American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Straight Up Chiropractic, PC (Applicant)	AAA Case No.	17-18-1101-6629
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	0385210470101023
Geico Insurance Company (Respondent)	NAIC No.	22055

ARBITRATION AWARD

I, Eileen Hennessy, 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-A.A.

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

   Keisha Alleyne from Law Offices of Eitan Dagan (Elmhurst) participated in person for the Applicant

   Robert Barnes from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 250.26**, was AMENDED and permitted by the arbitrator at the oral hearing.

   Applicant amended the amount in dispute from the original amount of $250.26 to $247.59. Applicant withdrew the claim for date of service 5/3/2017 ($3.12) as paid in accordance with the applicable fee schedule.

   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claims were mailed to and received by Respondent and (ii) Respondent's denials of the subject claims were timely issued.

3. Summary of Issues in Dispute

The record reveals that the Assignor-A.A., a 23-year-old male, claimed injuries as the driver of a motor vehicle involved in an accident on 5/1/2017. Applicant billed for chiropractic treatments from 5/5/2017 through 7/11/2017. Respondent partially denied the claims based on the bills exceeded the applicable Fee Schedule. The issue to be determined is whether the services were billed in accordance with the Fee Schedule?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for chiropractic treatments. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

Fee Schedule

Respondent partially denied the bills for dates of service 5/5/2017 through 7/6/2017 premised upon the 8-unit rule.

It is respondent's burden to come forward with competent evidentiary proof to support its fee schedule defenses. *See*Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 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 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 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 N.Y. Misc. LEXIS 1109 (App. Term, 1 Dep't, per curiam, 2006). A respondent may interpose a defense in a timely denial that the claim exceeds the fees permitted by the Workers' Compensation schedules, but respondent must, at minimum, establish, by evidentiary proof, that the charges exceeded that permitted by law. Abraham v. Country-Wide Ins. Co., 3 Misc.3d 130A, 787 N.Y.S.2d 678, 2004 N.Y. Misc. LEXIS 544 (App. Term, 2d Dept. 2004).

Furthermore, I take judicial notice 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) (App Term 2d, 11th & 13th Jud Dists. 2011); Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A) (App Term, 1st Dept. 2011).

Ground Rule 11 of the Physical Medicine Section of the Medicine Fee Schedule, *Multiple Physical Medicine Procedures and Modalities*, which applies to doctors, physical therapist, and occupational therapists, commonly referred to as the "8-Unit Rule", reads: "When multiple physical medicine procedures and/or modalities are performed on the same day, reimbursement is limited to 8.0 RVUs or the amount billed, whichever is less. The following codes represent the physical medicine procedures and modalities subject to this rule: 97010, 97012, 97014, 97016, 97018, 97022, 97024, 97026, 97028, 97032, 97033, 97034, 97035, 97036, 97039, 97110, 97112, 97113, 97116, 97124, 97139, 97140, 97150, 97530, 97535, 97537, 97542, 97660, 97661, and 97662"

Ground Rule 3 of the Physical Medicine Section of the Chiropractic Fee Schedule, *Multiple Physical Medicine Procedures and Modalities*, which applies to chiropractors, and is also commonly referred to as the "8-Unit Rule", reads: "When multiple physical medicine procedures and/or modalities are performed on the same day, reimbursement is limited to 8.0 RVUs or the amount billed, whichever is less. The following codes represent the physical medicine procedures and modalities subject to this rule: 97010, 97012, 97014, 97024, 97026, 97028, 97032, 97033, 97034, 97035, 97036, 97039, 97110, 97112, 97113, 97116, 97124, 97139, 97140, 97530, 98940, 98941, 98942."

These sections of the New York Workers' Compensation Fee Schedule contain CPT codes which appear in both sections and both sections provide that when multiple physical medicine procedures and/or modalities are performed on the same day, reimbursement is limited to 8.0 RVUs or the amount billed, whichever is less.

Additionally, these services are governed by a conversion rate of 8.45 for medical physicians, 7.70 for physical and occupational therapists who are self-employed, and 5.78 for chiropractors and licensed acupuncturists.

I have stated in the past I believe that if a treating physical therapist and chiropractor both bill for the CPT modalities that can be performed by either a licensed physical therapist or chiropractor on the same date, the carrier is not required to pay both bills and the limitation of a combined eight RVU applies.

As noted by Arbitrator Glen Wiener in *Goodheart Chiropractic, PC v Geico Insurance Co.*, AAA Legacy 412013101975 (February 20, 2014), in discussing whether there is a limitation to eight units based on specialist or CPT modalities, "…I respectfully decline to follow the holding of District Court Judge Hackeling who held only each provider is limited to reimbursement of 8 units per day. *See* Doctor of Medicine in the House v. Allstate Ins. Co., 41 Misc. 3d 983, 975 N.Y.S.2d 591 (3D District Ct. Suffolk Co Sept. 30, 2013). Judge Hackeling's holding is a misinterpretation of Ground Rule 11 which

clearly limits reimbursement to all providers performing physical medicine services on the same day. To hold otherwise would allow an acupuncturist, chiropractor, medical doctor, and massage therapist to bill for and receive reimbursement for a plethora of physical medicine treatments conducted on one individual on a single day (and many times out of the same location-as herein)."

I agree with Arbitrator Wiener's analysis. If a provider can render a licensed service but chooses not to then the 8-unit limitation will apply. Therefore, the modalities listed above, which can be performed by either a physical therapist or chiropractor are subject to the 8-unit limitation.

Notwithstanding this point, it is further worth mentioning this limitation would not apply when a treating provider is unable to perform the services rendered by another provider based upon licensing restrictions. Therefore, when a treating practitioner is not licensed to provide a specific physical medicine modality (such as chiropractic manipulation or acupuncture), and another healthcare practitioner then provides this service the "8-Unit Rule" should not be imposed to bar recovery. An injured individual should never be precluded from receiving subsequent non-traditional treatment such as chiropractic manipulation or acupuncture when the initial provider was neither licensed nor skilled in this service.

I am guided by a recent email, dated 1/30/2018, from Heather MacMaster, Deputy General Counsel, NYS Workers' Compensation Board to Chris Maloney of the Department of Financial Services, Ms. MacMaster stated that: "The 8 RVU limitation is per patient per day regardless of how many body parts are treated or how many practitioners treat. The only exception is with chiro and PT. If a chiro renders manipulation only (98940-98943) and does not bill any of the other physical medicine codes, the injured worker could receive chiro and PT on the same day. This scenario is usually performed by a chiro who is affiliated with the Chiropractic Council. They only perform manipulation. The physical medicine codes that are impacted by the 8 RVU limitation are in the chiro physical medicine fee schedule but the codes for spinal manipulation are not in the general physical medicine fee schedule."

Although Ms. MacMaster's advisory may not be an official position, nonetheless, I am guided by Ms. MacMaster's email and defer to the Workers' Compensation Board. I find that the WCB interpretation is entitled to deference. *See* Matter of 427 W. 51st St. Owners Corp. v. Division of Hous. & Community Renewal, 3 N.Y.3d 337, 342 (2004) ("[T]he interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable.").

I note that I do not apply payments made for code 98940-98943 towards the 8.0 unit maximum contained in Ground Rule 11 of the Physical Medicine Section of the New York State Workers' Compensation Medical Fee Schedule.

As my colleague, Arbitrator Antonietta Russo, in AAA Case Number 17-16-1039-3636 stated:

Eight units are eight units unless treatment is rendered by a medical doctor/physical therapist/occupational therapist and chiropractor on the same day. In that circumstance, the chiropractor may be reimbursed a maximum of 8 units of spinal manipulation (CPT codes 98940-98943) even when a medical doctor/physical therapist/occupational therapist has already been reimbursed 8 units.

Legal Analysis

Applicant billed $37.75 for the dates of service from 5/5/2017 through 7/11/2017; $26.41 for CPT code 98940 and $11.34 for CPT code 97140. Date of service 7/11/2017 was paid in full. Respondent paid $28.43 for dates of service 5/5/2017 through 6/16/2017; $26.41 (4.56 units) for CPT code 98940 and $2.02 (0.35 units) for CPT code 97140. Respondent paid $26.41 for dates of service 6/19/2017 through 7/6/2017 for CPT code 98940. Respondent denied the remainder stating: "Reimbursement for modalities and procedures may not exceed 8 relative value units per day".

Respondent provides copies of the bills and payment screens indicating that payment was issued to Seo Han Medical, P.C. for the same dates of service for a combination of CPT codes 97010, 97014, and 97124 in the amount of $64.65 for a total of 7.65 units. These codes are included in Ground Rule 11 of the Physical Medicine Section of the Medicine Fee Schedule and Ground Rule 3 of the Physical Medicine Section of the Chiropractic Fee Schedule and are therefore subject to 8-unit rule. As Respondent paid a total of more than 8 units to Applicant and a physical therapist combined for each of the dates of service in dispute, no additional reimbursement is warranted, and Applicant's claims are denied.

Accordingly, Applicant's claim is denied. This decision is in full disposition of all claims for No-Fault benefits presently before 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 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 Nassau

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

12/28/2019
(Dated)

Eileen Hennessy

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:
7ba832bd3a3dbe9672c21f8ca8cf8e09

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/28/2019