American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Eden Ortho Supply LTD (Applicant)	AAA Case No.	17-17-1079-3024
- and -	Applicant's File No.	SS-58119
State Farm Mutual Automobile Insurance Company (Respondent)	Insurer's Claim File No.	320443H90
	NAIC No.	25178

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 KT

1. Hearing(s) held on 02/27/2019
   Declared closed by the arbitrator on 02/27/2019

   Gregory Itingen, Esq from Samandarov & Associates, P.C. participated in person for the Applicant

   Ann Hellegers, Hearing Representative from Richard T. Lau & Associates participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 1,524.18**, 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 the Respondent has established its defense that the Applicant charged in excess New York State Workers' Compensation Fee Schedule, for the rental of Durable Medical Equipment, from 08/01/17 to 08/30/17, to wit: Continuous Passive Motion ("CPM") device and Cryotherapy Unit ("CTU").

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

The instant dispute arises out of a motor vehicle accident that occurred on 06/03/17, involving Assignor KT, a 44-year old male, as a driver. The Assignor came under the care of Mark S. McMahon, MD, who performed arthroscopic surgery to his left knee on 08/15/17. Dr. McMahon prescribed the DME. Applicant, Eden Ortho Supply Ltd., provided the use of durable medical eqipment, to wit: Continuous Passive Motion ("CPM") device and Cryotherapy Unit ("CTU") to the Assignor from 08/17/17 to 08/30/17, and seeks further reimbursement herein. Applicant charged $85.00 per day for the use of the CPM and $49.99 per day for the use of the CTU, plus delivery and incidental items.

Respondent paid the sum of $419.40, and asserts that the Applicant was properly paid pursuant to the New York State Workers' Compensation Fee Schedule ("fee schedule"). In support, Respondent submitted a fee audit by a Certified Professional Coder.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

The Applicant establishes its prima facie entitlement to reimbursement by proof that it submitted its claim, setting forth the fact and amounts of the losses sustained, and that payment of no-fault benefits was overdue. Insurance Law § 5106(a); *Mary Immaculate Hospital v. Allstate Insurance Co*., 5 A.D.3d 742 (2nd Dept. 2004).

Once the claimant has established a prima facie case, the burden shifts to the defendant to come forward with admissible evidence refuting the claimant's evidence and demonstrating the existence of a material issue of fact. (*King's Medical Supply v Country-Wide Ins.,* 5 Misc.3d 767, 770 [2004]; *Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). *Proscan Radiology of Buffalo vs. Progressive Cas. Ins. Co.,* 12 Misc.3d 1176A, 820 N.Y.S.2d 845 (Table), (Civ. Ct., N.Y. Co. 2006).

An insurer preserves a billing practices defense by checking Box 18 on the NF-10 denial of claim form. *See Megacure Acupuncture, P.C. v. Lancer Ins. Co*., 41 Misc.3d 139(A), 983 N.Y.S.2d 204 (Table), 2013 N.Y. Slip Op. 51994(U)(App. Term 2d, 11th & 13th Dists. Nov. 21, 2013).

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, (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, (Civ. 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 (App. Term, 1st Dept, *per curiam*, 2006).

The undersigned arbitrator is permitted to take judicial notice of the Worker's Compensation fee schedule. *See,* Kingsbrook Jewish Medical Center the Allstate Ins. Co., 871 N.Y.S.2d 680, 61 A.D. 3d 13 (App. Div. 2d Dept. 2009); Matter of Medical Society v. Serio, 100 N.Y.2d 854, 768 N.Y.S.2d 423 (2003).

Respondent relies on the Fee Audit by Lori Ercolini, R.N., C.P.C. The Coder opines that the proper daily reimbursement for the CPM is $4.69 per day and the proper reimbursement for the CTU is "N/A" because the code is not listed in the Medicaid DME fee schedule). The Coder refers to 12 NYCRR §442.2.

12 NYCRR §442.2 states:

> **442.2 Fee schedule.**
>
> (a) The maximum permissible charge for the purchase of durable medical equipment, medical/surgical supplies, and orthotic and prosthetic appliances shall be the fee payable for such equipment or supplies under the New York State Medicaid program at the time such equipment and supplies are provided, except that the fee for bone growth stimulators (HCPCS codes E0747, E0748 and E0760) shall be paid in one payment and not split. For orthopedic footwear or if the New York State Medicaid program has not established a fee payable for the specific item, then the fee payable, shall be the lesser of:
>
> (1) the acquisition cost (*i.e*. the line item cost from a manufacturer or wholesaler net of any rebates, discounts or other valuable considerations, mailing, shipping, handling, insurance costs or any sales tax) to the provider plus 50 percent; or
>
> (2) the usual and customary price charged to the general public.
>
> **(b) The maximum permissible monthly rental charge for such 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. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule.** [Emphasis added.]

However, the calculations reached by the Coder, have already been stricken down. See In the Matter of Town Supply v. Global Liberty, AAA Case No. 17-15-1020-4755, award by J. Andreotta. That decision was appealed and Master Arbitrator Godson affirmed the ruling, 99-15-1020-4755. In that case Arbitrator Andreotta stated the following:

After having carefully reviewed the opposing Affidavits and having reviewed the additional submissions of the Applicant, it is my opinion that the rate to the general public is the prevailing rate in this case. After consideration of both parties' arguments as well as documentary submissions I find in favor of the Applicant.

Upon review of the 12 NYCRR 442.2(b) and (g) it seems that the intention is to keep the Medicaid Fee Schedule and the Manual separate: "Medicaid provider manual and the policy guidelines for durable medical equipment are not included as part of the durable medical equipment fee schedule used in workers' compensation cases except to the extent such documents contain the Medicaid durable medical equipment fee schedule."

Per the statistical analysis by Ingenix/Optum, I find that the codes were billed in a reasonable range. The proper rental price is the rental price to the general public which was obtained from the Ingenix study.

In so ruling, I concur with my fellow Arbitrators and Master Arbitrators who have ruled similarly. See, e.g. Master Arbitrator D'Ammora, 99-14-1001-2311, Master Arbitrator Godson, 99-15-1010-2954, Arbitrator Haskel, 17-15-1019-0942, Arbitrator Mirabelli, 17-15-1014-5105, Arbitrator Hyland, 17-15-1022-1625, Arbitrator Lustig, 17-15-1020-4455.

In a similar ruling, Arbitrator Rebecca Feder, AAA Case No.: 17-12-9033-1293, also evaluated this argument and stated the following:

The Applicant provided the citations to many arbitration awards that also agree with the notion that neither the NYS Department of Health nor Medicaid has established a monthly rental fee for these DME and so the maximum allowable fee is the monthly rental charged to the general public. Vincent M. Esposito (Complete Orthopedic Services Inc. and Progressive Ins. Co., AAA Case No. AAA Case No. 412008030139, AAA Assessment No. 17 991 17651 08, August 31, 2009); Victor Moritz (Medical Records Retrieval/DBA Kamara Supplies and Geico Insurance Company, AAA Case No. 412009049137, AAA Assessment No. 17 991 00621 10, March 12, 2010; Medical Records Retrieval/DBA Kamara Supplies and State Farm Fire and Cas. Co., AAA Case No. 412009049147, AAA Assessment No. 17 991 00808 10, March 11, 2010; Medical Records Retrieval/DBA Kamara Supplies and 21st Century Ins. Co., AAA Case No. 412009048261, AAA Assessment No. 17 991 00804 10, March 11, 2010; Medical Records Retrieval/DBA Kamara Supplies and American Transit Ins. Co., AAA Case No. 412009049770, AAA Assessment No. 17 991 00724 10, March 10,

2010; Medical Records Retrieval/DBA Kamara Supplies and Geico Ins. Co., AAA Case No. 412009048507, AAA Assessment No. 17 991 00597 10, March 9, 2010); Harry Peltz (Complete Orthopedic Services, Inc. and Allstate Ins. Co., AAA Case No. 412008036588, AAA Assessment No. 17 991 22389 09, Jan. 21, 2009; Kenneth C. Rybacki, Jr., (Complete Orthopedic Services Inc. and Allstate Ins. Co., AAA Case No. AAA Case No. 412009045545, AAA Assessment No. 17 991 03190 10, March 29, 2010); John J. Talay (Complete Orthopedic Services Inc. and Geico Ins. Co., AAA Case No. 412009028897, AAA Assessment No. 17 991 17809 09, Feb. 2, 2010); Ellen F. Weisman, Complete Orthopedic Services Inc. and Geico Ins. Co., AAA Case No. 412009007518, AAA Assessment No. 17 991 06609 09, May 29, 2009); and Glen A. Wiener (Medical Records Retrieval/DBA Kamara Supplies and Allstate Ins. Co., AAA Case No. 412009021324, AAA Assessment No. 17 991 15921 09, Nov. 11, 2009; Medical Records Retrieval/DBA Kamara Supplies and Allstate Ins. Co., AAA Case No. 412009048774, AAA Assessment No. 17 991 15921 09, February 23, 2010; Medical Records Retrieval/DBA Kamara Supplies and Allstate Ins. Co., AAA Case No. 412009048617, AAA Assessment No. 17 991 00406 10, February 23, 2010; Medical Records Retrieval/DBA Kamara Supplies and Allstate Ins. Co., AAA Case No.412009049057, AAA Assessment No. 17 991 00355 10, February 23, 2010.

See, also, ***Horizon Ortho Supply Corp. v. United Services Automobile Association***, AAA Case No.: 99-15-1019-0791(Master Arbitrator Weisman)(invoices are not necessary to determine the correct reimbursement rate).

On this issue, it is Respondent's burden to prove that the usual and customary price charged to the general public is different than the actual price it paid the Applicant herein. Case law further dictates that 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,(Civil Ct, Kings Co. 2006).

Thus I find that Respondent failed to prove that the Applicant was billing in excess of the "usual and customary price charged to the general public" at the time this CPM and CTU were rented. Accordingly, after a careful review of the records and consideration of the parties' oral arguments, I find in favor of the Applicant. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6.A, B, C and D, below.

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**
	Eden Ortho Supply LTD	**08/17/17 - 08/30/17**	**$1,524.18**	**Awarded: $1,524.18**
Total			**$1,524.18**	**Awarded: $1,524.18**

B. The insurer shall also compute and pay the applicant interest set forth below. 11/13/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   Interest runs from the **date noted above** until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

   Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed**after 02/04/2015**, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-D).

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

03/07/2019
(Dated)

Nancy Kramer Avalone

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:
4889f742800e01aca92c0c1248634fdf

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 03/07/2019