

Text of proposed rule and any required statements and analyses may be obtained by filing a Document Request Form (F-96) located on our website <http://www.dps.ny.gov/f96dir.htm>. For questions, contact: John Pitucci, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 486-2655, email: john.pitucci@dps.ny.gov

Data, views or arguments may be submitted to: Michelle L. Phillips, Secretary, Public Service Commission, 3 Empire State Plaza, Albany, New York 12223-1350, (518) 474-6530, email: secretary@dps.ny.gov

Public comment will be received until: 60 days after publication of this notice.

Regulatory Impact Statement, Regulatory Flexibility Analysis, Rural Area Flexibility Analysis and Job Impact Statement

Statements and analyses are not submitted with this notice because the proposed rule is within the definition contained in section 102(2)(a)(ii) of the State Administrative Procedure Act.

(22-E-0183SP1)

Workers' Compensation Board

EMERGENCY RULE MAKING

Allowing Telemedicine in Some Circumstances, Supersede Previous Emergency Adoption

I.D. No. WCB-17-22-00004-E

Filing No. 293

Filing Date: 2022-04-12

Effective Date: 2022-04-12

PURSUANT TO THE PROVISIONS OF THE State Administrative Procedure Act, NOTICE is hereby given of the following action:

Action taken: Amendment of sections 325-1.8, 329-1.3, 329-4.2, 333.2 and 348.2 of Title 12 NYCRR.

Statutory authority: Workers' Compensation Law, sections 117 and 142

Finding of necessity for emergency rule: Preservation of public health, public safety and general welfare.

Specific reasons underlying the finding of necessity: This amendment is adopted as an emergency measure because the Board wants to avoid health and safety risks that can be avoided through social distancing due to COVID-19, including new variants, by allowing telemedicine in some circumstances, and to supersede the previous emergency adoption addressing this topic. Additionally, the Board has seen these emergency measures work efficiently and effectively to provide care for injured workers and plans to adopt a permanent regulation addressing when telehealth may be used to benefit injured workers, and wants to keep the current telemedicine rules in effect during the regulatory process for the permanent telehealth proposal.

Subject: Allowing telemedicine in some circumstances, supersede previous emergency adoption.

Purpose: To allow telemedicine in some circumstances due to COVID-19 and keep in effect during permanent telehealth proposal process.

Text of emergency rule: Section 325-1.8 of Title 12 NYCRR is hereby amended to read as follows:

325-1.8 Emergency medical aid and telemedicine.

(a) In the event of a serious accident requiring immediate emergency medical aid, an ambulance or any physician may be called to give first aid treatment.

(b) *Telemedicine, using two-way audio and visual electronic communication, or treatment via telephone, may be used by authorized providers where medically appropriate for social distancing purposes due to COVID-19, including new variants, in accordance with the Department of Health COVID-19 Medicaid Guidance and Guidance issued by the Centers for Medicare and Medicaid Services, or irrespective of purely social distancing considerations, in the clinical judgment of the authorized provider; the potential risk of COVID-19 infection to an individual patient outweighs any real or perceived incremental benefit derived from an in-person versus remote or virtual appointment. The authorized provider shall indicate on their report that such assessment was done using telemedicine by use of modifier 95 and indicating a place of service as 11, or telephonically by indicating place of service as 02. The provider shall also confirm the employee's identity as well as provide basic infor-*

mation about the services the employee is receiving by telephone or telemedicine.

New subdivisions (c) and (d) of section 329-1.3 of Title 12 NYCRR is hereby added to read as follows:

(c) *When medically appropriate, authorized providers who utilize the Official New York State Workers' Compensation Fee Schedule may, when telemedicine is used in accordance with section 325-1.8 of this Title and any applicable Medical Treatment Guideline, bill using the applicable Evaluation and Management codes (99212-99214) using modifier 95 and indicating 11 as the place of service. Modifiers 1B and 1D are available when services are rendered by telemedicine using two-way audio and visual communication. When services are rendered by telephone only in accordance with section 325-1.8 of this Title, the authorized provider shall indicate 02 as the place of service. Modifiers 1B and 1D are not available when services are rendered by telephone with no visual component.*

(d) *Providers with the following rating codes may bill the following psychotherapy codes in conjunction with Evaluation and Management codes:*

(i) *New patient Evaluation and Management: 99201-99204;*

(ii) *Psychotherapy combination codes and crisis codes: 90832-90834, 90836-90840, 90853;*

A new subdivision (d) of section 329-4.2 of Title 12 NYCRR is hereby added to read as follows:

(d) *When medically appropriate, authorized physical therapists and occupational therapists shall use Common Procedural Technology (CPT) code 99212 using modifier 95 and indicating 11 as the place of service when treatment is rendered by telemedicine using two-way audio and visual communication, and indicating 02 as the place of service when treatment is rendered by telephone only. Treatment in accordance with section 325-1.8 of this Title and using these codes shall be limited to one unit per patient per day, up to two treatments per week during the thirty days following injury, and up to one treatment per week thereafter.*

New subdivisions (c) and (d) of section 333.2 of Title 12 NYCRR is hereby added to read as follows:

(c) *When medically appropriate, authorized providers, including psychologists and licensed clinical social workers, shall use a Common Procedural Technology (CPT) therapy code (90832, 90834, or 90837) for services delivered by telemedicine in accordance with section 325-1.8 of this Title using modifier 95 and indicating 11 as the place of service for therapy by telemedicine using two-way audio and visual communication. Modifiers 1B and 1D are available when services are rendered by telemedicine using two-way audio and visual communication. When services are rendered by telephone only in accordance with section 325-1.8 of this Title, the authorized provider shall indicate 02 as the place of service. Modifiers 1B and 1D are not available when services are rendered by telephone with no visual component. Group therapy: 90853. Group therapy is limited to a maximum of 20 participants and does not require that every participant in the group therapy session be a workers' compensation claimant.*

A new subdivision (c) of section 348.2 of Title 12 NYCRR is hereby amended to read as follows:

(c) *When medically appropriate, authorized chiropractors shall use Common Procedural Technology (CPT) code 99212 using modifier 95 and indicating 11 as the place of service when treatment is rendered by telemedicine using two-way audio and visual communication and indicating 02 as the place of service when treatment is rendered by telephone only. Treatment in accordance with section 325-1.8 of this Title and using these codes shall be limited to one unit per patient per day, up to two treatments per week during the thirty days following injury, and up to one treatment per week thereafter.*

This notice is intended to serve only as an emergency adoption, to be valid for 90 days or less. This rule expires July 10, 2022.

Text of rule and any required statements and analyses may be obtained from: Heather MacMaster, Workers' Compensation Board, Office of General Counsel, 328 State Street, Schenectady, NY 12305, (518) 486-9564, email: regulations@wcb.ny.gov

Regulatory Impact Statement

1. Statutory authority: WCL § 117(1) authorizes the Chair of the Workers' Compensation Board (Board) to adopt reasonable rules consistent with, and supplemental to, the provisions of the WCL.

2. Legislative objectives: The emergency adoption allows telemedicine visits in some circumstances due to the outbreak of COVID-19, and to keep telemedicine in effect during the regulatory process for a permanent proposal regarding telehealth.

3. Needs and benefits: For social distancing purposes to avoid furthering the outbreak of COVID-19, including new variants, the emergency adoption allows telemedicine visits in some circumstances to avoid in person visits to authorized providers when medically appropriate, consistent with guidance issued by the Center for Medicaid and Medicare

Services. This regulation will permit physicians, nurse practitioners, physician assistants, psychologists, licensed clinical social workers, chiropractors, physical therapists and occupational therapists to treat using telehealth due to COVID-19, including new variants.

Additionally, the Board has seen these emergency measures work efficiently and effectively to provide care for injured workers, and plans to adopt a permanent regulation addressing when telehealth may be used to benefit injured workers, and wants to keep the current telemedicine rules in effect during the regulatory process for the permanent telehealth proposal.

4. Costs: The emergency adoption will have no impact on costs.

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

6. Paperwork: The emergency adoption requires authorized providers to indicate in their report that the services rendered were through telemedicine due to the outbreak of COVID-19, including new variants.

7. Duplication: The emergency adoption does not duplicate other regulatory initiatives.

8. Alternatives: An alternative would be to not file an emergency adoption addressing telemedicine, and not keep it in effect during the public comment period and regulatory process for a permanent telehealth proposal. However, this poses a health risk to both the authorized providers and the claimants being treated, and social distancing, where medically appropriate, is a better alternative due to the outbreak of COVID-19, including the new variants. Additionally, not keeping telemedicine in effect would cause confusion and could negatively impact injured workers relying on telemedicine in some instances for their care.

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

10. Compliance schedule: The emergency adoption takes effect immediately upon filing but does not require telemedicine – it offers it as a tool to assist with social distancing in some circumstances. Any provider rendering services using telemedicine must comply with the emergency adoption, including the reporting requirements.

Regulatory Flexibility Analysis

A Regulatory Flexibility Analysis is not required because the emergency adoption will not have any adverse economic impact or impose any new reporting, recordkeeping or other compliance requirements on small businesses or local governments. The emergency adoption provides for telemedicine visits in some circumstances due to the outbreak of COVID-19 and to keep telemedicine in effect during the regulatory process for a permanent proposal regarding telehealth.

Rural Area Flexibility Analysis

A Rural Area Flexibility Analysis is not required because the emergency adoption will not have any impact rural areas. The emergency adoption provides for telemedicine visits in some circumstances due to the outbreak of COVID-19 and to keep telemedicine in effect during the regulatory process for a permanent proposal regarding telehealth.

Job Impact Statement

A Job Impact Statement is not required because the emergency adoption will not have any impact on jobs or employment opportunities. The emergency adoption provides for telemedicine visits in some circumstances due to the outbreak of COVID-19 and to keep telemedicine in effect during the regulatory process for a permanent proposal regarding telehealth.

**HEARINGS SCHEDULED
FOR PROPOSED RULE MAKINGS**

Agency I.D. No.	Subject Matter	Location—Date—Time
Education Department		
EDU-13-22-00024-EP	Accelerated due process procedures	Zoom—June 8, 2022, 4:00 p.m. Link: https://zoom.us/j/94999944349?pwd=MDhYbnV3WFR6dHRZU00rakFDR0Yrdz09 Meeting ID: 949 9994 4349 Passcode: 452424 Call In: +1 646 558 8656 US (New York) Zoom—June 15, 2022, 11:00 a.m. Link: https://zoom.us/j/91822156772?pwd=OHJUbjQwV3RPL3JUZXVDOXF4NmZuUT09 Meeting ID: 918 2215 6772 Passcode: 672220 Call In: +1 646 558 8656 US (New York)
EDU-13-22-00028-P	The disability classification “emotional disturbance”	Zoom—April 27, 2022, 4:30 p.m. Link: https://zoom.us/j/91627203714?pwd=U3FVMERETkg5NDJNzdJJSQzAyMUo2UT09 Meeting ID: 916 2720 3714 Passcode: LxM5Xw Call in: +19294362866, 91627203714#, *246557# US (New York) Zoom—May 23, 2022, 9:00 a.m. Link: https://zoom.us/j/97521696405?pwd=YTRDaE5PaUZTUWE2Yk5WM0FrdWVzQT09 Meeting ID: 975 2169 6405 Passcode: g5iX4x Call in: +19294362866, 97521696405#, *494917# US (New York)
EDU-13-22-00029-P	Special education due process system procedures	Zoom—June 8, 2022, 3:00 p.m. Link: https://zoom.us/j/94999944349?pwd=MDhYbnV3WFR6dHRZU00rakFDR0Yrdz09 Meeting ID: 949 9994 4349 Passcode: 452424 Call in: +1 646 558 8656 US (New York) Zoom—June 15, 2022, 10:00 a.m. Link: https://zoom.us/j/91822156772?pwd=OHJUbjQwV3RPL3JUZXVDOXF4NmZuUT09 Meeting ID: 918 2215 6772 Passcode: 672220 Call in: +1 646 558 8656 US (New York)
Long Island Power Authority		
LPA-17-22-00011-P	Access to records and fees collected under the Freedom of Information Law	Virtual Public Meeting—June 27, 2022, 10:00 a.m. Virtual Public Meeting—June 27, 2022, 6:00 p.m.
LPA-17-22-00012-P	COVID-19 arrears forgiveness and low-income customer discount eligibility	Virtual Public Meeting—June 27, 2022, 10:00 a.m. Virtual Public Meeting—June 27, 2022, 6:00 p.m.
LPA-17-22-00013-P	Time-of-use rate options for commercial customers	Virtual Public Meeting—June 27, 2022, 10:00 a.m. Virtual Public Meeting—June 27, 2022, 6:00 p.m.
LPA-17-22-00014-P	LIPA’s delivery service adjustment cost recovery rider	Virtual Public Meeting—June 27, 2022, 10:00 a.m. Virtual Public Meeting—June 27, 2022, 6:00 p.m.
LPA-17-22-00015-P	The start date of LIPA’s smart meter opt-out	