

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RES Physical Medicine & Rehab. Services
(Applicant)

- and -

State Farm Fire & Casualty Company
(Respondent)

AAA Case No. 17-17-1080-2635

Applicant's File No. N/A

Insurer's Claim File No. 52-1386-4C4

NAIC No. 25143

ARBITRATION AWARD

I, Fred Lutzen, 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: EIP/claimant/patient

1. Hearing(s) held on 01/15/2019
Declared closed by the arbitrator on 01/15/2019

Shannon S. Fuhrman, Esq., from Fuhrman Law participated by telephone for the
Applicant

Lisa Weiss, Esq., from Richard T. Lau & Associates participated by telephone for the
Respondent

2. The amount claimed in the Arbitration Request, **\$ 302.81**, 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

Applicant seeks reimbursement in the amount of \$302.81 for denied toxicology/drug screening performed on 8/28/17. The dispute is over CPT code 80101 [v. 80104]. Applicant billed for 16 units of drug testing under CPT Code 80101, and Respondent contends that only one unit of testing is permitted under the fee schedule, and should be billed under 80104 at \$28.39. Respondent paid a total of \$163.98 for this date of service, leaving an unpaid balance of \$302.81.

The female EIP (initials "LS") was 51-years-old when she was injured in an automobile accident on 4/23/17. She subsequently came under the care of Applicant.

The evidence clearly demonstrates that Applicant submitted its claims to Respondent and that Respondent issued a timely partial denial / partial payment on 10/2/17. The only issue to be determined is whether Applicant's charges exceeded fee schedule allowances.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of representatives for both parties, the prevailing case law, and those documents submitted to the American Arbitration Association as contained in the MODRIA electronic case folder as of the date of this hearing. No witnesses testified at the hearing.

Respondent's denials state, in relevant part:

Based on the documentation provided: Line 2* - 80101 will rate to \$7.69. The description of code 80101 is for a single drug class. The provider is indicating they tested for multiple different drugs which would be multiple drug classes. Per AMA instructions, when coding for drug testing by any method other than chromatography for multiple drugs or drug classes, you should report 80104 Drug screen, qualitative; multiple drug classes other than chromatographic method, each procedure. If qualitative methods other than chromatography are used to test for a single drug only, you should report 80101 Drug screen, qualitative; single drug class method (eg, immunoassay, enzyme assay), each drug class. The AMA's CPT 2011 Changes: An Insider's View further clarifies, "Code 80104 has been established to report a specific drug screen, qualitative analysis by multiplexed method for 2-15 drugs or drug classes (eg, multidrug screening kit)." The fee schedule amount for CPT 80104 is \$28.39. Lines 2 and 2* will total this amount.

Both sides presented affidavits by certified professional coders in support of their respective fee schedule positions. Counsel argued in support of their coders' analyses.

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). *See also, Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co.*, 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 NY Slip Op 50393U, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that a plaintiff's claims were more than 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).

However, I also take judicial notice of the fee schedule and the applicable ground rules.

In support of its fee schedule defense, Respondent submitted an affidavit by Lisette Giffels, a Certified Professional Coder, dated 6/18/18. Ms. Giffels states:

Provider billed [] ... CPT code 80101 x 16 units...

CPT code 80101 is not the appropriate code to bill based on the report submitted. The appropriate code is CPT code 80104.

Per the CPT assistant Pathology and Laboratory Changes in CPT 2011; December 2010; Volume 20; Issue 12:

Qualitative assays (ie, tests that detect whether a particular analyte, constituent, or condition is present or absent) are reported with the drug testing codes. Qualitative screen analysis using a multiplexed screening kit for multiple drugs or drug classes is reported with the new CPT code 80104. This new code was established to allay confusion when reporting qualitative analysis using a multiplexed method for 2-15 drugs or drug classes (eg, multidrug screening kit). Traditionally, a chromatographic method may have been used that identified multiple drug classes during a single procedure. This was represented by code 80100, Drug screen, qualitative; multiple drug classes chromatographic method, each procedure. Methods then became available that relied upon immunoassay or enzyme assay in which an assay identified the presence or absence of drugs within a single class. Each test run was for just one class and code 80101 Drug screen, qualitative; single drug class method (eg, immunoassay, enzyme assay), each drug class described this method. More recently point of care and other testing can be used to identify multiple drug classes in a single test procedure. However, these assays do not utilize a chromatographic method, making code 80100 inappropriate to use. They may rely on immunoassays, for example. Kits are commercially available for 12 or more analytes. These test kits are often called "multiplexed" because of the ability to qualitatively assay multiple drugs simultaneously. It is effectively running multiple tests at once, in a single procedure, due to the test kit design. Prior to 2011, the reporting of qualitative testing for multiple drugs classes in a single kit was commonly reported as multiple units of code 80101 as code 80101 was not specific to a single or multiple sequential procedures. In 2010 a HCPCS code G0430 was created to describe a non chromatographic method wherein multiple drug classes were screened in a single procedure. New code 80104 represents this same procedure, more accurately reflecting the resources used in a multiplex test kit as compared to multiple runs using a single class methodology.

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As per the documentation by the provider the drug screening test was run using a Thermo Indiko Plus Chemical Analyzer which is programmed to perform 13-14 drug assays per sample.

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Based on the laboratory result and the letter from the provider, the test performed falls under CPT code 80104 "Drug screen, qualitative; multiple drug classes other than chromatographic method, each procedure" as described in the above rationale.

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CPT code 80101 and 80104 were deleted in 2015 and the replacement codes were 80300 and 80301 respectively.

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The description for CPT code 80300 is "Drug screen, any number of drug classes from Drug Class List A; any number of non-TLC devices or procedures, (eg, immunoassay) capable of being read by direct optical observation, **including instrumented-assisted when performed** (eg, dipsticks, cups, cards, cartridges), per date of service"

.
CPT Guidelines restricts 80300 to test methods that the lab analyst can read by direct optical observation, even if the lab analyst doesn't do so because an instrument reads the results. The exception is thin layer chromatography, called TLC, which you should not report as 80300. Use one unit of 80300 no matter how many of these procedures the lab analyst performs on a single date for the same patient.

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The description for CPT code 80301 is "Drug screen, any number of drug classes from Drug Class List A; single drug class method, by instrumented test systems (eg, discrete multichannel chemistry analyzers utilizing immunoassay or enzyme assay), per date of service" Clinical Responsibility:

The lab analyst performs a test on a patient specimen, such as urine or blood, to test for any number of drug classes from List A in the introduction to the Presumptive Drug Class Screening section. The lab analyst may use methods such as immunoassay or enzyme assay, and the equipment must involve an instrument test system that evaluates individual drug classes, such as a discrete multichannel chemistry analyzer. Thin layer chromatography does not meet the criteria for code 80301. Use one unit of 80301 no matter how many of these procedures the lab analyst performs on a single date for the same patient.

CPT code 80300 and 80301 are not listed in the NY Workers' Compensation Fee Schedule since the fee schedule has not been updated since June 2012.

In order to apply the appropriate fee per the fee schedule, a crosswalk was made: CPT code 80300 to CPT code 80101 and CPI code 80301 to 80104.

Only one unit of CPT code 80104 can be billed and reimbursed as per the above.
(emphasis added).

Ms. Giffels' complete and thorough analysis is wholly supported by the authority cited, namely the AMA CPT code book and WCB Fee Schedule instructions that direct coders to the AMA CPT code book "**for an explanation of coding rules and regulations not listed in this schedule.**" Ms. Giffels' affidavit contains a comprehensive rationale and demonstrates, prima facie, that Applicant incorrectly billed for multiple units under CPT Code 80101..

In rebuttal, Applicant submitted an affidavit by Dr. Strut, who contends that Ground Rule 12 of the Pathology and Laboratory Fee Schedule does not apply to the disputed testing, and an affidavit by Vanessa R. Smith, a Certified Professional Coder, dated 11/2/18. Ms. Smith states that she is familiar with, among other things, "[b]illing and coding procedures as it relates to toxicology testing." She states that "Code 80101 is used for complex chemistry analyzers that involve distinct analysis per drug class, which is the Thermo Scientific Indiko Plus analyzer. CPT Code 80104 is used for multiplexed methods that identify multiple drug classes, such as drug test kits - these are typically less complex, involving tests that waived status labs (under [CLIA]) might perform in an office setting. 1 (One) test kit for multiple drug classes."

Ms. Smith concluded that "[t]he '[Indiko Plus] Chemical Analyzer' is an immunoassay testing device. This is billed differently than a 'urine cup.'"

Applicant's coder did not address the critical issues raised by Ms. Giffels. Ms. Smith did not address that CPT Code 80301 is describes as "Drug screen, any number of drug classes from Drug Class List A; single drug class method, by **instrumented test systems** (eg, **discrete multichannel chemistry analyzers utilizing immunoassay or enzyme assay**), per date of service." (emphasis added). In addition, Applicant did not provide any response to Ms. Giffels' analysis of cross-walking code 80301 to 80104.

On 11/28/17, with its original arbitration submission, Applicant submitted as evidence a letter dated 8/28/17 (the date of service herein), explaining that the in-depth toxicology screenings that were performed on the EIP did not involve the use of a single-use kit test or a cup and was performed in the laboratory accredited by CLIA and COLA, and that the testing was done by a NYS licensed Medical Technologist. Applicant's letter states that Ground Rule 12 does not apply, and that the charges were correctly billed.

Applicant states this "**is NOT a single-use kit test or a cup.**" (emphasis in original). Applicant also relies on the aforementioned affidavit by Dr. Strut, wherein he points out the complexity of the device used and the laboratory's CLIA certification.

However, in this particular case, Respondent does not rely on Ground Rule 12. Neither Dr. Strut nor Ms. Smith respond to Ms. Giffels' well-reasoned and comprehensive opinion supporting that chemical analyzer testing should be billed under code the 803** codes, according to the AMA CPT Code book.

Unless the parties' agreement provides otherwise, an arbitrator need not apply the rules of evidence, is not bound by principles of substantive law, may do justice as he sees it, and may apply his own sense of law and equity to the facts as he finds them to be. Matter of New Century Acupuncture, P.C. v. Country Wide Ins. Co., 48 Misc.3d 1201(A), 18 N.Y.S.3d 580 (Table), 2015 N.Y. Slip Op. 50919(U) at 2, 2015 WL 3821534 (Dist. Ct. Suffolk Co., C. Stephen Hackeling, J., June 18, 2015).

That said, if we read Ground Rule 12 with literal precision, rather than interpreting it with a common-sense approach, Applicant's contention would be that more than \$7,245.00 in drug screening tests per hour under the New York No-Fault System would be permissible - as the marketing material submitted by Applicant for this testing machine (Indiko Plus) shows that up to 350 tests can be performed per hour ($350 \times 20.70 = \$7,245.00$). For example, it appears that if \$300 were reimbursable per test, the amount could reach up to \$105,000.00 per hour. The marketing materials also state that this testing method is a "cost-effective solution", "minimal daily maintenance", and that a "unique low volume cuvette technology is the basis of Indiko's cost effectiveness."

"Notwithstanding the goal of full compensation, there is no doubt that cost containment was also among the Legislature's objectives. Licari v. Elliott, 57 N.Y.2d 230, 236-37, 455 N.Y.S.2d 570, 441 N.E.2d 1088 [1982]." Oceanside Medical Healthcare, P.C. v. Progressive Ins., 2002 N.Y. Slip Op. 50188(U) at 3, 2002 WL 1013008 (Civ. Ct. Kings Co., Jack M. Battaglia, J., May 9, 2002).

Arbitrator Natia Pavel, in **AAA Case No. 17-15-1022-7649**, issued on 9/9/17, found in favor of a Respondent on this issue. Arbitrator Mona Bargnesi also found in favor of Respondent, in **AAA Case No. 17-14-9025-3653**, issued on 3/16/17. Master Arbitrator Robert Trestman, in **AAA Case No. 99-15-1008-9219**, affirmed a lower arbitrator's award in favor of a Respondent on this same issue. Master Arbitrator Robyn D. Weisman, in **AAA Case No. 99-14-9021-8866** and Master Arbitrator Frank G. Godson, in **AAA Case No. 99-14-9022-2901**, affirmed lower arbitrator's awards that determined Ground Rule 12's limitations apply to drug screening performed with a similar device at Applicant's offices.

In weighing the competing expert affidavits, I was ultimately convinced by Ms. Giffels as the affidavit by Ms. Smith, a Certified Professional Coder, makes no reference to the AMA CPT Code book. As noted above, the WCB Fee Schedule where it directs coder to the AMA CPT code book "for an explanation of coding rules and regulations not listed

in this schedule." Without reference to the material cited by Ms. Giffels, I find Ms. Smith's affidavit to lack sufficient probative value to overcome Respondent's prima facie case regarding the drug screening charges.

Having carefully considered the submissions of the parties, the relevant case law and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of Respondent.

No further payments are due.

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 claim is DENIED in its entirety

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

State of New York

SS :

County of Erie

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

01/25/2019
(Dated)

Fred Lutzen

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:
66f15557b794e3c3526993045fdd3a9a

Electronically Signed

Your name: Fred Lutzen
Signed on: 01/25/2019