

Regulatory Impact Statement for changes to 12 NYCRR 440.3 and 440.4

1. **Statutory Authority:** Workers' Compensation Law (WCL) §117(1) and 142 authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with, and supplemental to, the provisions of the WCL. WCL §13(i) sets forth the requirements for ensuring injured workers receive prescribed medication and for payment for these medication by the insurance carrier, self-insured employer or third-party administrator (payer).

2. **Legislative Objectives:** In 2007, the Legislature set forth requirements in WCL §§13 and 13-o for providing injured workers with medically necessary prescribed medication and to permit a payer to require use of a pharmacy network to obtain those medications. Regulations were adopted by the Board to implement these statutory requirements. This proposal furthers that objective by clarifying the path for an injured worker who is required to use a pharmacy network to obtain prescribed medication when the payer disputes whether the medication is associated to the work-related injury or is the legal obligation of the payer.

3. Needs and Benefits:

The proposal seeks to provide clear guidelines allowing an injured worker to obtain outpatient prescription medications from a non-designated pharmacy, particularly when the payer has not yet accepted a claim for compensation for a particular body part or when the payer has another legal objection to the prescribed medication. There is an issue that injured workers can face when there is an existing workers' compensation claim for a particular body part and they have been notified by the payer of the requirement to use a pharmacy network for all prescription medication related to the workers' compensation injury or illness. Should the injured worker seek treatment for another injury or illness not yet accepted by the payer, medication for treatment of such injury or illness is often not dispensed by the designated pharmacy, because the claim has not been established for that new body part or condition. This creates a situation where the injured worker can have difficulties obtaining necessary prescription medication

because they have been notified of the need to use a network pharmacy but that pharmacy will not dispense the prescribed medication.

The proposal will ensure that injured workers have a path to obtain medically necessary medication either through use of the network or, if the network will not dispense, by notice of their ability to use an out-of-network pharmacy.

This regulatory proposal creates a simple method for injured workers to get necessary medication. The proposal also allows payers to evaluate the claim and prescription to determine whether to dispense the medication within network and keep the discounts associated to network use or notify the injured worker that they may go out of network. When the payer notifies the injured worker that they may go out of network, the payer assumes the risk that if the medication is later determined to be the payer's responsibility, the payer will be obligated to reimburse the injured worker or non-network pharmacy at the fee schedule rate for the medication plus 25%. This is currently what happens in a disputed worker's compensation claim.

The proposal:

- Adds language clarifying exactly when the payer must provide notice to the injured worker in writing that they have (or will have) a legal objection and will not pay for the prescribed medication, thus allowing the injured worker to go out of network until either the claim is established or the legal objection is resolved. The injured worker will have clear instructions so they can obtain their needed prescribed medication.
- Adds language clarifying that the notice must be in the format prescribed by the Chair, and that the format prescribed by the Chair may be electronic.
- Adds language making clear that prior to the injured worker being served such notice, the pharmacy must dispense the medication and the payer will be responsible for payment for that medication.
- Adds language that if the pharmacy fails to dispense the prescribed medication in that case, the payer will be subject to penalties under section 114-a(3) of the WCL.
- Adds language clarifying that the requirement for an injured worker to use a designated pharmacy is not effective until all requirements under the regulation have been met.

4. Costs:

Overall, this proposal is expected to be cost neutral but will provide added clarity for an injured worker attempting to get prescribed medication. The notice that payers may provide will be created by the Board and may be delivered electronically. These minimal compliance costs are balanced by the anticipated reduction in frictional costs associated with resolving the disputes and the necessity of assuring that injured workers have access to medically necessary medication even when it is unclear if the need for the medication is due to their work-related injury or not.

While there are possible penalties included in this proposal for payers who do not follow the notice requirements, whether or not payers incur such penalties is within their control.

5. Local government mandates: The proposed amendments do not impose any additional program, service, duty, or responsibility upon any county, city, town, village, school district, fire district, or other special district.

6. Paperwork: The proposed amendments will require payers to provide the injured worker with a notification in the format prescribed by the Chair if there is a legal objection and the injured worker can go out of network, and also when they must resume going to the designated pharmacy after the body part is accepted, etc. This notification may be electronic.

7. Duplication: The proposal does not duplicate or conflict with any State or Federal requirements.

8. Alternatives: An alternative would be to not amend the regulation and not address this issue at all, which is how the system currently operates. However, the problem this proposal attempts to fix is a situation where an injured worker has difficulty obtaining prescription medication that they need. This proposal provides guidelines and clear rules so that the injured worker can obtain needed prescription medication and guidance for the payer to steer the injured worker back to the designated pharmacy once they provide the injured worker with written notice.

The legislature has taken notice of this interest and introduced legislation to help combat this issue as well, but a regulatory approach is more streamlined and more efficient – both with guiding payer behavior and with ensuring injured workers continue to have access to their prescribed medication even when there is a legal objection/the claim is controverted. This proposal should avoid the unnecessary litigation and hearings that would be required under the bill.

9. Federal standards. There are no applicable Federal standards.

10. Compliance schedule: The proposal will be effective upon publication of the Notice of Adoption in the State Register.