

Assessment of Public Comment

During the public comment period, the Board received 5 comments, some of which addressed multiple issues.

One comment recommended including language that direct examination is waived unless authorized or directed by the Workers' Compensation Law Judge, or that direct examination is denied in all depositions. This was addressed in the previous assessment of public comment.

One comment criticized raising the deposition rates for all providers, including physician assistants. Deposition fee increases were addressed in the previous assessment of public comment. Physician assistants were added as a result of the previous public comments. The Board sees no reason to provide a lower fee to physician assistants than other healthcare providers addressed in Section 301.3 of Title 12 NYCRR.

One comment requested clarification on whether an employer or carrier would be required to pursue court enforcement of a subpoena before obtaining a preclusion of records. This was addressed in the previous assessment of public comment.

One comment noted that form HP-1.0 does not currently have a mechanism for addressing unpaid deposition fees where there is no underlying bill or for an increased fee for an unpaid bill. The Board is creating an affirmation form and updating procedures for this purpose. Therefore, no change has been made in response to this comment.

One comment requested clarification on whether the 45-day deadline for payment is calculated based on the date that the carrier receives the deposition, and whether an extension to submit the deposition transcript also creates an extension for payment. Because the proposed regulation states that the deadline for payment is calculated based on the date of the deposition itself, no change has been made in response to this comment.

One comment requested clarification on whether there was a specific CPT code for billing of additional 15-minute increments of depositions that are longer than one hour. As the regulation notes that no bill is necessary, the payer is expected to track their own activities and remit payment accordingly. Therefore, no change has been made in response to this comment.

One comment noted that subdivision (c) of section 300.10 of Title 12 NYCRR refers only to physicians, and recommended expanding this as other medical providers may be deposed. Requests to cross-examine other types of healthcare providers fall under the general tenets of due process and caselaw, and procedural steps such as requests for extension on submission of transcripts are addressed in other areas of the regulation. Therefore, no change has been made in response to this comment.

One comment requested clarity on the term "offer of proof" and expressed concern that the use of this term in the proposed regulation would create a heightened evidentiary standard. The term "offer of proof" is generally understood in the legal field to relate to an argument for submission of evidence, where, in this case, the evidence is the deposition itself. All parties requesting cross-

examination of a medical provider should be prepared to offer an explanation of why the cross-examination should be taken and admitted as evidence. Therefore, no change has been made in response to this comment.

One comment suggested clarifying the situations under which a Workers' Compensation Law Judge could deny cross-examination and noting that the only reason to cross-examine the treating provider is regarding the provider's opinion. Another recommended identifying which legal issues would create a right to cross-examine the provider. This was already addressed in the previous assessment of public comment, so no change has been made in response to these comments.

One comment recommended that the Workers' Compensation Law Judge should be required to state any reasons for denial with specificity. The text of the proposed regulation already notes that when providing the basis for a denial, the Judge shall address the offer of proof. Therefore, no change has been made in response to this comment.

Changes made:

- None