American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Isurply LLC (Applicant)	AAA Case No.	17-19-1120-1888
	Applicant's File No.	StubbsK
- and -	Insurer's Claim File No.	3200V922Q
	NAIC No.	25143
State Farm Fire & Casualty Company (Respondent)		

ARBITRATION AWARD

I, Frank Marotta, 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-KS

1. Hearing(s) held on 03/31/2020
   Declared closed by the arbitrator on 03/31/2020

   Karen Wagner, Esq. from Dash Law Firm, P.C. participated by telephone for the Applicant

   Daniel Fuentes, Esq. from Freiberg, Peck & Kang, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 4,784.72**, was NOT AMENDED at the oral hearing.
   Stipulations WERE made by the parties regarding the issues to be determined.

   The parties stipulate and agree that the Applicant established its prima facie burden and the Respondent's denials of the subject claims were timely issued.

3. Summary of Issues in Dispute

   The record reveals that the Assignor-KS, a 56 a year old male, sustained injuries in a motor vehicle accident on 12/10/17. The Applicant submitted a bill in the amount of $3,799.50 for the rental of a Continuous Passive Motion (CPM) device between 6/18/18 and 7/29/18 and synthetic sheepskin pad using CPT Codes E0188 and E0936. The Respondent reimbursed the Applicant for the synthetic sheepskin pad as billed and

$559.33 for the rental fees. The Applicant submitted a bill in the amount of $1,680.00 for the rental of a Game Ready Compression Unit between 6/12/18 and 7/2/18 and shoulder sling using CPT Codes E1399. The Respondent reimbursed the Applicant $135.45. Applicant now seek the balance of its rental fees. The issue for determination is whether the Respondent properly calculated the rental reimbursement as 1/6th of the equipment provider's acquisition cost.

4. Findings, Conclusions, and Basis Therefor

The Applicant filed this arbitration in the amount of $4,784.72 for disputed rental fees in connection with a CPM device and Game Ready Compression Unit provided to the Assignor following a motor vehicle accident that occurred on 12/10/17.

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.

Respondent reimbursed the claims noting, "*Pursuant to Insurance Law 5108(a), 11 NYCRR 68.1 and 12 NYCRR 442.2, the DME Fee Schedule has been applied. 12 NYCRR 442.2(b) states that the maximum permissible monthly rental charge for 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. Pursuant to the New York State Department of Health area office, the maximum monthly rental fee is calculated at 1/6th of the equipment provider's acquisition cost. Pursuant to the Policy Guidelines of the New York State Medicaid DME Fee schedule, the monthly rental fee is calculated at 1/6th of the equipment provider's acquisition cost for DME items that have not been assigned a Maximum Reimbursement Amount (MRA) in New York State Medicaid Program DME Fee Schedule.*"

Although the parties stipulated to the timeliness of the Respondent's denials, the heart of the controversy is whether the Respondent proper calculated the rental reimbursement per the applicable fee schedule. Since the services at issue were rendered after April 1, 2013 pursuant to the revised Regulation the issue of whether the healthcare provider billed in accordance with the fee schedule is not subject to preclusion. 11 NYCRR 65-3.8 (g) (effective April 1, 2013); Precious Acupuncture Care, P.C. v Hereford Ins. Co., 2018 NY Slip Op 50042(U), 58 Misc. 3d 147(A) (Appellate Term, Second Dept. 2018).

Though it is a defense that can be raised at any time, it is still a defense, upon which the insurer bears the burden of proof. To that extent, where an insurer sets forth a defense based upon fee schedule they are required to come forward with competent evidentiary proof to support it. 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). Here the Respondent has offered no such proof in the form of an affidavit by a Certified Professional Coder or otherwise to support its reimbursement.

It is further noted that the issue of whether a rental fee is properly reimbursed at 1/6th of the equipment provider's acquisition cost as noted on Respondent's denial or the monthly rental charge to the general public as expressed by Applicant's fee expert, Certified Coder Lorraine Perez, has been the subject of many arbitration decisions, including some by the undersigned. See Advanced Recovery Equipment & Supplies, LLC and State Farm Mutual Automobile Insurance Company, AAA Case No. 17-18-1085-8934 and Orthocare Tech, Inc. and State Farm Fire and Casualty Company, AAA Case No. 17-17-1070-7820 wherein I noted;

"*After a review of the documents contain in the ECF for the instant matter and given the arguments by the parties at the hearing, I find, as I did earlier, that there is insufficient proof to support Respondent's argument that the Manual Policy Guidelines for DME were adopted for no fault purposes along with the Medicaid Fee Schedule for DME and therefore should be used when calculating rental fees for no fault reimbursement. In the past I've noted that while the Respondent relies on the opinion letter by the Office of General Counsel (No. 09 02 06), it was issued in 2009 and before the amendment to 12 NYCRR §442.2 in 2012 which specifically notes in §442.2 (g) that, "The Medicaid provider manual and the policy guidance for durable medical equipment are not included as part of the durable medical equipment fee schedule used in Worker's Compensation cases except to the extent such documents contain the Medicaid durable medical equipment fee schedule." Furthermore, while the opinion letter determined that the no-fault system adopted the New York State Medicaid program fee schedule for durable medical equipment for billing and reimbursement it makes no mention of adopting the policy guidelines.*

After consideration and weighing the proof provided by the Respondent in support of their use of the Policy Guidelines to calculate the rental reimbursement for the DME in question, I find that since there is no MRA in the Medicaid Fee Schedule and no proof that the New York State Department of Health area office has determined a monthly rental charge for the items the proper reimbursement would be the rental charge to the general public. Insurance Law §5108 limits the fees for health services provided under no-fault insurance to those charges permissible in the Workers' Compensation fee established by the Chair of the Workers' Compensation Board. Considering the proof and arguments by the parties, I find that the issue is guided and controlled by 12 NYCRR §442.2 (g) which clearly expresses and establishes that the Medicaid Provider Manual and the Policy Guidance for durable medical equipment are not included along with the New York State Medicaid Fee Schedule to be used in workers' compensation cases. Along with a number of other arbitrators, I have reached a similar conclusion in past.

Accordingly, after a thorough review of the matter and in consideration of the arguments made by the parties, I find that the permissible charge for the disputed DME, in the absence of any price determined by the New York State Department of Health or Medicaid, is the rental charge to the general public. Based on the foregoing, I find that Respondent has failed to demonstrate otherwise and I accept Applicant's billed amounts based on the proof provided."

Further support for the use of the rental charge to the general public as the proper reimbursement is found in the decision of Master Arbitrator Vic D'Ammora in the Matter of Advanced Recovery Equipment & Supplies, LLC and State Farm Mutual Ins. Co., AAA Assessment No. 99-18-1098-1879. In his decision dated 6/5/19 Master Arbitrator D'Ammora found that the proper charge is the monthly rental charges to the general public. In his decision he notes

"*The lower arbitrator conducted a hearing and reviewed all of the evidence including the affidavit of a certified coder. Based upon that review Arbitrator Gallagher determined that the Respondent had sufficiently established its fee schedule defense. Arbitrator Gallagher further determined that the Applicant failed to rebut Respondent's evidence. And as such denied the claim.*

This Master Arbitrator had previously found that lower arbitrators erred by allowing the Respondent to use a legally prohibited fee schedule to reduce the claim. Again, in this matter I disagree Arbitrator Gallagher's analysis and conclusions. The proper charge for the CPM and CTU is the monthly rental charges to the general public. A similar finding was reached by Justice O'Connor involving these same parties.

Under the circumstances the award of the lower arbitrator was incorrect as a matter of law and arbitrary and capricious. The case is remanded to determine the appropriate rental charge with respect to ones charged to the general public."

In light of the above, I find for the Applicant in the amount of $4,784.72.

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**
	Isurply LLC	**06/18/18 - 07/29/18**	**$3,240.17**	**Awarded: $3,240.17**
	Isurply LLC	**06/12/18 - 07/02/18**	**$1,544.55**	**Awarded: $1,544.55**
Total			**$4,784.72**	**Awarded: $4,784.72**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/22/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30 day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of filing with the American Arbitration Association and end on the date the award is paid.

C. Attorney's Fees

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

The Respondent shall also pay the Applicant an attorney fee in accordance with 11 NYCRR §65-4.6 (e). If, however, the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation period, then the attorney 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, Frank Marotta, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

04/01/2020
(Dated)

Frank Marotta

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:
06293c9b539f8d56def189b2e73d5837

Electronically Signed

Your name: Frank Marotta
Signed on: 04/01/2020