

Chapter V. of Title 12 NYCRR is amended to add a new Subchapter M, Parts 440 and 442 to read as follows:

M. Pharmacy and Durable Medical Goods Fee Schedules and Appendices

Part 440. Pharmacy Fee Schedule

Section 440.1 Applicability.

This pharmaceutical fee schedule is applicable to prescription drugs or medicines dispensed on or after the most recent effective date of section 440.5 of this part for medical care or treatment of an injured employee, regardless of the date of accident or date of disablement. The date that the prescription drug or medicine is dispensed shall be the applicable date for reimbursement in accordance with this fee schedule. Prescription drugs or medicines dispensed prior to July 11, 2007, shall be reimbursed at the usual and customary rate in the location where the claimant resides. Prescription drugs or medicines dispensed on or after July 11, 2007, but prior to the most recent effective date of section 440.5 of this part, shall be reimbursed pursuant to the fee schedule in section 440.5 of this part in effect on the date the prescription drug or medicine was dispensed.

Section 440.2 Definitions.

(a) “Average Wholesale Price” or “AWP” means the average wholesale price of a prescription drug as provided in the most current release of the Red Book published by Thomson Reuters or Medi-Span Master Drug Database by Wolters Kluwer Health or any successor publisher, on the day a prescription drug is dispensed or other nationally recognized drug pricing index adopted by the Chair or Chair’s designee.

(b) “Brand name drug” means a drug for which an application is approved under the Federal Food, Drug, and Cosmetic Act Section 505(c).

(c) “Controlled substance” has the meaning provided in Public Health Law Section 3306.

(d) “Generic drug” means a drug for which an application is approved under the Federal Food, Drug, and Cosmetic Act Section 505(j).

(e) “Independent pharmacy” means a pharmacy (including a remote pharmacy) that is not part of a pharmacy chain.

(f) “Insurance carrier” means the State Insurance Fund, stock corporations, mutual corporations or reciprocal insurers with which employers have insured, and any special fund maintained by the Board that is responsible for paying for medical treatment and care of injured workers, including but not limited to, the Special Fund for Reopened Cases created and governed by Workers’ Compensation Law Section 25-a and the Uninsured Employers’ Fund created and governed by Workers’ Compensation Law Section 2-a.

(g) “Pharmacy benefit management” means the services provided to a self-insured employer or insurance carrier, directly or through another entity, including 1) the negotiation of the amount to be paid for prescription medicine or drugs by the self-insured employer or insurance carrier and the amount paid to independent pharmacy, pharmacy chain, or remote pharmacy dispensing prescription medicine or drugs, 2) procurement of prescription medicines or drugs to be dispensed to injured employees, or 3) the administration or management of prescription medicine or drug benefits, including, but not limited to, any of the following: (i) mail service pharmacy; (ii) claims processing, retail network contracting and management, or payment of claims to pharmacies for dispensing prescription medicines or drugs; (iii) patient compliance, therapeutic intervention, or generic substitution programs; (iv) disease management; and (v) retrospective review.

(h) “Pharmacy benefit manager” means any entity that performs pharmacy benefit management for a self-insured employer or insurance carrier.

(i) “Pharmacy chain” means any entity that has been designated by a carrier or self-insured employer under section 440.3(1) of this Part that is (1) a group of pharmacies (including remote pharmacies) under common ownership; or (2) a group of pharmacies (including remote pharmacies) linked to the same company via franchise agreements.

(j) "Pharmacy Processing Agent" means person or entity that contracts with a pharmacy as permitted by law, establishing an agent or assignee relationship, to process claims and act on behalf of the pharmacy under the terms and conditions of a contract related to services being billed. Such contracts may permit the agent or assignee to submit billings, request reconsideration, receive reimbursement, and seek medical dispute resolution for the pharmacy services billed.

(k) "Remote pharmacy" means any pharmacy that sells anywhere in New York State by mail, phone and/or Internet.

(l) "Rural area" means counties within the state having a population of less than two hundred thousand, and the municipalities as are found therein, and in counties having a population of two hundred thousand or greater, "rural areas" means towns with population densities of one hundred fifty persons or less per square mile, and the villages and other municipalities as are found therein. For purposes of this Part, a rural area does not include municipalities which are incorporated cities or villages having a population of 2,500 or more.

(m) "Self-insured employer" means an employer permitted by the Chair to pay compensation and medical benefits directly under the provisions of Workers' Compensation Law Section 50 (3), (3-a) or (4).

(n) "Third party payor" means any self-insured employer, insurance carrier, nonprofit hospital service plan, health care service plan, health maintenance organization, or any person or other entity which provides payment for medical and related services.

Section 440.3 Designated pharmacies.

(a) A self-insured employer or insurance carrier, or its agent, may designate one or more independent pharmacy, pharmacy chain, or pharmacy benefit manager that injured employees must use to obtain outpatient prescription medications, provided that the self-insured employer or insurance carrier:

(1) has filed with the Chair, in the manner prescribed by the Chair either (i) a listing of all pharmacy chains and independent pharmacies it has designated under this section, and notified the Chair, in the manner

prescribed by the Chair, of the addition or removal of any pharmacy chain or independent pharmacy from that listing on a quarterly basis, or (ii) the name and contact information for a pharmacy benefit manager or other party listed in the notice provided under section 440.4(a)(1) of this Part, provided such pharmacy benefit manager or other party shall provide a list of all pharmacy chains and independent pharmacies it administers, in the manner prescribed by the Chair, and notifies the Chair, in the manner prescribed by the Chair, of the addition or removal of any pharmacy chain or independent pharmacy from that listing on a quarterly basis; and

(2) is compliant with the notification requirements set forth in Section 440.4 of this Part.

(b) Each independent pharmacy or pharmacy chain designated under this Part must maintain a sufficient inventory such that it may service claimants without undue delay. Each designated pharmacy must either (1) be a remote pharmacy; or (2) be open for business hours that are regular and customary in the community.

(c) A claimant shall not be required to obtain medications from a designated pharmacy:

(1) prior to receiving the individual notice and identifying documents required by section 440.4 of this Part;

or

(2) after receipt of the notice required by subdivision (d) of this section; or

(3) if no designated pharmacy is a remote pharmacy or one that delivers to the claimant, and no designated pharmacy is located within fifteen miles of the claimant's place of residence or employment if the claimant resides in a rural area or within five miles of the claimant's place of residence or employment if the claimant resides in a municipality which is an incorporated city or village having a population of 2,500 or more; or

(4) a medical emergency occurs and it is not reasonably possible to obtain immediately required prescribed medicine from a designated pharmacy. It shall be deemed a medical emergency when (i) a medical provider directs a claimant to take a medication by a certain time, and such medication cannot be obtained prior to that time via a remote pharmacy, (ii) no designated pharmacies are located within the distance from claimant's residence or employment set forth in paragraph (3) of this subdivision, and (iii) the medication obtained is not a

refill, or the claimant was not otherwise aware of his or her need to take the medication within sufficient time to obtain it via a remote pharmacy.

(d) In any claim controverted by the self-insured employer or insurance carrier pursuant to Workers' Compensation Law Section 25(2), where the self-insured employer or insurance carrier will not reimburse the designated independent pharmacy, pharmacy chain, or pharmacy benefits manager for prescription medicines dispensed to the claimant until the controversy is resolved and the claim established, even under the provisions of Workers' Compensation Law Section 21-a, the self-insured employer or insurance carrier shall provide notice of this decision to the claimant with the notice that the right to compensation is controverted. Such notice shall be in the form prescribed by the Chair, and shall state that the self-insured employer or insurance carrier does not intend to reimburse the independent pharmacy, pharmacy chain, or pharmacy benefit manager it has designated while the claim is controverted and until it is established, and the claimant may elect to use a pharmacy not designated pursuant to this Part during the period that the claim is controverted. In the event the claimant prevails on his or her claim, the self-insured employer or insurance carrier shall reimburse either (1) the claimant, the pharmacy processing agent, or other third party that has made payment for such medication or (2) the pharmacy from which the claimant has obtained such medication where the pharmacy has not received payment from the claimant, the pharmacy processing agent, or any third party. Such reimbursement shall not exceed the maximum amount set by the fee schedule for controverted claims in section 440.5 of this Part. In the event the self-insured employer or insurance carrier prevails, it shall have no obligation to reimburse the claimant, the pharmacy processing agent, or any third party that paid for such medication, or pharmacy. Nothing in these regulations shall bar the pharmacy or pharmacy processing agent or other third-party payor from seeking payment or reimbursement from the claimant if the claim is not established as otherwise permitted by law.

(e) For purposes of this part, no remote pharmacy may offer purchases solely by email or online, but must provide an option to make purchases by telephone and mail order.

(f) Where a claim is apportioned between more than one self-insured employer or insurance carrier, the claimant may select among pharmacies designated under this Part by all such self-insured employers or insurance carriers liable for apportionment. If any such self-insured employers or insurance carriers have not designated any independent pharmacies, pharmacy chains, or pharmacy benefit manager under this Part, the claimant is not bound by any designation made under this Part.

Section 440.4 Notification

(a) Universal notice requirements when the self-insured employer or insurance carrier designates an independent pharmacy, pharmacy chain, or pharmacy benefit manager. The self-insured employer or insurance carrier shall provide notice to potential claimants of its designated independent pharmacy, pharmacy chain, or pharmacy benefit manager, in writing and in plain language, as follows:

(1) All insurance carriers that have designated an independent pharmacy or pharmacies, pharmacy chain or chains, or pharmacy benefit manager under this Part shall provide to all employers whose employees will be required to use such pharmacy or pharmacies, a notice not materially different than the form prescribed by the Chair for such purpose. All self-insured employers who have designated an independent pharmacy or pharmacies, pharmacy chain or chains, or pharmacy benefit manager under this Part, which their employees are required to use, shall prepare a notice materially the same as the form prescribed by the Chair as described in this paragraph. Such notice shall include (i) either the identity of all independent pharmacies and pharmacy chains designated by the carrier, or where the carrier designates a pharmacy benefits manager or other party, the identity and contact information for the pharmacy benefits manager or other party, who shall provide a list of all pharmacies in the employee's state to the employee in writing or electronically upon and in accordance with an employee's request; and (ii) a toll-free number and website where the employee may access information

regarding the procedures the employee must follow to fill and refill prescriptions through a remote pharmacy or other means, and may obtain a list of such pharmacies including their name, address and phone number, searchable by geographic location and fully updated as of the date at issue, in that employee's state.

(2) Each employer within seven days following receipt of such notice, and each self-insured employer upon the designation of an independent pharmacy or pharmacies, chain pharmacy or pharmacies, pharmacy benefit manager, or other party under this section, must either (i) post the notice required in paragraph (1) of this subdivision in the same location where the notice of workers' compensation coverage required by section 51 of the Workers' Compensation Law is posted ; or (ii) distribute a copy of the notice to all employees in New York State by providing the notice in paper format or sending it electronically, or (iii) posting the notice on its employee accessible intranet or internet website.

(3) If the designated independent pharmacies, pharmacy chains, or pharmacy benefit manager change, the carrier or self-insured employer, or its designee, must revise the notification required by paragraphs (1) and (2) of this subdivision to reflect such changes. The carrier or its designee shall provide such revised notification to all employers whose employees are required to use such pharmacy or pharmacies or pharmacy benefit manager. Such revised notification shall be posted or distributed by each employer in accordance with paragraph (2) of this subdivision. The designation of any new independent pharmacy, pharmacy chain, or pharmacy benefit manager previously listed in the notice provided under paragraph (1) of this subdivision, or the removal of any such pharmacy chain, independent pharmacy, or pharmacy benefit manager, shall not be valid until seven business days after such posting and distribution of the revised notice.

(b) Individual notice requirements for self-insured employers and insurance carriers. All self-insured employers and insurance carriers shall provide the claimant upon being informed that a work related accident, injury, or illness has occurred, with a document, such as a pharmacy benefit card, (1) identifying the self-insured employer or insurance carrier, and (2) listing telephone and other contact information by which a

claimant or pharmacy may make inquiries concerning the workers' compensation coverage for the claimant. If the self-insured employer or insurance carrier has designated an independent pharmacy or pharmacies, chain pharmacy or pharmacies, or pharmacy benefit manager, and requires the claimant to obtain prescription medicine from such pharmacy or pharmacies or from a pharmacy affiliated with the pharmacy benefit manager, the document shall include such information as necessary to notify the claimant or pharmacies when the claimant attempts to fill a prescription, that the self-insured employer or insurance carrier has made such designation, including the website address and toll-free telephone number required by subdivision (a)(1) of this section and any identifying code that the claimant may be required to use when making purchases through a remote pharmacy. The document may contain such accurate and relevant information in regard to the workers' compensation coverage for the claimant as the self-insured employer or insurance carrier deems appropriate, and shall be accompanied by such explanatory information in easily understood plain language as is necessary to explain how to use the document to purchase medication. In addition, upon receiving notification of the claim, the self-insured employer or insurance carrier shall provide the claimant a toll-free number and website where any information about the designated independent pharmacies, pharmacy chains, or pharmacy benefit manager can be obtained, and (1) a list of designated independent pharmacies or chain pharmacies that shall include pharmacies located within fifteen miles of the claimant's place of residence or employment if the claimant resides in a rural area or within five miles if the claimant resides in a municipality which is an incorporated city or village having a population of 2,500 or more, and (2) contact information for any designated remote pharmacy.

(c) The requirement to use a designated independent pharmacy, chain pharmacy, or pharmacy benefit manager, shall not be effective until all notification requirements set forth in subdivisions (a) and (b) of this section have been met.

(d) A self-insured employer's, insurance carrier's, or employer's failure to comply with the notification requirements of this Part may be subject to sanction by the Chair in accordance with section 440.10 of this Part. Such sanction may include a direction that reimbursement to any pharmacy, pharmacy processing agent or other third party that paid for the medication harmed by such failure to be at a rate greater than that provided to designated pharmacies, although in no case more than the fee schedule, and the costs to the harmed party resulting from the failure plus statutory interest. In cases of persistent and significant non-compliance, such sanction may include suspension or prohibition of the self-insured employer's or insurance carrier's designation of pharmacies under this Part.

Section 440.5 Fee Schedule

(a) (1) The maximum reimbursement or payment for prescription drugs or medicines in uncontroverted cases, including all brand name and generic prescription drugs or medicines, shall be the Average Wholesale Price for the national drug code for the prescription drug or medicine on the day it was dispensed minus twelve percent of the Average Wholesale price plus a dispensing fee of four dollars for brand name drugs or medicines or minus twenty percent of the Average Wholesale Price plus a dispensing fee of five dollars for generic drugs or medicines.

(2) The maximum reimbursement for prescription drugs or medicines dispensed in controverted cases during the period the case is controverted, including all brand name and generic prescription drugs or medicines, shall be twenty-five per cent more than the maximum reimbursement at the time the prescription drugs or medicines are provided if the case was uncontroverted, plus a dispensing fee of seven dollars and fifty cents for generic prescription drugs or medicines and six dollars for brand-name prescription drugs or medicines.

(3) Nothing in this section shall bar a self-insured employer or insurance carrier from providing a lower reimbursement rate or dispensing fee pursuant to a written agreement with any independent pharmacy, pharmacy chain, or pharmacy benefit manager.

(4) The maximum reimbursements or payments for prescription drugs or medicines set forth in this subdivision shall be the maximum payment any individual or entity may receive from any claimant, individual, entity, self-insured employer, insurance carrier, or third party in connection with a claim for workers' compensation benefits.

(b) Fees for pharmacy benefit management shall be established by agreement between the self-insured employer or insurance carrier and the independent pharmacy, pharmacy chain, or pharmacy benefit manager. Fees to a pharmacy processing agent shall be established by agreement between the independent pharmacy, pharmacy chain, or pharmacy benefit manager and the pharmacy processing agent. The Chair may audit agreements from time to time for the purpose of ensuring compliance with this Part.

(c) Notwithstanding any other provision of this Part, if a prescription drug or medicine has been repackaged, the Average Wholesale Price used to determine the maximum reimbursement shall be the Average Wholesale Price of the underlying drug product, as identified by its national drug code (or NDC), of the underlying drug product used in the drug packaging. If the NDC is not supplied with the bill for the prescription drug or medicine, the self-insured employer or insurance carrier may identify the NDC of the underlying drug product to calculate reimbursement.

(d) Compounded medications shall be reimbursed at the ingredient level, with each ingredient identified using the applicable NDC of the drug product, and the corresponding quantity. Ingredients with no NDC are not separately reimbursable. Payment shall be based upon a sum of the allowable fee for each ingredient plus a single dispensing fee per compound.

(e) The fee schedule created by this section shall not apply to prescription drugs or medicines provided as part of treatment governed by the medical and hospital fee schedule issued pursuant to Workers' Compensation Law Section 13.

Section 440.6 Prescription Drugs or Medicines

(a) When a brand name drug is prescribed to treat an injury for which a self-insured employer or insurance carrier is liable pursuant to Workers' Compensation Law Section 13, a generic drug equivalent, if a generic equivalent is available, shall be provided unless the prescribing physician specifically provides otherwise on the prescription in accordance with New York Education Law Section 6810(6).

(b) A billing statement submitted to a self-insured employer or carrier for a prescription drug that has been dispensed shall include the national drug code number of the prescription drug as listed in the national drug code directory maintained by the federal Food and Drug Administration and shall state separately the price of the prescription drug and the dispensing fee.

Section 440.7 Transition period

Where an injured worker has been prescribed a medication or drug prior to receiving the notifications required by Section 440.4 of this Part, the injured worker may continue to have the prescription refilled at the pharmacy from which it was originally dispensed. Upon receiving written notification under section 440.4 of this Part that the self-insured employer or insurance carrier requires an injured worker to obtain all prescription medications from a designated independent pharmacy or pharmacies, chain pharmacy or pharmacies, or from a pharmacy affiliated with a designated pharmacy benefit manager, the injured worker shall transfer any prescriptions for controlled and non-controlled substances or medications to a designated pharmacy at such time as all refills for that prescription are exhausted, or within ninety days following such notification for controlled substances and sixty days following such notification for non-controlled substances, whichever occurs first.

Section 440.8 Payment of Bills and Reimbursement Requests

(a) Upon receipt of a bill or reimbursement request for prescription medicine, the self-insured employer or insurance carrier shall pay or reimburse the claimant, pharmacy, pharmacy benefit manager, pharmacy processing agent or third party within forty-five days of receipt of the bill or reimbursement request in

accordance with section 440.5 of this Part, unless (1) the liability of the self-insured employer or insurance carrier for the claim has not been established, or (2) the prescribed medicine is not for a causally related condition, or (3) the prescribed medicine was not prescribed consistent with the medical treatment guidelines set forth in section 342.2 (a) of Part 342 of this Chapter.

(b) Where the liability of the self-insured employer or insurance carrier for the claim has not been established, or the prescribed medicine is not for a causally related condition, or the prescribed medicine was not prescribed consistent with the medical treatment guidelines set forth in section 342.2 of Part 342 of this Chapter, the self-insured employer or insurance carrier shall pay any undisputed amount of the bill or reimbursement request and notify the claimant, the claimant's representative, if any, as well as the pharmacy, or pharmacy benefit manager, pharmacy processing agent, or third party which submitted the bill or reimbursement request, as appropriate. A notice to the pharmacy, pharmacy benefits manager, pharmacy processing agent, or third party must be made for each claim; denial of multiple claims in a single notice are not in compliance with this Section. Such notice shall be made to all parties on the same day within forty-five days of receipt of the claim or reimbursement request and shall state:

(1) that the claim is not being paid and the reason for non-payment of the claim; or

(2) that additional information is needed to reasonably determine the self-insured employer's or insurance carrier's liability for the claim, whether the medicine is causally related to the injury, or whether the prescribed medicine was prescribed in accordance with the medical treatment guidelines and to request such information. Upon receipt of the information reasonably requested by this paragraph, the self-insured employer or insurance carrier shall have twenty days to pay the bill or reimbursement request or provide a written explanation why the bill is not being paid, with copies of the additional information requested attached to the explanation to support the determination. The written explanation shall be sent by the self-insured employer or insurance carrier to the

claimant, pharmacy, pharmacy benefit manager, pharmacy processing agent or third party that submitted the bill or reimbursement request, the claimant's legal representative, if any, and the Board on the same day.

(c) Where the self-insured employer or insurance carrier has failed to pay a bill or reimbursement request or make reasonable request for additional information within forty-five days of receipt of the bill or reimbursement request, the self-insured employer or insurance carrier is deemed to have waived any objection to liability for the bill or reimbursement request and shall upon the expiration of such period pay the bill or reimbursement request to the claimant, pharmacy, pharmacy benefit manager, pharmacy processing agent, or third party that submitted it, in accordance with the fee schedule or written agreement with the pharmacy, pharmacies, pharmacy benefit manager or pharmacy processing agent.

(d) When a self-insured employer or insurance carrier, receives a bill or reimbursement request from a pharmacy, third party, pharmacy benefit manager or pharmacy processing agent that has not been designated by the self-insured employer or insurance carrier to dispense prescription medicines, it must notify such pharmacy and its billing agent, if any, third party, or pharmacy benefit manager by the method used to pay and receive bills and reimbursement requests, that the self-insured employer or carrier requires the claimant to obtain his or her prescription medicines from an independent pharmacy or pharmacy chain designated by, or affiliated with a pharmacy benefit manager designated by, such employer or carrier and the claimant was provided with the notification required by section 440.4 of this Part. Notwithstanding any provisions to the contrary in this Part, the self-insured employer or insurance carrier shall pay a bill or reimbursement request submitted by a pharmacy or third party at the fee schedule rate where the prescription was dispensed before the pharmacy and its billing agent, if any, or the third party that submits the bill or reimbursement request received notification that the self-insured employer or insurance carrier requires the claimant to use a designated independent pharmacy, pharmacy chain or pharmacy benefit manager. The pharmacy and its billing agent, if any, or the third party that submits the bill or reimbursement request is deemed to have received the notification required

by this subdivision five business days after the date of the notice. The self-insured employer or insurance carrier is not obligated to pay any bill or reimbursement request for a prescription medicine dispensed after the date the pharmacy and its billing agent, if any, or the third party that submitted the bill or reimbursement request is deemed to have received the notification required by this subdivision. In the event the prescription was dispensed more than ninety days following such individual notification of the claimant for controlled substances and sixty days following individual notification of the claimant for non-controlled substances, the carrier or self-insured employer shall not be liable.

(e) Any medical provider authorized to treat injured workers under Workers' Compensation Law Section 13-b shall indicate, in clear and legible print, on any prescription given to any worker whom he or she reasonably believes to have injuries or illness that are covered by workers' compensation insurance, that the prescription is for a workers' compensation injury or illness.

(f) Prior to such time as a self-insured employer or insurance carrier has given notice to claimant that it will provide medication, or that it will not do so pursuant to subdivision (a) of this section, if such claimant (1) provides a pharmacy with direct payment for any medication, either at his or her own expense or via a third party other than a self-insured employer or insurance carrier, and (2) presents either a prescription containing the notification set forth under subdivision (e) of this section, pharmacy benefit card or other comparable document issued under this Part, or other proof that the medication is needed for an injury or illness for which he has filed, or has a colorable basis for filing a claim for workers' compensation, the pharmacy shall not charge the claimant more than the fee schedule set forth in section 440.5 of this Part for non-controverted claims.

(g) A pharmacy's persistent failure to comply with this Section shall be sufficient grounds for the Chair to remove that pharmacy from any designation under this Part, or to bar that pharmacy from being designated under this Part.

Section 440.9 Language other than English

When the electronic case folder containing a claimant's claim information maintained by the Board, which is accessible to the self-insured employer or carrier, indicates that the claimant's primary language is other than English, the notifications required under this Part in regard to the claim shall be in the claimant's primary language.

Section 440.10 Compliance

(1) In order to enforce the provisions of Workers' Compensation Law section 13(i) and 13-o and this Part, the Chair may exercise his authority under Workers' Compensation Law section 111 to request information, which includes documents, reports, interrogatories and examinations under oath.

(2) The Chair may refer any violations of Workers' Compensation Law section 13(i) and 13-o or this Part by: (a) a carrier to the Superintendent of Insurance; (b) a pharmacy or medical provider other than a physician to the New York State Education Department Office of the Professions; and (c) a physician to the New York State Department of Health Office for Professional Medical Conduct. In addition to the referral to the referenced above, the Chair or his or her designee may also commence a proceeding to revoke or temporarily suspend the authorization of a medical provider.

Part 442. Durable Medical Goods Fee Schedule

Section 442.1 Applicability

This durable medical equipment fee schedule is applicable to durable medical equipment, medical/surgical supplies and other such items prescribed in the course of medical care or treatment for an injured employee dispensed on or after the most recent effective date of section 442.2 of this Part, regardless of the date of accident or date of disablement for an occupational disease. Durable medical equipment, medical/surgical supplies and other such items dispensed on or after July 11, 2007, but prior to the most recent effective date of

section 442.2 of this part, shall be reimbursed pursuant to the fee schedule in section 442.2 of this part in effect on the date the durable medical equipment, medical/surgical supply or other such time was dispensed.

Section 442.2 Fee Schedule

(a) The maximum permissible charge for the purchase of durable medical equipment, medical/surgical supplies, and orthotic and prosthetic appliances shall be the fee payable for such equipment or supplies under the New York State Medicaid program at the time such equipment and supplies are provided, except that the fee for bone growth stimulators (HCPCS codes E0747, E0748 and E0760) shall be paid in one payment and not split. For orthopedic footwear or if the New York State Medicaid program has not established a fee payable for the specific item, then the fee payable, shall be the lesser of:

(1) the acquisition cost (i.e. the line item cost from a manufacturer or wholesaler net of any rebates, discounts or other valuable considerations, mailing, shipping, handling, insurance costs or any sales tax) to the provider plus 50%; or

(2) the usual and customary price charged to the general public.

(b) The maximum permissible monthly rental charge for such equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule.

(c) The maximum permissible charge for the purchase of durable medical equipment, medical/surgical supplies, and orthotic and prosthetic appliances and the maximum permissible monthly rental charge for such equipment, supplies, and services provided on a rental basis as set forth in subdivisions (a) and (b) of this section are payment in full and there are no separate and/or additional payments for shipping, handling, and delivery.

(d) Self-insured employers and insurance carriers, including their agents and designees, shall not direct a claimant to use a particular supplier of durable medical equipment, medical/surgical supplies, and orthotic and prosthetic appliances, except as part of a certified preferred provider organization in accordance with Workers' Compensation Law Article 10-A and Subpart 325-8 of this Title. Self-insured employers and insurance carriers, including their agents and designees, may recommend a supplier of durable medical equipment, medical/surgical supplies, and orthotic and prosthetic appliances.

(e) Notwithstanding any other provision to the contrary, the Chair may make other adjustments to the durable medical equipment fee schedule as he or she deems appropriate, upon a finding that the reimbursement provided for a particular piece of durable medical equipment, medical/surgical supply or other such item under the fee schedule is grossly inadequate to meet the suppliers' or pharmacies' costs, and following thirty days notice on its website and consideration of any comments provided in response to such notice. Requests for such adjustments to the fee schedule shall be submitted to the Bureau of Health Management, 100 Broadway-Menands, Albany, New York 12241.

(f) Hearing aids are not considered durable medical equipment for purposes of this fee schedule and the reimbursement is the provider's usual and customary price.

(g) The Medicaid provider manual and the policy guidance for durable medical equipment are not included as part of the durable medical equipment fee schedule used in workers' compensation cases except to the extent such documents contain the Medicaid durable medical equipment fee schedule.

Section 442.3 Payment of Bills and Reimbursement Requests

(a) Upon receipt of a bill or reimbursement request for durable medical equipment, medical/surgical supplies, or orthotic or prosthetic appliances, the self-insured employer or insurance carrier shall:

(1) pay or reimburse the claimant or supplier in accordance with the fee schedule established by section 442.2 of this Part; and

(2) pay or reimburse the claimant or supplier within forty-five days of receipt of the bill or reimbursement request unless (i) the liability of the self-insured employer or carrier for the claim has not been established, or (ii) the durable medical equipment, medical/surgical supply, or orthotic or prosthetic appliance is not for a causally related condition.

(b) Where the liability of the self-insured employer or insurance carrier has not been established, or the durable medical equipment, medical/surgical supply, or orthotic or prosthetic appliance is not for a causally related condition, the self-insured employer or insurance carrier shall pay any undisputed amount of the bill or reimbursement request and notify the claimant or supplier, as appropriate, in writing within forty-five days of receipt of the claim or reimbursement request:

(1) that the claim is not being paid and the reason for non-payment of the claim on the form prescribed by the Chair for such purpose and file a copy of the notice sent to the claimant or supplier with the Board and send a copy to the claimant, if the claimant did not submit the bill or reimbursement request for payment, and the claimant's legal representative, if any, on the same day; or

(2) that additional information is needed to reasonably determine the self-insured employer's or insurance carrier's liability for the claim or whether the durable medical equipment, medical/surgical supply, or orthotic or prosthetic appliance is causally related to the injury. The request for additional information shall be filed with the Board and if the claimant submitted the bill or reimbursement request a copy shall be sent to the claimant's legal representative, if any, on the same day. Upon receipt of the information reasonably requested by this paragraph, the self-insured employer or insurance carrier shall have twenty days to pay the bill or reimbursement request or provide a written explanation why the bill is not being paid, on the form prescribed by the Chair for such purpose, with copies of the additional information requested attached to the explanation to support the determination. The written explanation shall be sent to the claimant or supplier that submitted the

bill or reimbursement request, the claimant if the claimant did not submit the bill or request, the claimant's legal representative, if any, and the Board on the same day.

(c) Where the self-insured employer or insurance carrier has failed to pay a bill or reimbursement request or make reasonable request for additional information within forty-five days of receipt of the bill or reimbursement request, the self-insured employer or insurance carrier is deemed to have waived any objection to liability for the bill or reimbursement request and shall upon the expiration of such period pay the bill or reimbursement request to the claimant or supplier, in accordance with the fee schedule.

(d) Any self-insured employer or insurance carrier that fails to reimburse the claimant or pay the supplier, as appropriate and as required in this section, shall be obligated to pay to the claimant or supplier the amount prescribed on the fee schedule established by section 442.2 of this Part plus simple interest at the rate set forth in section five thousand four of the civil practice law and rules.