American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Accelerated DME Recovery Inc (Applicant)	AAA Case No.	17-16-1043-2669
	Applicant's File No.	
- and -	Insurer's Claim File No.	32790K333
	NAIC No.	25178
State Farm Mutual Automobile Insurance Company (Respondent)		

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 07/28/2017
   Declared closed by the arbitrator on 07/31/2017

   Helen Cohen, Esq. from of counsel to Hanford, Cooke & Associates, P.C. participated in person for the Applicant

   Catherine Gretschel, Esq. from De Martini & Yi, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,478.40**, 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

   The claimant was a 53 year-old male who was involved in a motor vehicle accident on 12/15/15. Following the accident the claimant purportedly suffered injuries which resulted in the claimant seeking treatment. At issue are the 4/22/16-5/19/16 rental fees for a continuous passive motion (CPM) unit provided by Applicant. Respondent has raised a fee schedule defense.

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

Applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was a 53 year-old male who was involved in a motor vehicle accident on 12/15/15. There are no medical reports in evidence. Impliedly the claimant's injuries included injury to his right shoulder. Impliedly on 3/16/16 Frank Segreto, M.D. performed right shoulder arthroscopy and on 3/24/16 prescribed a continuous passive motion (CPM) unit provided by Applicant; the rental fees for 4/22/16-5/19/16 are at issue here.

According to Respondent's NF-10 the $2,100.00 bill at issue for date of service (DOS) 4/22/16-5/19/16 was received on 5/25/16, no verification was requested and the bill was denied ninety two days later on 8/25/16. Box 28 of Respondent's NF-10 (Date final verification requested) and Box 29 (Date final verification received) are blank. The NF-10 is untimely on its face. However, Respondent's counsel argued that Respondent timely requested and received verification prior to issuing this denial. Respondent also submitted a copy of a verification request dated 6/8/16 and a copy of a response to this verification dated 8/12/16. Even, if this initial verification had been noted on the denial, the denial would still be late as no follow-up verification was issued. On 8/25/16 Respondent partially paid $621.60 and denied the remainder "Pursuant to Insurance Law 5108(a), 11 NYCRR 68.1 and 12 NYCRR 442.2, the DME Fee Schedule has been applied. 12 NYCRR 442.2(b) states that the maximum permissible monthly rental charge for 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. Pursuant to the New York State Department of Health area office, the maximum monthly rental fee is calculated at 1/6th of the equipment provider's acquisition cost. Pursuant to the Policy Guidelines of the New York State Medicaid DME Fee Schedule, the monthly rental fee is calculated at 1/6th of the equipment provider's acquisition cost for DME items that have not been assigned a Maximum Reimbursement Amount (MRA) in New York State Medicaid

Program DME Fee Schedule." Even though the denial is untimely, under 11 NYCRR 65-3.8(g) which went into effect on April 1, 2013, the defense of excessive fees is not subject to preclusion. Interest was owed and not paid on the $621.60 that was untimely paid for DOS 4/22/16-5/19/16.

The insurer has the burden of coming forward with competent evidentiary proof to support its fee reduction or denial. See, *Robert Physical Therapy, P.C. v. State Farm Mut. Auto Ins. Co.*, 13 Misc.3d 172, 2006 NY Slip Op. 26240 (Civ. Ct. Kings Co. 2006). In the absence of such proof, a defense of noncompliance with the appropriate fee schedule cannot be sustained. See, *Continental Medical, P.C. v. Travelers Idem. Co.*, 11 Misc.3d. 145(A), 2006 NY Slip Op. 50841(U) (App Term 1st Dept. 2006). Here, Applicant contends that it is entitled to the rental amount to the general public and Respondent contends that Applicant is limited to 1/6 of the acquisition cost of the equipment.

Respondent submitted the affidavit of James Lee, D.C., C.P.C. dated 11/2/16 to indicate that pursuant to his calculation, the proper fee schedule amount was $22.19 per day for the rental of the shoulder CPM for 28 days. Referring to the NYS Medicaid DME Fee schedule, Dr. Lee stated that according to the Medicaid Policy Guidelines, Applicant should have based its rental charges for the CPM at 1/6 of the acquisition cost which would equal the monthly rental fee, and further divided by the daily rental rate. He noted that the CPM was not specifically listed/scheduled in the Medicaid DME fee schedule. He used the purchase price provided by Applicant to reach what he deemed to be the acquisition cost by Applicant for the CPM. It is noted that Dr. Lee determined the maximum reimbursable amount was $621.32 and Respondent overpaid $0.28.

In support of its claim, Applicant submitted a detailed brief. Applicant also submitted an affidavit of medical billing and coding expert, Elsa Rodriguez dated 12/6/14 and the affidavit of medical billing expert Diana Wendelken dated 1/21/16. They indicate that the CPM provided by Applicant had CPT code E0936 which is not listed in the DME Medicaid Workers Compensation fee schedule. Thus, according to the regulations in effect at the time, Applicant was allowed to rent the device to claimant at a daily rate equal to what it charges members of the general public (which here was $75.00 per day). Ms. Rodriguez and Ms. Wendelken also referenced pages from the Optum Customized HCPCS Fee Analyzer (Fee Analyzer) indicating that the daily rental rate charged by Applicant was approximately at 85% of the highest such rates for such supplies in the US. Applicant submitted a copy of the 2015 Fee Analyzer from INGENIX. INGENIX is a recognized consulting service that provides national fee information on a regional basis. Upon examination of the data set forth in the INGENIX report, I am persuaded that the amounts set forth are fair and reasonable and reflect the amounts charged to the general public for such items in the New York area given the high cost of living and doing business in the New York City metropolitan area.

Respondent also relies in part on the decision in *Accelerated DME Recovery a/o Ana Pleitz v. State Farm* [Supreme Court, Queens County, Index No. 706132/2015] wherein Judge Modica affirmed the lower arbitrator's and Master Arbitrator's award that for DME items that do not have a maximum reimbursement amount the rental fees are to be calculated at 1/6 of the equipment providers acquisition cost. In upholding the

arbitration award Judge Modica relied on a New York State Department of Health Area Office opinion letter, dated 7/3/14, which Judge Modica interpreted as establishing that the price for the CPM is to be calculated at 1/6 of the equipment providers acquisition cost. Respondent submitted a copy of the 7/3/14 letter that was written by Joanne Criscione, Esq., Senior Attorney at the New York State Department of Health. The letter states in pertinent part "The Department of Health's Office of Health Insurance Programs has established a Medicaid reimbursement policy for durable medical equipment (DME) rental of items that have not been assigned a Maximum Reimbursement Amount (MRA). For DME items that do not have a MRA, the rental fee is calculated at 1/6th of the equipment provider's acquisition cost."

Applicant's counsel argued that the *Pleitz* decision is not binding and that the CPT code in question here (E0936) is not listed in the Medicaid DME fee schedule and therefore not subject to the policy guideline described in the 7/3/14 letter. Applicant cited 12 NYCRR 442.2(g) (contained in the chapter on Workers Compensation) which states as follows: "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 Worker's Compensation cases except to the extent such documents contain the Medicaid durable medical equipment fee schedule." Applicant submitted a subsequent letter by Joanne Criscione, Esq. dated 6/8/16, wherein she states that "My letter of July 3, 2014 was not a determination by a Department of Health area office establishing the reimbursement rate applicable to Workers Compensation claims, nor do I have authority to do so. My letter merely states the Medicaid reimbursement policy as that policy is set forth in the Medicaid Provider Manual for DME."

I find that the regulations clearly provide that the maximum permissible monthly rental charge for the rental of the CPM machine should 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 and the total accumulated monthly rental charges shall not exceed the amount allowed under the Medicaid fee schedule. There was no evidence submitted to establish that the Department of Health determined a price for the rental of a CPM or that the rental is included in the Medicaid fee schedule. The limitation of the monthly rental fee to 1/6th of the equipment provider's acquisition cost is contained in the Medicaid DME Policy Guidelines and I find that the Medicaid provider manual and the policy guidelines are not applicable to no-fault reimbursement for the CPM rental. See, 12 NYCRR 442.2(g). Therefore, the maximum rental charge is the price to the general public.

The 28th amendment to Regulation 83 (11 NYCRR 68) provides that: "The maximum permissible monthly rental charge for durable medical equipment 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 charge shall not exceed the fee amount allowed under the Medicaid fee schedule." The Department of Health has not determined a price for the rental of a CPM and it is not included in the Medicaid fee schedule. Therefore, we are left with the maximum permissible monthly rental charge being the monthly rental charge to the general public. I am not persuaded that sufficient evidence of a lower monthly rental charge to the general public than the amount billed by Applicant was

submitted. Given that Respondent introduced no evidence to establish that "the monthly rental charge" for the CPM was in fact lower than that billed by the provider, or that Medicaid had capped that amount, I find that the Respondent has failed to prove in the first instance that the services were improperly billed, and Applicant prevails. See *First Aid Occupational Therapy, PLLC v. Country-Wide Ins. Co.*, 2010 N.Y. Slip Op. 50149(U) (App. Term 2d, 11th & 13th Dists. Jan. 29, 2010); *Bronx Multi Med. Care, P.C., v. Kemper Cas. Ins. Co.*, 2008 NY Slip Op. 51928(U), 21 Misc.3d 127(A) (App Term 1st Dept.).

It is also noted that several lower arbitration awards limiting reimbursement to one-sixth of acquisition cost have been set aside on Master Arbitrator review. One such claim is In the Matter of US Tech Rehab Inc., and Liberty Mutual Insurance Company, AAA Case No.: 99-14-1001-2311, where Master Arbitrator Victor J. D'Ammora reversed an arbitration award on only one-sixth of acquisition finding the arbitrator "erred by allowing the Respondent to use a legally prohibited fee schedule to reduce the claim." Master Arbitrator Robert Trestman addressed the same issue in AAA Case No.: 99-15-1020-9929. Citing to the award, Master Arbitrator Trestman stated:

"*The arbitrator found, in pertinent part, as follows: [1] neither the NYS Department of Health nor Medicaid has established a rental fee schedule for the disputed DME item; [2] respondent's 1/6th calculation is not per the NYS Medicaid program but is only included in the Medicaid policy guidelines; [3] 12 NYCRR 442.2[g] states that the Medicaid provider manual and policy guidelines for DME are not included as part of the DME fee schedule used in workers' compensation cases except to the extent such documents contain the Medicaid DME fee schedule; [4] since the disputed DME item is not listed in the Medicaid DME fee schedule, the proper fee would be the monthly rental charge to the general public; [5] the Medicaid Fee Schedule and the Medicaid Provider Manual are two separate and distinct documents, only one of which is applicable herein; [6] had the DOH area office set a rental reimbursement limitation in the Medicaid DME fee schedule, as it has for other items, the 1/6th limitation would apply to the instant claim; [7] as there is no such limitation in the Schedule, one cannot look to the DME Provider Manual and Policy Guidelines and the only limitation is the 'rate available to the general public' 12 NYCRR 442.2[b]; [8] the Court decision, in Accelerated DME Recovery a/o Ana Pleitz v State Farm [Supreme Court, Queens County, Index No. 706132/2015], relied heavily upon the 7/3/14 opinion letter from a NYS DOH representative which was subsequently clarified in an opinion letter dated 6/8/16 which stated that the prior opinion letter was not a determination by a DOH area office establishing the reimbursement rate applicable to workers' compensation claims; [9] in US Tech Rehab and Liberty Mutual, AAA Case No. 99-14-1001-2311, the Master Arbitrator reversed a lower arbitrator's application of the 1/6th calculation method, finding that the arbitrator 'erred by allowing the Respondent to use a legally prohibited fee schedule to reduce the claim*."'

Accordingly, the claim is granted in the entirety.

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**
	Accelerated DME Recovery Inc	**04/22/16 - 05/19/16**	**$1,478.40**	**Awarded: $1,478.40**
Total			**$1,478.40**	**Awarded: $1,478.40**

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 10/07/2016, which is a relevant date only to the extent set forth below.)

Applicant's claim being untimely denied, interest shall accrue as of 6/24/16, the 30th day following the date the claim was presented by the Applicant, until 8/25/16, the date the claim was denied. Then again from 10/7/16, the filing date for this case, until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month. On the $621.60 that was untimely paid, interest shall accrue as of 6/24/16, the 30th day following the date the claim was presented by the Applicant until 8/25/16, the date payment was made.

C. Attorney's Fees

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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of $1,360."

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

08/28/2017
(Dated)

Charles Blattberg

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:
16141becf136dce55aa83ca8af74637d

Electronically Signed

Your name: Charles Blattberg
Signed on: 08/28/2017