

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Dahu Acupuncture PC  
(Applicant)

- and -

State Farm Mutual Automobile Insurance  
Company  
(Respondent)

AAA Case No. 17-19-1125-7248

Applicant's File No. AF19-103410

Insurer's Claim File No. 32-6813-D37

NAIC No. 25178

**ARBITRATION AWARD**

I, Kevin R. Glynn, 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

1. Hearing(s) held on 11/06/2020  
Declared closed by the arbitrator on 11/06/2020

Cliff Ryan, Esq. from Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone LLP participated in person for the Applicant

Dianne Galluzzo, Esq. from Bruno Gerbino & Soriano LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,322.58**, was AMENDED and permitted by the arbitrator at the oral hearing.  
The amount in dispute was amended to \$1,038.24. The amended amount reflects the prior proper payment in full of acupuncture charge under CPT codes 97810, 97811, 99202. The amended amount represents the balance of the amounts billed for the two units of cupping billed over fourteen dates of service.

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

3. Summary of Issues in Dispute  
The Assignor, KD, is a 25yo male driver who was injured when involved in a motor vehicle accident on 12/3/18. KD suffered injuries which resulted in his seeking treatment. In dispute are Applicant's remaining claims for two units of cupping (97799) performed over fourteen dates of service from 12/14/18-1/30/19, billed at \$45.99 per

unit. Respondent partially reimbursed one unit of cupping per date of service in the amount of \$19.07, leaving a disputed amount of \$72.91 per each of the fourteen dates of service in the total amended amount of \$1,038.24. Therefore, the issue to be determined is Respondent's fee schedule defense can be sustained.

4. Findings, Conclusions, and Basis Therefor

This case 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 reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

I find that Applicant established a prima facie case of entitlement to reimbursement for its claims. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2<sup>nd</sup> Dept. 2004). I also find that Respondent timely partially denied the claims.

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 Op 26240, 12 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedule, Respondent's defense of noncompliance with the appropriate fee schedule 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, 1<sup>st</sup> Dep't, per curiam, 2006).

Applicant submitted its claims for two units of cupping, performed on 2/10/16, under CPT code 97799 in the total amount of \$59.99. Respondent partially paid one unit in the amount of \$19.07 and denied the second unit, leaving an amount in dispute of \$72.91 per each of the fourteen dates of service. Respondent supports its fee schedule defense with an affidavit by Brandy Donbeck, RN, CPC, dated 7/26/19. Ms. Donbeck opines:

CPT Code 97799 has "BR" under the RVU column. Medical records reviewed indicate the provider is using 97799 for cupping Per the AMA the appropriate CPT code for cupping is 97039...

...CPT code 97039 the correct code for cupping has a "BR" under the RVU column. Ground Rule #2 on page 3 in the Introduction and General Guideline section of the Chiropractic fee Schedule would apply. Per New York Workers' Compensation fee schedule General Rule #2 titled "Procedures without Specified Unit Values", for any procedure where the unit value is listed in the schedule as "BR", the physician shall establish a unit value consistent in relativity with other unit values shown in the schedule. The ground rule also state that the insurer shall review all submitted "BR" unit values to ensure that the relativity

consistency is maintained. The amount allowed is based on documented time, skill, and equipment.

CPT code 97039 falls under the application of a modality that determine direct (one-on-one) patient contact. The reference code to determine the RVU would be CPT code 97016 (application of a modality to 1 or more areas; Vasopneumatic devices).

Code 97016 was selected as the reference code after reviewing the WebMD article on cupping and CPT Assistant description of 97016. WebMD indicates there are various types of cupping therapy, including: Dry Cupping and Wet Cupping. During both types of cupping, a flammable substance such as alcohol, herbs, or paper is placed in a cup and set on fire. As the fire goes out, the cup is placed upside down on the patient's skin. As the air inside the cup cools, it creates a vacuum. This causes the skin to rise and redden as blood vessels expand. The cup is generally left in place for five to 10 minutes.

Per the AMA CPT Assistant 1995: "97016 vasopneumatic devices: These devices incorporate suction type force to the soft tissues being treated. Vasopneumatic devices are also used to describe pumps that decrease edema in extremity tissues. Examples include, the Jobst Pump, Vibromassage, and Interferential Pump."

In following Ground Rule #2 for procedures listed without a relative value it is found that cupping would have a similar relative value as 97016 which is 3.30 RVU  $5.78 \times 3.30 = \$19.07$ .

CPT 97039 in the description indicates time spent should be documented is constant attendance. Time wouldn't change the reimbursement as cupping is considered a modality and modalities are allowed once per dates of service. Per CPT Assistant Archives Dated August 2010/Volume 20 Issue 8 "The supervised modality codes (97010-9728) and the constant attendance codes (97032-97039) include language in their code descriptors that indicate "application of a modality to one or more areas." The number of areas is not considered a factor when reporting these codes.

Explanation 1a: 97799 is an unlisted code. The AMA indicates that an unlisted CPT code can only be reported once per date of service. The provider has submitted CPT 97799 two times for cupping on two different body areas. The CPT Assistant Archives also indicates that the number of areas of applications are not considered a factor when performing these codes. Even using the appropriate

CPT code for cupping which 97039 is still unlisted and can only be reported once per date of service. Per CPT Assistant Archives Dates June 2010. Page 8 "When performing two or more procedures that require the use of the same unlisted code, the unlisted code used should only be reported once to identify the services provided. This is due to the fact that the unlisted code does not identify a specific unit value or service. Unit values are not assigned to unlisted codes since the codes do not identify usual procedural components or the effort/skill required for the service."

Applicant submits a rebuttal analysis by Acupuncturist Aharam Um, L.Ac., dated 6/4/20. Acupuncturist Um opines:

Additionally, in assessing the RVUs listed in the physical medicine section of the New York Worker's Compensation Fee Schedule, it is my professional opinion that the RVU for cupping can be 7.95, which mirrors the treatments within CPT code 97039 (i.e. constant attendance physical medicine and rehabilitation). Further, the treatments at issue were rendered within a Region IV zip code, which provides a conversion factor of \$5.78. Thus, in order to arrive at the appropriate reimbursement for cupping treatment, one must multiply the CPT RVU \$7.96, by the applicable conversion of \$5.78, which equals \$45.99, which is the rate Harmonized applied to the treatment performed on patients.

Further, the amount of \$45.99 per unit is based on documented time, skills, expertise, and Equipment. Based upon Harmonized's daily notes for each patient, CPT 97799 is submitted two times for cupping on two different areas of the body for each of the dates of service at issue. Harmonized has not billed two different procedures under the same unlisted code, but instead billed two units of the same procedure on two different areas of the body under the same unlisted code. Each different zone of the body requires its own specific treatment. Each zone requires cups to be placed and pressures to be adjusted by the acupuncturist. Each zone is treated separately as the available healing healthy white blood cells must concentrate on only one zone at a time to achieve maximum healing benefits.

However, I find this report by a non-fee coder Acupuncturist much less persuasive than the detailed fee schedule analysis prepared by Ms. Donbeck. I find Ms. Donbeck's fee schedule analysis persuasive. As such, Applicant has already been reimbursed the amount allowed pursuant to the correct fee schedule rate and the claim for the disputed balance regarding the cupping charges is denied. However, Ms. Donbeck did acknowledge that Respondent had failed to reimburse Applicant for one unit of acupuncture treatment under CPT Code 97811, in the fee scheduled amount of \$17.57

for date of service 1/30/19. As such, Applicant is awarded reimbursement in the amount of \$17.57.

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
	Dahu Acupuncture PC	12/14/18 - 12/14/18	\$128.38	\$72.91	Denied
	Dahu Acupuncture PC	12/18/18 - 12/21/18	\$271.53	\$218.73	Denied
	Dahu Acupuncture PC	12/26/18 - 12/27/18	\$181.02	\$145.82	Denied
	Dahu Acupuncture PC	01/02/19 - 01/03/19	\$181.02	\$145.82	Denied
	Dahu Acupuncture PC	01/09/19 - 01/15/19	\$181.02	\$145.82	Denied
	Dahu Acupuncture PC	01/16/19 - 01/21/19	\$181.02	\$145.82	Denied
	Dahu Acupuncture PC	01/22/19 - 01/30/19	\$198.59	\$145.82	Awarded: \$17.57
Total			\$1,322.58		Awarded: \$17.57

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/10/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In the instant matter Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR 65-3.9 (a) provides that Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." Pursuant to 11 NYCRR 65-3.9 (c), "if an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate

on the disputed claim or element of claim until such action is taken." Applicant submitted its claim for arbitration 4/10/19, more than thirty days after receipt of the denial of claims. Therefore, interest shall run effective 4/10/19.

C. Attorney's Fees

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

An attorney's fee of 20% shall be paid on the sum of the awarded claim plus interest, subject to a maximum of \$1,360.00.

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

12/07/2020  
(Dated)

Kevin R. Glynn

**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:**  
e502b43cf43c68a40e42fe823572e10b

### **Electronically Signed**

Your name: Kevin R. Glynn  
Signed on: 12/07/2020