

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sunray Acupuncture PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-18-1092-0130
Applicant's File No.	OS-37882
Insurer's Claim File No.	0434039950101042
NAIC No.	22055

ARBITRATION AWARD

I, Andrew Horn, 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, eligible injured person, EIP.

1. Hearing(s) held on 11/26/2019
Declared closed by the arbitrator on 11/26/2019

Olga Sklyut, Esq., from Law Office of Olga Sklyut, P.C., participated by telephone for the Applicant

Farhan Imtiaz, Esq., from Geico Insurance Company, participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 936.34**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's attorney withdrew the outstanding charges except for those relating to the initial examination, for which the provider sought additional payment of \$13.18 (the difference between the amount billed and the amount paid), and twenty-eight (28) cupping treatments, for which the provider sought additional payment of \$10.58 each (the difference between \$24.45 per treatment and \$13.87, the amount paid). Amended claim amount: \$309.42.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

In dispute is Applicant Sunray Acupuncture, P.C.'s amended claim as the assignee of a 27-year-old man injured in a motor vehicle accident on September 1, 2017, for reimbursement for an initial examination on September 6, 2017 and twenty-eight (28) cupping treatments performed from September 6, 2017 through November 28, 2017 by Leonid Khlevner, its owner, and Markova Iya Sergeevna, an employee.

Respondent Geico Insurance Company partially denied the (amended) claim because the fees charged were excessive under the relevant fee schedule.

4. Findings, Conclusions, and Basis Therefor

An insurer is only required to pay for services in the amounts prescribed by the relevant fee schedule, see Oleg's Acupuncture, P.C. and Hereford Ins. Co., 58 Misc.3d 151(A) (App Term 2d, 11th & 13th Dists. 2018), but has the burden to establish that the amounts charged exceed the permitted amounts, see Rogy Med. P.C. v. Mercury Cas. Co., 23 Misc.3d 132(A) (App Term 2d, 11th & 13th Dists. 2009).

By statute and regulation, the fee schedules established by the New York State Workers' Compensation Board are expressly made applicable to claims under No-Fault Law. See Insurance Law §5108; 11 NYCRR §68.0, §68.1 (a) (1).

I am permitted to take judicial notice of, among other things, the 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), (App Term 2d, 11th & 13th Dists. 2011); Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A) (App Term 1st Dept. 2011).

Respondent denied the portion of the claim involving the initial examination because it contends that there is "no allowance for this procedure in the New York State Worker's Compensation Fee Schedule under the provider's specialty."

However, the contention that a service is not reimbursable because it is not listed in the section designated for the provider in the fee schedule, standing alone, is insufficient to warrant the denial of a claim. See Acupuncture Approach, P.C. v. Tri State Consumer Ins. Co., 57 Misc.3d 129(A) (App Term 1st Dept. 2017); TC Acupuncture, P.C. v. Tri-State Consumer Ins. Co., 52 Misc.3d 131(A) (App Term 1st Dept. 2016). See also WJJ Acupuncture P.C. v. Geico Ins. Co., 34 Misc.3d 134(A) (App Term 2d, 11th & 13th Dists. 2011); Olga Bard Acupuncture, P.C. v. Geico Ins. Co., 29 Misc.3d 132(A) (App Term 2d, 11th & 13th Dists. 2010); Raz Acupuncture, P.C. v. AIG Indem. Ins. Co., 28 Misc.3d 127(A) (App Term 2d, 11th & 13th Dists. 2010).

For example, with respect to moxibustion and infrared treatments performed by an acupuncturist, the court in VS Care Acupuncture v. State Farm Mut. Auto. Ins. Co., 46 Misc.3d 141(A) (App Term 1st Dept. 2015), rejected the "position taken by defendant's

affiant, a certified medical coder, that the above-mentioned services ... 'cannot be considered for reimbursement' because the procedure codes billed under were listed in the workers' compensation physical medicine fee schedule." Id.

Arbitrator Marilyn Felenstein hit the nail on the head in Excell Acupuncture P.C. and Allstate Ins. Co., AAA Case No. 412012130718, AAA Assessment No. 17 991 03515 13 (May 22, 2013), when she astutely noted that "(t)his defense has an innate problem because there is no established fee schedule for services provided by a licensed acupuncturist" and "(s)ince there is no fee schedule for acupuncturists, it cannot be said that a procedure is not allowed under the fee schedule".

"Just as there is no bar to physical therapists and/or occupational therapists using codes from the Medicine section, which is outside their specialty, there is no bar to a licensed acupuncturist using codes from the ... the medical fee schedule." Harmonious Acupuncture P.C. and American Transit Ins. Co., AAA Case No. 412013080820, AAA Assessment No. 17 991 57844 13 (arb. Stacy A. Presser, Jan. 13, 2014).

To the extent that the insurance carrier also contended that the provider sought to recover in excess of the fee schedule, in essence, by unbundling the initial examination from "a more comprehensive service provided," which presumably was the initial acupuncture treatment, Respondent "did not submit an affidavit (or statement) from someone with sufficient expertise to establish that ground as a matter of law". See First Aid Occupational Therapy, PLLC v. Country-Wide Ins. Co., 26 Misc.3d 135(A) (App Term 2d, 11th & 13th Dists. 2010).

Accordingly, Respondent's denial involving the evaluation is vacated and Applicant is awarded the difference between the amount billed and the amount previously paid: \$13.18.

The instant provider billed for the disputed cupping utilizing CPT code 97799, which is for an "(u)nlisted special service, procedure or report" that must be billed "by report," and, pursuant to the fee schedule, a "by report" procedure should be reimbursed at a fee consistent with a similar fee-scheduled procedure.

The insurance carrier paid \$13.87 for the cupping (instead of the amount billed), relying on an affidavit from Dr. Steven Schram, a chiropractor and licensed acupuncturist in practice "for over 20 years," who has "Diplomate certification from the National Certification Commission for Acupuncture and Oriental Medicine," has authored articles on acupuncture, and served as past President and Board Member of the Acupuncture Society of New York (ASNY).

Dr. Schram noted that the "AMA CPT Assistant supports using code 97039 for an unlisted modality."

Because the "Official New York Workers' Compensation Medical Fee Schedule ... directs users to 'refer to the CPT book for an explanation of coding rules and regulations not listed in his schedule,'" and the "CPT book, in turn, expressly makes reference to CPT Assistant," an arbitrator's "refus(al) to consider CPT Assistant" "is incorrect as a

matter of law." Matter of Global Liberty Ins. Co. v. McMahon, 172 A.D.3d 500 (1st Dept. 2019).

While acknowledging that acupuncture "has a Work RVU of 3.55" units, Dr. Schram determined that cupping should be assigned a relative value unit (RVU) of 2.40, which is "between an unattended hot pack (2.37) and attended ultra-sound (2.41)," and, consequently, reimbursed at \$13.87 per session, because, in his opinion, acupuncture requires "a higher skill in both application and professional judgment than ... cupping."

As Applicant's attorney aptly pointed out though, Dr. Schram did not review any of the medical records in this case, but simply explained that cupping, in general, is "a very simple procedure that requires a minimal amount of technical skill," with "little overhead ... as it requires very little in the way of supplies."

Although I am cognizant that numerous arbitrators - Joanna Andreotta in Sunny Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-17-1065-8034 (March 21, 2018), Elyse Balzer in Oleg Shargorodskiy LAC and Geico Ins. Co., AAA Case No. 17-16-1050-0371 (Nov. 26, 2017), Steven Celauro in XYJ Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1043-4351 (June 14, 2017), Toby Susan De Simone in Gentle Care Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-4045 (April 11, 2018), Stacey Erdheim in New Future Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1042-2900 (July 17, 2017), Lori Ehrlich in Forest Park Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-17-1069-2328 (May 30, 2018), Rebecca Feder in LVOV Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-3986 (mAY 8, 2018), Eileen Hennessy in Unicorn Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-0516 (July 22, 2018), John Hyland in Gentle Care Acupuncture, P.C. and Geico Ins. Co., AAA Case No. (June 11, 2018), Shawn Kelleher in Health One Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-17-1057-1822 (June 25, 2018), Nancy S. Linden in Alternative PLM Acupuncture, P.C. and Geico Ins. Co., Case No. 17-17-1071-9578 (June 18, 2018), Mitchell Lustig in Unicorn Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-0501 (June 11, 2018), Victor Moritz in Gentle Care Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-4093 (May 22, 2018); Heidi Obiajulu in Vivid Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1038-2931 (April 17, 2018), Marina O'Leary in Brooklyn Medical Practice, P.C. and Unicorn Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1038-8882 (July 27, 2018), Tali Philipson in NY Earnest Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1044-0076 (Aug. 7, 2017), Michael Rosenberger in Gentle Care Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1048-9976 (Feb. 17, 2018), Nicole J. Simmons in First Alternative PLM Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1052-1995 (May 21, 2018), Keith Tola in Gentle Care Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1039-4073 (June 6, 2018), and Paul Weidenbaum in East Coast Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1042-3604 (March 15, 2018), among them -- have found Dr. Schram's affidavit insufficient to sustain a fee schedule defense, other arbitrators have determined otherwise - notably, Drew M. Gewuerz in XYJ Acupuncture and Geico Ins. Co., AAA Case No. 17-16-1041-7743 (May 3, 2017), Pamela Hirschhorn in Jeff Harmonize Acupuncture, P.C. and Geico Ins. Co., AAA Case No. 17-16-1051-2543 (Jan. 3, 2018), Aaron Maslow in Forest Park Acupuncture, P.C.

and Geico Ins. Co., AAA Case No. 17-17-1062-6761 (June 5, 2018), and Glen Wiener in Journey Acupuncture and Geico Ins. Co., AAA Case No. 17-17-1072-9013 (June 26, 2018) -- that Dr. Schram's affidavit constitutes sufficient *prima facie* proof that cupping should be reimbursed in the amount of \$13.87. I concur with the latter.

However, Mr. Khlevner, an acupuncturist licensed to practice in New York since 2003, with "extensive training in proper billing procedures," "disagree(d) with Dr. Schram's description of the cupping procedure as well as his determination of the appropriate amount to bill for the procedure." He asserted, contrary to Dr. Schram's contention that "cupping is a very simple procedure that requires a minimal amount of technical skill," that cupping "requires expertise in the same complex traditional Chinese medical theories as does acupuncture or moxibustion." Furthermore, he contended that, unlike hot packs, which is "an unattended procedure," cupping "requires constant attendance," and, unlike ultrasound, which he characterized as "a very low level technical skill procedure," cupping involves "many adjustments, variation, and possible complications."

Mr. Khlevner proposed that "the procedure most similar to cupping is described in code 97140 - Manual therapy techniques," since "this code, just like cupping, is used for treatment of painful spasms and/or restricted motion of soft tissues," and cupping is "a form of manual therapy that among benefits, improves lymphatic drainage." Hence he contended that the "minimum amount of reimbursement ... is \$24.45" per treatment.

While Respondent also pointed out that a fee of \$13.87 was upheld by arbitrator Regina Anzalone Kurz, relying on a report by an Independent Health Consultant (IHC), in Unicorn Acupuncture, P.C. and Geico Ins. Co., 17-16-1041-5485 (Dec. 27, 2018), I find the underlying IHC report by Susan Montana, President of Habonero, Inc., unpersuasive given that Ms. Montana's qualifications or expertise to opine as to the appropriate amount of reimbursement for cupping are nowhere set forth in the report or accompanying curriculum vitae.

After careful consideration of both experts' arguments, I am persuaded by Mr. Khlevner that code 97140 is the most similar fee-scheduled procedure.

Accordingly, Respondent's partial denials are vacated and Applicant's amended claim is granted in its entirety.

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	Amount Amended	Status
	Sunray Acupuncture PC	09/06/17 - 09/21/17	\$134.20	\$34.34	Awarded: \$34.34
	Sunray Acupuncture PC	09/11/17 - 09/20/17	\$174.75	\$31.74	Awarded: \$31.74
	Sunray Acupuncture PC	09/22/17 - 10/06/17	\$147.32	\$42.32	Awarded: \$42.32
	Sunray Acupuncture PC	09/27/17 - 10/04/17	\$161.19	\$31.74	Awarded: \$31.74
	Sunray Acupuncture PC	10/10/17 - 10/10/17	\$39.86	\$21.16	Awarded: \$21.16
	Sunray Acupuncture PC	10/19/17 - 10/19/17	\$39.86	\$21.16	Awarded: \$21.16

	Sunray Acupuncture re PC	10/24/17 - 10/24/17	\$39.86	\$21.16	Awarded: \$21.16
	Sunray Acupuncture re PC	10/30/17 - 10/30/17	\$39.86	\$21.16	Awarded: \$21.16
	Sunray Acupuncture re PC	11/07/17 - 11/14/17	\$119.58	\$63.48	Awarded: \$63.48
	Sunray Acupuncture re PC	11/28/17 - 11/28/17	\$39.86	\$21.16	Awarded: \$21.16
Total			\$936.34		Awarded: \$309.42

B. The insurer shall also compute and pay the applicant interest set forth below. 04/13/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Inasmuch as Applicant did not file for arbitration within 30 days of receipt of Respondent's denials, the statutory tolling provision applies. Accordingly, the insurer shall pay interest on the amended claim in the amount of \$309.42 from April 13, 2018, the date arbitration was initiated, until such time as payment is made.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee, subject to a maximum fee of \$1,360.00, in accordance with 11 NYCRR § 65-4.6(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 Bronx

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

12/27/2019
(Dated)

Andrew Horn

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:
c535f337c728a62e984dbe45b60e24c5

Electronically Signed

Your name: Andrew Horn
Signed on: 12/27/2019