

## Assessment of public comments for the Thirty-Fourth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

The Department received 13 comments in response to its publication of the proposed rule in the New York State Register. The Department received comments from the following entities:

- Property/casualty insurers;
- Health service providers;
- Trade associations comprised of New York State automobile insurers;
- Law firms that provide legal services to various providers;
- Trade associations comprised of health service professionals.

Summaries of the comments on the proposal and the Department's responses thereto are as follows.

Insurers and their trade associations overwhelmingly support the proposed rule, noting serious concerns about the potential impact that the substantial increase in the most recently adopted fee schedules of the Workers' Compensation Board ("WCB") has on no-fault costs.

However, health service providers (or "providers") and trade associations representing health service professionals object to either any delays in the implementation of the WCB's fee schedules or disagree that the delay should be for 18 months. Below is a discussion on specific comments made by proponents and opponents of the proposed rule.

### **Comments Made by Proponents of the Rule**

1. Insurers and their trade associations unanimously support the rule delaying the application of the WCB's fee schedules for 18 months. They contend the changes to the fee schedules will result in a substantial increase in no-fault loss costs. As such, insurers will need adequate time to study the impact of the fee schedule changes on no-fault in order to adjust rate filings appropriately. These proponents also assert that the delay will provide the Department with the opportunity to consider and possibly implement other cost containment measures such as medical treatment guidelines for no-fault.

### **Department's Response**

The Department agrees that insurers will need time to study the cost impact to no-fault since consumers ultimately will absorb the increased costs through higher premiums. With respect to proponents' suggestion to adopt medical treatment guidelines to no-fault, the Department will take this proposal into consideration. However, this comment is beyond the scope of changes to the regulation being implemented at this time. Accordingly, no change to the regulation was made based upon this comment.

2. One insurer, while applauding the immediate application of certain WCB Ground Rules to no-fault, recommended the Department make clear in its amendment to Insurance Regulation 83 that with respect to a procedure that has a relative value unit ("RVU") listed as "BR" (By Report), a chiropractor may only establish a RVU consistent with other RVUs listed in the Chiropractic Fee Schedule, in lieu of adopting Ground Rule 10. The insurer contended that if such a clarification is not made, chiropractors will continue to bill manipulation under anesthesia procedures as "BR" and use a higher corresponding code from the Medical Fee Schedule.

### **Department's Response**

The Department finds that no further clarification to this rule is necessary. The WCB's BR provision in the Chiropractic Fee Schedules (as well as the fee schedules of other specialties) state in pertinent part that: "For any procedure where the relative value unit is listed in the schedule as "BR", the chiropractor [or other specialty] shall establish a relative value unit consistent in relativity with other relative value units shown **in the schedule**." [Emphasis added.] The WCB has clarified any ambiguity as to whether a provider may use any fee schedule to establish BR codes by codifying its position that no provider may be reimbursed for treatments not enumerated in that provider's fee schedule.

### **Comments Opposing the Rule**

Groups representing providers as well as providers proffered the following arguments against the proposed rule:

1. Some chiropractors objected to the adoption of Ground Rule 10 because the rule will restrict reimbursement for certain procedures not specifically listed in the Chiropractic Fee Schedule, which courts have held that chiropractors may seek reimbursement because they are licensed to perform those procedures.

One chiropractor noted his objection to the WCB's changes to its fee schedules in general, referring to them as "discriminatory against chiropractic care" because physical therapists are being reimbursed at higher RVUs than chiropractors, and that chiropractic RVUs are far less than other states.

### **Department's Response**

The fee schedules, including RVUs are established by the WCB and are adopted by the Department pursuant to Insurance Law § 5108. Therefore, any differences in RVUs across specialties are under the purview of the WCB. With respect to Ground Rule 10, the Department merely is adopting a rule that the WCB has asserted was the WCB's intent and codified that rule in its most recent amendment to its fee schedules.

2. A trade association representing health service professionals argues that the adoption of the fee schedule changes to take effect October 1, 2020, and the adoption of certain Ground Rules to take effect April 1, 2019 with respect to no-fault should have the same effective date. The association contended that although it is understood that a "short" delay for a few months is necessary to provide insurers with notice of changes to the fee schedules, an 18-month delay in applying fee schedule increases is unreasonable. The association also argued that the more immediate application of Ground Rule 10 to no-fault will result in depriving patients access to well-needed chiropractic services, which studies have shown to be more cost effective and efficacious than medical care that includes prescribing opioids and surgery.

### **Department's Response**

The Department disagrees that a short delay of a few months is enough time for insurers to study the cost impact of the fee schedules changes to no-fault, especially when it is consumers who ultimately will absorb those costs.

The Department sees no reason to delay the application of Ground Rule 10 for use in no-fault. According to the WCB in its adoption of its fee schedules promulgated in the December 26, 2018 edition of the New York State Register, the Ground Rules limiting certain providers to bill for services within their respective fee schedules are merely a “clarification” of the WCB’s intent with respect to its fee schedules, and not a new addition to its fee schedules.

3. A chiropractor, in expressing his objection to the 18-month delay in applying the fee schedules changes to no fault, contended that the Department’s rationale for doing so is illogical because workers’ compensation carriers are being required to absorb the costs of the fee schedule increases after only 6 months. As such, no-fault carriers should be required to do the same.

**Department's Response**

The Department finds that this comment lacks merit. In 2018, the Department approved a workers’ compensation rate filing with loss cost level change of -11.7%. This reduction took effect on October 1, 2018. Furthermore, the vast majority of loss costs in no-fault are attributable to payments for health services as opposed to workers’ compensation where the majority of loss costs is attributable to disability and wage claims.

4. A trade association representing medical professionals argued that the 18-month delay will be problematic for providers who will have to maintain two different coding systems and fee schedules. The association contended that different billing systems will hamper any progress towards a fully integrated electronic claims filing system. The association also asserted that to avoid the burden of separate billing systems, practitioners may refuse to accept no-fault assignments and bill patients directly.

**Department's Response**

The Department understands the potential difficulty to providers in maintaining two separate billing systems. However, the Department finds compelling the need to provide insurers with sufficient time to study the impact

the significant changes to the fee schedule will have on no-fault loss costs in order to appropriately amend insurance rates, especially because consumers ultimately will be absorbing those costs.

With respect to the commentator's assertion that practitioners may avoid the billing issue by refusing to accept no-fault assignments and directly bill patients, regardless of whether they accept assignments or directly bill no-fault patients, they are still required by law to bill in accordance with the applicable fee schedules. Therefore, practitioners will need to maintain coding systems for schedules that are applicable at the time of service.

5. A law firm representing providers challenged the Department's rationale for delaying the application of the fee schedule changes to no-fault for 18 months. The commentator asserted that paying providers at higher rates will not impose any increases costs on insurers because their total liability is statutorily capped at \$50,000.

#### **Department's Response**

The commentator's assertion that the mandatory \$50,000 coverage shields insurers from any increased costs as a result of fee schedule increases is fundamentally flawed. Only a small percentage of auto accidents result in an injury serious enough to exhaust the \$50,000 no-fault coverage limit available under the policy. Therefore, insurers, when formulating premium rates, do not base those rates on the assumption that most policies will be exhausted, but do so based on actual loss costs incurred. Additionally, current premium rates are based on exposure at fee schedules in effect prior to April 1, 2019. Without sufficient time to reassess claims severity based on much higher fee schedules, insurers will be unable to ascertain the appropriate underwriting exposure and may unwittingly inflate premium rates paid by consumers.