

Assessment of Public Comments for the Thirty-Fifth Amendment to 11 NYCRR 68 (Insurance Regulation 83)

The Department of Financial Services (“Department”) received one comment from an insurer in response to the publication of the proposed rule in the New York State Register.

The insurer requested that the Department eliminate the delay in adopting the workers’ compensation acupuncture fee schedule and omit any effective dates for the promulgation of the proposed rule. The insurer asserted that the delay to October 1, 2020 implicitly permits acupuncturists to be reimbursed at the rate of a medical doctor rather than the more comparable chiropractic rate. In addition, the insurer disagreed with the Department’s assertion in its Regulatory Impact Statement that the immediate adoption of the workers’ compensation acupuncture fee schedule would ultimately increase arbitration disputes over fee schedules. To support its claim that the Department should consider adopting the acupuncture fee schedule as of the date it took effect for workers’ compensation claims, the insurer referenced the case Global Liberty Ins. Co. of N.Y. v. Acupuncture Now, P.C., 178 A.D. 3d 512 (2nd Dept. 2019), in which the Appellate Division affirmed that Acupuncture Now was entitled to reimbursements under the physician fee schedule rather than the chiropractic fee schedule. The insurer asserted that by delaying the adoption of the fee schedule, the Department implicitly agrees that acupuncturists should be reimbursed at the higher physician rate rather than the lower chiropractic rate since a chiropractor’s licensing requirements are similar to those of an acupuncturist.

The Department rejects the insurer’s request to eliminate the October 1, 2020 effective date of the workers’ compensation acupuncture fee schedule. In February 2019, the Department delayed until October 1, 2020, which insurers and insurer trade associations unanimously supported, the adoption the Workers’ Compensation Board’s significant increases in its medical fee schedules, which took effect on April 1, 2019 for workers’ compensation claims. It would be arbitrary and capricious to now single out the acupuncture fee schedule to take effect immediately while delaying the fee schedule increases of other health service providers.

(Of note, the Department has not received comments from any other insurer or insurer trade organizations objecting to the delay in adopting the workers' compensation acupuncture fee schedule.)

Furthermore, the Department finds the comment that the delay in adopting the fee schedule implicitly upholds the Appellate Division's holding in Global Liberty is without merit. The Department holds, as stated in its Office of General Counsel opinion letters regarding reimbursements for acupuncturists and, more generally, Insurance Regulation 83, that if the Superintendent has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service shall be the prevailing fee in the geographic location of the provider subject to review by the insurer for consistency with charges permissible for similar procedures under schedules already adopted or established by the Superintendent. Therefore, the fee schedule for physicians and chiropractors may apply to treatments rendered by acupuncturists. It is up to the insurer to prove that the treatment in question should be reimbursed at the lower chiropractic rate than at the higher physician rate.

The Department believes that it is necessary that all the amendments to the workers' compensation fee schedules be adopted at the same time in order to give insurers and providers enough time to update their bill processing systems. Having to maintain separate billing systems simultaneously if there are different effective dates for fee schedules will have a significant cost impact on insurers and providers and will inevitably lead to confusion and inaccurate billing, resulting in an increase in arbitration disputes, which already are at a staggering rate.