone at 1-800-464-3649, option 1; or online at www.optum360coding.com keyword New York or <https://www.optum360coding.com/Product/40508/>.

Section 348.2 of Title 12 NYCRR is hereby amended to read as follows:

(a) The chiropractic fee schedule for chiropractic services shall be the Official New York Workers' Compensation Chiropractic Fee Schedule, updated [October] *December* [3]26, 201[2]8, prepared by the board and published by OptumInsight, which is herein incorporated by reference.

(b) The Official New York Workers' Compensation Chiropractic Fee Schedule incorporated by reference herein may be examined at the office of the Department of State, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231, the Legislative Library, the libraries of the New York State Supreme Court, and the district offices of the board. Copies may be purchased from OptumInsight, by writing to Official New York Workers' Compensation Fee Schedule, PO Box 88050, Chicago, IL 60680-9920; by

telephone at 1-800-464-3649, option 1; or online at www.optum360coding.com keyword New York or <https://www.optum360coding.com/Product/40508/>.

Final rule as compared with last published rule: Nonsubstantive changes were made in sections 329-1.3, 333.2, 343.2 and 348.2.

Revised rule making(s) were previously published in the State Register on October 3, 2018.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, 328 State Street, Schenectady, NY 12305, (518) 486-9564, email: regulations@wcb.ny.gov

Revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

A revised Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement are not required because the changes made to the last published rule do not necessitate revision to the previously published document. These changes do not affect the meaning of any statements in the document.

Initial Review of Rule

As a rule that requires a RFA, RAFA or JIS, this rule will be initially reviewed in the calendar year 2021, which is no later than the 3rd year after the year in which this rule is being adopted.

Assessment of Public Comment

The Board received approximately 282 unique formal written comments, approximately 226 form letters, and approximately 100 postcards. Requests for information have been responded to individually and are not summarized here. The comments received are summarized below.

Medical Fee Schedule

The Board received a comment requesting Ground Rule 10 be amended to permit a 50% testimony fee if a deposition is cancelled with less than 48 hours' notice, and another comment requesting chiropractors be paid for medical testimony at the same rate as physicians. The Board does not have authority to impose fees on carriers when no services have been rendered, and increased testimony fees for all providers by 50 dollars, so no change has been made in response to these comments.

The Board received comments about Ground Rule 11, opining that supervision of a PA or NP should be paid at 100%, not 80%. A physician is not actually providing the treatment, and because physicians are no longer required to be on-site when treatment is rendered, no change has been made. It is believed that 80% reimbursement conforms to the method of reimbursement for other types of insurance.

The Board received comments highlighting a typographical error in Physical Medicine Ground Rule 11, where CPT code 97101 should say 97010, and the Board has corrected this error.

An attorney group commented with concern about fees applying to out of state providers. The Board did not make a change to this section in the revised proposal and did not receive a comment about this in the first proposal. The comment cited a 1993 case *Conn v. Kotasek* (198 AD2d 600) to support its contention that the Medical Fee Schedule does not apply to out of state treatment. In that case, the Appellate Division affirmed the Board's finding that the person injured in New York but living in Florida was entitled to medical treatment in Florida and the medical provider could be paid using the Florida fee schedule. The proposal does not change this, but addresses fees that may be charged for out of state treatment when the injured worker lives in New York State, so no change has been made.

The Board received several comments concerning the changes to Ground Rule 12 to conform this Ground Rule to the requirements contained in the Board's Non-Acute Pain Medical Treatment Guidelines (NAP MTG). These commenters express concern about the sensitivity of immunoassays used for drug screening; about the urine drug test rules in the proposal generally; expressing disagreement with the limitation on confirmatory testing when there are red flags. As the in-office screening and circumstances available for confirmatory lab testing mirror the testing requirements and protocols set forth in the Board's NAP MTG, which sets forth the treatment standard for managing non-acute pain, the rules governing payment for this type of screening must conform to the NAP MTG. It is noted that contrary to some comments received, confirmatory lab testing is always available when the in-office screening reveals an unexplained positive or negative test and that immunoassay tests are available to screen for fentanyl. Finally, several commenters want the fees for such testing to increase. As these fees reflect substantial increases over Medicare Fees for the same tests, no changes have been made in response to these comments.

The Board received a comment disagreeing with removing "at least" from Ground Rule 12, citing no-fault concerns. To the extent that commenters believe that the Medical Fee Schedule ("MFS") proposal impacts No-Fault, those comments should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over

No-Fault and may not make statements regarding applicability of any of its rules to the No-Fault system. No change has been made in response to this comment.

Two comments highlighted a typographical error in Physical Medicine Ground Rule 11 where an extra “is” appeared, and the Board has corrected this error.

The Board received many comments disagreeing with physical medicine Ground Rule 2 – specifically, the 12 sessions/180-day limitation. In response, the Board has decided not to implement this change, so Ground Rule 2 will read as it did previously: “Physical medicine services in excess of 12 treatments or after 45 days from the first treatment, require documentation that includes physician certification of medical necessity for continued treatment, progress notes, and treatment plans. This documentation should be submitted to the insurance carrier as part of the claim.” This limitation has been removed wherever it appeared.

The Board received comments requesting the RVU cap for physical therapy be increased from 8 to 16, but the revised proposal reflects an increase to 12, and increased the available RVUs for initial evaluations and reevaluations, so no change has been made in response to these comments.

The Board received comments from insurance companies requesting a change back to 8 RVUs. The Board received over 600 comments objecting to this in the previous proposal and increased to 12 in this proposal, so no change has been made. If commenters believe the proposal impacts No-Fault, those comments should be directed to DFS, as the Board does not have jurisdiction and cannot make statements as to the applicability of any of its rules to the No-Fault system.

The Board received a comment opining that physical therapists performing acupuncture or acupuncture modalities is dangerous. The MFS only permits services for which the provider has the appropriate licensing and/or certification, and these codes have always been present in the MFS. No change has been made.

Two comments requested clarification about whether CPT codes 97161-97163 and 9716-97167 are for self-employed physical therapists and occupational therapists only. The services that may be billed remain unchanged, so no change has been made.

The Board received comments objecting to the change in CPT codes resulting in reductions in reimbursement for EMG studies and EDX testing. Needle EMG tests have received proportionate increases. Surface EMGs are not recommended under the Medical Treatment Guidelines and therefore have no fee associated. Fees for NCV reflect changes to the CPT codes themselves, as created by the American Medical Association, and the method for billing, and will be reimbursed at 200% of the Medicare level, so no change has been made.

One comment opined that EDX testing should only be allowed by neurologists and psychiatrists. The MFS does not limit how treatment may be rendered under the Workers’ Compensation Law (“WCL”) and other relevant NYS laws and regulations, so no change has been made.

One comment requested clarification about biofeedback and whether evaluation reports are no longer required. This proposed Ground Rule was modified to reflect updates from the Medical Treatment Guidelines. The evaluation report sentence was excluded since reports are due for any medical treatment under the WCL, and no change has been made.

An insurance company requested clarification about reimbursement for co-surgeons. Under the WCL, surgeons should determine the proportion, and the MFS sets the maximum. If they cannot agree, the bill is subject to arbitration under the WCL, and this procedure is currently used rarely – no change has been made. To the extent commenters believe the MFS proposal impacts No-Fault, they should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over no-fault and cannot make statements as to the applicability of any of its rules to the no-fault system.

A form letter expressed concerns about billing within a diagnostic network testing (“DTN”) contract. Fees adjusted under a DTN contract are contractual – physicians do not have to join DTNs, and the terms of such contracts are not within the Board’s purview, so no change has been made.

Chiropractic Fee Schedule

Several comments requested higher fees. The proposal increased fees proportionately, so no change has been made.

One comment objected to removing CPT code 97750, and that CPT code 95999 should not have an RVU of 0. This was considered in the first proposal, so no change has been made.

Many comments objected to the 180-day limitation in chiropractic Ground Rule 3 (and to physical medicine Ground Rule 2, discussed above). In response, the Board has decided not to implement this change, so the 180-day limitation has been removed.

One comment supported proposed changes to chiropractic Ground Rule 11.

Several comments objected to removal of specific CPT codes. As the

Board noted previously, the Board did not decrease reimbursement rates and increased RVUs for chiropractors – to the extent fees declined, that is due to the modification of CPT codes themselves since 2012 and earlier. No change has been made.

Several comments objected to proposed changes impacting MUA and spinal decompression. These are not recommended under the Medical Treatment Guidelines, so no change has been made.

Several comments objected to chiropractic Ground Rule 10. Since this is not a new rule, but clarification of an existing one, no change has been made.

A number of comments disagreed with limitations on manual clinical muscle testing systems. Since this is included in the fee for E&M services, no change has been made.

One comment requested clarification for Ground Rule 11 about unit-limitation reviews. Under the WCL, each provider is subject to his or her own rules, so no change has been made.

Behavioral Fee Schedule

Several comments objected to the rule about supervision of non-authorized mental health professionals. As previously noted, the WCL only permits supervision of non-authorized providers by physicians, in accordance with WCL § 13-b, and there is no corollary in § 13-m permitting psychologists to supervise non-authorized providers. Because only the legislature may amend the WCL, no change has been made.

One comment objected to the use of CPT code 97127, but this is the current CPT code in use for cognitive function testing, so no change has been made.

General Comments

The Board received several comments in general support, and several comments and postcards disagreeing as with the proposal as a whole with no suggested changes. No change has been made.

One comment requested MFS be published on the website, but because they have always been published by an outside publisher and it is available for review at Board offices and Supreme Court and Legislative libraries in accordance with rules about incorporating by reference, no change has been made.

Several comments expressed concern about impact or possible conflicts on No-Fault. To the extent that commenters believe that the medical fee schedule proposal impacts No-Fault, those comments should be directed to DFS as to their application to the No-Fault system. The Board does not have jurisdiction over No-Fault and therefore may not make statements as to the applicability of any of its rules to the No-Fault system.

One comment highlighted possible errors in headings, which have been corrected.

Comments from insurance companies requested new fee schedules (acupuncture and massage therapy). Since the WCL does not permit treatment by acupuncturists or massage therapists, no fee schedules are necessary and no change has been made.

Comments from insurance companies also requested ground rules differentiate strapping and kinesio taping, and eliminate generic BR codes. The differences in these codes are in the description of the CPT codes, and WCL has ability to resolve disputes about BR codes, so no change has been made. To the extent commenters believe the MFS proposal impacts no-fault, they should direct them to DFS. The Board does not have jurisdiction over No-Fault and therefore cannot make statements as to the applicability of any of its rules to the No-Fault system.

Changes

- Fixed two typographical errors in Physical Medicine Ground Rule 11 (CPT code 97101 to 97010) and deleted “is” from “patient is may not”
- Reverted to original language of Physical Medicine Ground Rule 2
- Removed 180-day limitation in chiropractic Ground Rule 3
- Fixed errors in headings