

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

OrthoPro Services, Inc.
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-16-1047-7440

Applicant's File No. 1699565

Insurer's Claim File No. 0339952359

NAIC No. 19232

ARBITRATION AWARD

I, Evelina Miller, 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: JW

1. Hearing(s) held on 09/04/2018
Declared closed by the arbitrator on 09/04/2018

Ryan Berry Esq from Israel, Israel & Purdy, LLP participated in person for the Applicant

Adam Kass Esq from Peter C. Merani Esq. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 24.99**, 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 established entitlement to No-Fault compensation for fees associated with TENS unit, wires and electrodes received by the Assignor.

Whether Respondent was able to establish its burden in coming forward with competent evidentiary proof to support its fee schedule defenses

4. Findings, Conclusions, and Basis Therefor

Applicant was represented by Ryan Berry Esq., who presented oral arguments and relied upon documentary submissions. Adam Kass Esq., appeared on behalf of Respondent and presented oral arguments and relied upon documentary submissions. I have reviewed the submissions contained in MODRIA. These submissions are the record in this case.

The dispute arises from the underlying automobile accident of September 3, 2014, in which the Assignor (JW), a 46-year-old male, was the driver. Thereafter, Assignor sought private medical attention and was eventually evaluated by Dr. Stiller. Patient presented with complaints of pain in the neck, back and the right shoulder. Patient was recommended to undergo conservative care. Eventually patient was prescribed a TENS unit for home use. The bill in dispute is for the electrodes and the wires that operate with the TENS unit received by the Assignor on 10/1/14.

Fee Schedule:

The rates charged by Applicant must be in accordance with Insurance Law § 5108, as the charges for services rendered "shall not exceed the charges permissible under the schedules prepared and established by the chairman of the Workers Compensation Board for Industrial Accidents, except where the insurer or arbitrator determines that unusual procedures or unique circumstances justify the excess charge."

In addition, § 5108 (c) states that, "no provider of health services... may demand or request any payment in addition to the charges authorized pursuant to this section."

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See, *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct. Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that a plaintiff's claims were in excess of the appropriate fee schedules, defendant's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, *Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term. 1st Dep't. per curiam, 2006).

Effective April 1, 2013 11 NYCRR 65-3.8(g)(1) has been amended so that the application of the New York State Worker's Compensation fee schedule is no longer a precludable defense and no payment is due on those claims in excess of the fee schedule. Per 11 NYCRR 65-3.8(g), where the services were rendered after April 1, 2013, a defense of excessive fees is not subject to preclusion *Surgicare Surgical Associates v. National Interstate Ins. Co.*, Misc.3d, N.Y.S.3d, 2015 N.Y. Slip Op. 25338 (App. Term 1st Dept. Oct. 8, 2015), *aff'g*, 46 Misc.3d 736, 997 N.Y.S.2d 296 (Civ. Ct. Bronx Co. 2014) (New Jersey fee schedule). The insurer is entitled to reduce the bills to the proper fee schedule amount.

For the date of service of 10/1/14, Applicant billed for the TENS unit in the amount of \$76.25, as well as lead wires in the amount of \$18.86, and electrodes in the amount of \$6.13. Respondent reimbursed Applicant \$76.25 for the TENS unit. Respondent did not reimburse Applicant for the wires or for the electrodes.

The timely issued denial for date of service of 10/1/14 stated the following:

"The claim is denied based upon the Examination Under Oath testimony of claimant.

The treatment billed for was not provided as claimed."

To support its denial Respondent submits an EUO transcript of the Assignor which reads in relevant part:

Q: What equipment did you receive?

A: A TENS machine.

Q: That's the same unit that you use while receiving physical therapy?

A: Yes

Q. Does it come with small **pads** to put on your body?

A. Yes.

Q. Do you recall how many it initially came with?

A. **Four**.

Q. Do you plug it into the wall or is it battery powered?

A: Battery powered.

Q: Did it come with **wires** for you to connect to the pads?

A: Yes.

Q: How many wires did it come with?

A: **Two** wires. Yeah.

I am permitted to take note of the New York State Workers' Compensation Fee Schedule. See *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dept. 2009); *LVOV Acupuncture, P.C. v. Geico Ins. Co.*, 32 Misc.3d 144(A), 2011 NY Slip Op. 51721(U) (App Term 2d, 11th & 13th Jud Dists. 2011); *Natural Acupuncture Health, P.C. v. Praetorian Ins. Co.*, 30 Misc.3d 132(A), 2011 NY Slip Op 50040(U) (App Term, 1st Dept. 2011). Based on my review of the New York Workers' Compensation Fee Schedule and the testimony presented at the EUO I find the following.

CPT Code E0730 is described in the Fee Schedule as: "TENS device, four or more leads, for multiple nerve stimulation (dual channel).

CPT Code A4557 is described as: "Lead wires, per pair (up to 2 pair, any type). - \$18.86"

CPT Code A4556 is described as: "Electrodes, per pair (up to 2 pair, any type). - \$6.13"

Here, based on his own testimony, the patient received the TENS unit with 4 pads (electrodes) and 2 wires.

Since code E0730 (TENS unit) includes the wires, I find that Applicant is not entitled to any reimbursement for the wires (code A4557). Accordingly, I find that Respondent reached its burden of coming forward with competent evidentiary proof to support its fee schedule defenses regarding the wires/leads. See, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co. Supra.

As to the electrodes, or the pads, the TENS unit code E0730 does not encompass the pads. Since the patient received 4 pads, Applicant is entitled to code A4556 billed twice at \$6.13 for a total of \$12.26 (2 x \$6.13). Here, Respondent failed to reach its burden in support of its fee schedule defenses.

Accordingly, I find that Applicant is entitled to reimbursement in the amount of \$12.26.

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
	OrthoPro	10/01/14 -		Awarded:

	Services, Inc.	10/01/14	\$24.99	\$12.26
Total			\$24.99	Awarded: \$12.26

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/27/2016 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30 day month. 11 NYCRR 65-3.9(a). In accordance with 11 NYCRR 65-3.9c, interest shall be paid on the claims totaling \$12.26 from the date the arbitration was commenced.

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee upon the amount awarded plus the interest, as calculated in section "B" above, and in accordance with 11 NYCRR 65-4.6(e), i.e., 20 percent of the amount of first party benefits, plus interest thereon. The minimum attorney's fee payable shall be in accordance with 11 NYCRR 65-4.6c. For cases filed after February 4, 2015, there is no minimum attorney's fee but there is a maximum fee of \$1,360.00. However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b)."

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

10/03/2018
(Dated)

Evelina Miller

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:

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Electronically Signed

Your name: Evelina Miller
Signed on: 10/03/2018