

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Gentle Care Acupuncture, P.C.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-16-1039-4109
Applicant's File No.	88016
Insurer's Claim File No.	0104175360101088
NAIC No.	22063

ARBITRATION AWARD

I, John Talay, the undersigned arbitrator, designated by the American Arbitration Association pursuant to the Rules for New York State No-Fault Arbitration, adopted pursuant to regulations promulgated by the Superintendent of Insurance, having been duly sworn, and having heard the proofs and allegations of the parties make the following **AWARD**:

Injured Person(s) hereinafter referred to as: Assignor

1. Hearing(s) held on 05/25/2017
Declared closed by the arbitrator on 05/25/2017

Naomi Cohn, Esq. from Ursulova Law Offices P.C. participated by telephone for the Applicant

Brian Boxler, Esq. from Rivkin & Radler LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 900.00**, was NOT AMENDED at the oral hearing.
Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Whether applicant is entitled to No-Fault reimbursement for and acupuncture technique, "cupping" in the face of respondent defenses.

There are two linked cases scheduled on this date. Due to the unity of issues and facts, a common decision is appropriate. Both cases are identical except for the dates of service. The two cases are as follows:

AAA case number 17 - 16 - 1039 - 4109 for DOS: 7/2/15 - 7/23/15 @ \$900.00

AAA case number 17 - 16 - 1039 - 4128 for DOS: 6/30/15 - 9/16/15 @ \$2047.91

Whether the medical services for which benefits are sought were reasonable and medically necessary as required by 11 NYCRR 65.1 (d) (1).

4. Findings, Conclusions, and Basis Therefor

BOTH SIDES WERE REPRESENTED BY COUNSEL. WRITTEN SUBMISSIONS FROM THE PARTIES WERE DULY FILED AND ARE CONTAINED WITHIN THE ELECTRONIC CASE FOLDER OF THIS FORUM. THEY ARE INCORPORATED, BY REFERENCE, IN THIS DECISION. DOCUMENTS WILL BE IDENTIFIED SPECIFICALLY, AS NEEDED.

The within dispute springs from an underlying motor vehicle accident of June 25, 2015. Assignor is a 40-year-old male injured in a two-car MVA. Post accident, he was treated with essentially conservative care including acupuncture treatment. Bills were submitted to the carrier regarding acupuncture the treatment by this provider. These bills were reimbursed at the appropriate amount, save for the "cupping" procedure for which carrier reimbursed nothing. The "cupping treatment" was billed at \$90 per session.

Cupping therapy is a traditional Chinese medicine technique in which rounded glass cups are warmed and applied to an individual's bear skin to treat local qi problems or blood stagnation. Once the cup is warmed, the oxygen in the cup is eliminated so that a vacuum is created; this holds the cup to the skin, and encourages the flow of blood and qi to the area beneath the cup. It is recommended only when performed by a licensed practitioners, due to non-permanent marking and bruising.

The issue then is the appropriate reimbursement rate for cupping procedure. Medical necessity is not challenged. Applicant submits an affidavit from a retained expert and fee coder, Lana Zolan, Esq. she describes a procedure and utilization of the workers compensation fee schedule for evaluation of cupping therapy which she evaluated at \$40.05 per session.

Strangely, applicant who billed at \$90 per session and seeks to hold to this number notwithstanding its own expert opinion submission.

In support of the claim, applicant presents assignment of benefits form, verified billing and contemporaneous medical documentation. Applicant seeks no-fault reimbursement for these services.

Under Section 5102 of the New York Insurance Law, No-Fault first party benefits are reimbursable for all medically necessary expenses due to personal injuries arising out of the use or operation of a motor vehicle. Applicant establishes a prima facie entitlement to judgment as a matter of law by proof that he submitted a claim,

setting forth the fact and amount of the loss sustained, and that the payment of No-Fault benefits was overdue. See Insurance Law Section 5106a; Mary Immaculate Hosp. v. Allstate Ins. Co. 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Damadian MRI in Canarsie, P.C. v. General Assurance Company, 2006 NY Slip Op 51048U, 2006 NYS Misc. Lexis 1363 (Decided June 2, 2006 Appellate Term, 2d Department); Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3rd 128, 784 N.Y.S. 2d 918 (2003).

Pursuant to 11 NYCRR 65-4.5 (O) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

The medical necessity of therapeutic treatment must be proven to justify payment for it. There must be some explanation as to how the treatments will alleviate the symptoms and improve the condition of the patient. There also must be evidence that the treatment took place. The evidence may consist of notes made when the treatment took place or a narrative report. Finally, there must be an explanation of how the treatment affected the patient.

Respondent resists the claim in a counsel position paper dated August 17, 2016. At the outset, counsel stipulates that paying nothing for cupping was not appropriate by respondent. It contends that the excessive cupping charges are in contravention to the ground rule set forth in the New York State Workers Compensation fee schedule. Accordingly, it asked that the claim be denied in its entirety or, in the alternative, to be paid at a rate set forth by its own expert appraisal/affidavit.

To support its position, it submits the affidavit of Steven Schram, L.Ac., D.C. . He is a qualified expert. He opines that charges of \$90 for each cupping treatment is grossly excessive in light of the simplicity, lack of overhead, lack of necessary supervision needed to perform a cupping procedure. The contest use of the CPT code 97799, a "buy report" fee code. Upon consideration of the value of similar acupuncture treatment, is readily apparent that the applicant charges are solely designed to impermissibly obtain reimbursement in excess of the rate set forth in the fee schedule.

The respondent affidavit seeks to determine the appropriate value of cupping as compared to work related to cupping to the work of other procedures for which a value was already established i.e. , hot or cold pack therapy and electrical stimulation therapy. The position paper sets forth in clear detail the position. In support of the respondent's position, I have reviewed the detailed affidavit of the expert Dr. Schram he approximates the appropriate amount for reimbursement at \$13.87 per session.

All relevant issues were discussed with counsel present. The case can be summarily discharged. Herewith are my findings:

Once the insurer makes a prima facie showing that the amounts charged by a provider were in excess of the fee schedule, the burden shifts to the provider to show that the charges involved a different interpretation of such schedule or an inadvertent miscalculation or error. Cornell Medical, P.C. v. Mercury Casualty Co., 24 Misc.3d 58, 884 N.Y.S.2d 558 (App. Term 2d, 11th & 13th Dists. 2009).

As an example of a similar procedures under the fee schedule, and acupuncturist and Region IV is entitled to \$20.52 under CPT code 97810 for the initial 15 min. of acupuncture treatment and entitled to \$17.57 under CPT code 97811 for each additional 15 min. of acupuncture treatment.

Here applicant charged \$90 per cupping session, nearly 4.5 times the acupuncture fee schedule amount for each less than 15 min. sessions of cupping treatment. It is plain that this charge is not consistent with the other relative value units shown in the schedule an applicant's claim should be adjusted.

I have reviewed both expert reports and logic. I am persuaded that the respondent submission is the more cogent. Accordingly, I award as follows

AAA case number 17 - 16 - 1039 - 4109, I award for 10 sessions at \$13.87 per session, in the amount of \$138.70.

AAA case number 17 - 16 - 1039 - 4128, I award for 24 sessions at \$13.87 per session, in the amount of \$332.88

Decision: Award in favor of applicant in the total amount of \$138.70, together with statutory costs, interests and fees.

This award is in full disposition of all No-Fault benefit claims submitted to this arbitrator.

5. Optional imposition of administrative costs on Applicant.
Applicable for arbitration requests filed on and after March 1, 2002.

I do NOT impose the administrative costs of arbitration to the applicant, in the amount established for the current calendar year by the Designated Organization.

6. **I find as follows with regard to the policy issues before me:**

- ☐ The policy was not in force on the date of the accident
- ☐ The applicant was excluded under policy conditions or exclusions
- ☐ The applicant violated policy conditions, resulting in exclusion from coverage
- ☐ The applicant was not an "eligible injured person"
- ☐ The conditions for MVAIC eligibility were not met
- ☐ The injured person was not a "qualified person" (under the MVAIC)
- ☐ The applicant's injuries didn't arise out of the "use or operation" of a motor vehicle

☐ The respondent is not subject to the jurisdiction of the New York No-Fault arbitration forum

Accordingly, the applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Gentle Care Acupuncture, P.C.	07/02/15 - 07/23/15	\$900.00	Awarded: \$138.70
Total			\$900.00	Awarded: \$138.70

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 07/22/2016, which is a relevant date only to the extent set forth below.)

The denial in this matter is timely issued. Principal amount awarded is \$138.70. Interest shall be computed from the filing of the AR-1 or commencement of action, 7/22/2016, at a rate 2% per month, simple, and ending with the date of payment of the award.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

Attorney fee is payable on a per claimant basis in which benefits are paid pursuant to the case of LMK Psychological Services, PC vs. State Farm Mutual Automobile Ins. Co (2009 NY Slip Op 02481), Decided April 2, 2009.

D. The respondent shall also pay the applicant forty dollars (\$40) to reimburse the applicant for the fee paid to the Designated Organization, unless the fee was previously returned pursuant to an earlier award.

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York
SS :
County of Nassau

I, John Talay, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

06/27/2017
(Dated)

John Talay

IMPORTANT NOTICE

This award is payable within 30 calendar days of the date of transmittal of award to parties.

This award is final and binding unless modified or vacated by a master arbitrator. Insurance Department Regulation No. 68 (11 NYCRR 65-4.10) contains time limits and grounds upon which this award may be appealed to a master arbitrator. An appeal to a master arbitrator must be made within 21 days after the mailing of this award. All insurers have copies of the regulation. Applicants may obtain a copy from the Insurance Department.

ELECTRONIC SIGNATURE

Document Name: Final Award Form
Unique Modria Document ID:
5ec6f01f3f21285d522d18ab5818ba8b

Electronically Signed

Your name: John Talay
Signed on: 06/27/2017