

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

	AAA Case No.	17-20-1173-0051
RES Physical Medicine & Rehab. Services (Applicant)		GM20-162510, GM20-162511, GM20-162512,
- and -	Applicant's File No.	GM20-162513, GM20-162514, GM20- 162515
Kemper Independence Insurance Company (Respondent)	Insurer's Claim File No.	C026296NY18
	NAIC No.	10914

ARBITRATION AWARD

I, Tasha Dandridge-Richburg, 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

1. Hearing(s) held on 02/08/2021
Declared closed by the arbitrator on 02/08/2021

Michael Poropat, Esq. from Law Offices of Gabriel & Moroff, P.C. participated in person for the Applicant

Kristina O'Shea, Esq. from Gullo & Associates, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,356.67**, 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

The 69 year-old EIP was the driver of a motor vehicle that was involved in an accident on May 22, 2018. At issue in this case is \$3356.67 for treatment including drug screens and other drug testing on the following dates of service: July 2, 2019, August 1, 2019, August 29, 2019, October 29, 2019 and November 26, 2019. Respondent partially denied the claims and argues that the fees charged exceed those allowed pursuant to the Workers' Compensation Fee Schedule.

4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), the Arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations. This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments by or on behalf of the parties and any testimony given during the hearing.

RESPONDENT'S FEE SCHEDULE DEFENSE

Respondent argues that in accordance with the Workers' Compensation Fee Schedule, Applicant is not allowed to bill multiple units of CPT 80101 for the type of drug testing performed. Respondent did not submit the affidavit of a coding expert in support of its Fee Schedule argument.

Applicant submitted no meaningful evidence in response to Respondent's Fee Schedule argument.

Analysis

Pursuant to the Fourth Amendment effective April 1, 2013 to 11 NYCRR 65-3.8(g)(1), an Applicant is not entitled to recover fees that exceed the charges permissible pursuant to the Workers Compensation Fee Schedule which is incorporated by Insurance Law 5108. If there is a dispute that requires an application or interpretation of the Fee Schedule, the Respondent has the burden to come forward with competent evidentiary proof to support its defenses. *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 13 Misc.3d 172 (Civil Ct, Kings Co. 2006). Judicial notice may be taken of the Workers' Compensation Medical Fee Schedule. *Natural Acupuncture Health, P.C. v. Praetorian Ins. Co.*, 30 Misc.3d 132(A), 958 N.Y.S.2d 647 (Table), 2011 N.Y. Slip Op. 50040(U), 2011 WL 135241 (App. Term 1st Dept. Jan. 14, 2011).

For the date(s) of service at issue, Applicant billed for multiple units of CPT 80101. I find that Applicant may not bill multiple units of CPT 80101 pursuant to the Fee Schedule and that CPT 80104 is the proper billing code for the drug screens performed herein. This assertion is based upon a plain reading of the New York Workers' Compensation Fee Schedule. In addition, numerous arbitrators have previously ruled that CPT 80104 was incorporated into the fee schedule in 2011 for drug-testing for multiple classes of drugs. Ground Rule 12 of the Pathology and Laboratory section of the New York State Workers' Compensation Fee Schedule states:

When urine drug screening is performed in an office setting using a quick or rapid screening test method utilizing a stick/dip stick, cup, or similar

device reimbursement shall be limited to one unit of 80101 for a single drug class or 80104 for two or more drug classes regardless of the number of drug classes tested or reported per date. The documented cost of the testing device per invoice may be reported (bill as CPT code 99070). In addition, the provider may bill the appropriate evaluation and management code commensurate with the services rendered.

As per AMA CPT Assistant 2010, CPT 80101 should be used for years prior to 2011 when running multiple tests at once. As of 2011, new code 80104 was implemented to be used when "assaying multiple drugs simultaneously due to a kit design". Arguably, this would have been the proper code.

In *RES Physical Medicine & Rehab. Services v. Allstate*, AAA Case. NO. 99-15-1008-9219 (May 10, 2017) Master Arbitrator Robert Trestman upheld the lower Arbitrator's determination that Ground Rule 12 was applicable and limited reimbursement to one unit of 80101 for a single drug class and found Dr. Strut's affidavit insufficient to rebut the applicability of Ground Rule 12 defense. The Master Arbitrator stated:

... as the arbitrator's fee schedule determination appears to be a rational fact finding that the subject testing falls under the definition and billing limitations of Ground Rule 12. Regarding applicant's contention as to the arbitrator's other "contradictory" awards, I find those cases distinguishable as the insurer stipulated to the amount of the bill/fee schedule or the arbitrator therein found that the insurer did not raise or adequately establish a fee schedule defense. In fact, my review of this arbitrator's awards and other arbitrator's awards and master arbitrator awards affirming those awards reveals the same Ground Rule 12 determination wherein the arbitrators found that the insurer preserved and established a fee schedule defense.

[See, 17-15-1008-9242; 17-15-1006-3144; 17-14-9052-9361; 17-14-9023-8527 aff'd at 99-14-9023-8527; 17-14-9021-8866 aff'd 99-14-9021-8866; 17-14-9025-4961 aff'd at 99-14-9025-4961].

Master Arbitrator Anne L. Powers in *RES Physical Medicine & Rehab Services v. Allstate*, AAA Case No. 99-14-9025-4961 (November 28, 2016) similarly upheld the lower Arbitrator's determination that Ground Rule 12 applied and that there was no evidence that this was not a quick or rapid screening test method and that the Applicant could only bill for one unit. *See also*: AAA Case No. 17-14-9022-7403 (Feb. 5, 2016).

In *RES Physical Medicine & Rehab v. 21st Century Centennial Insurance Company*, AAA Case No. 99-14-9021-8866 (May 20, 2016), Master Arbitrator Robyn D. Weisman upheld a determination that Ground Rule 12 does not permit the billing for multiple

units under CPT 80101. The Master Arbitrator rejected Applicant's argument that Ground Rule 12 only applies to the dip stick method.

This Arbitrator comes to the conclusion that the proper reimbursement for multiple units of CPT 80101 is one unit of CPT 80104 at \$28.39. A thorough review of the evidence at ADR Center reveals that for each date of service at issue Respondent reimbursed \$41.40 (2 x \$20.70) for two units of CPT 80101. Therefore, no further reimbursement is due for CPT 80104. In addition to its fee reductions for CPT 80101, Respondent reduced reimbursement of CPT 83925 from the billed amount of \$177.48 to \$59.16. Respondent's EOBs state with respect to this reduction, "The procedure code(s) referenced by the provider was used more than what is normally expected." Respondent did not submit evidence from a coding expert and I find that this fee reduction cannot be ascertained from a plain reading of the Fee Schedule. Therefore, Applicant is entitled to a total of \$709.92 for the six (6) dates of service that this code was improperly reduced.

Accordingly, I find for Applicant as follows.

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
	RES Physical Medicine & Rehab. Services	07/02/19 - 07/02/19	\$490.92	Awarded: \$118.32
	RES Physical Medicine & Rehab. Services	08/01/19 - 08/01/19	\$902.07	Awarded: \$118.32
	RES Physical Medicine & Rehab. Services	08/29/19 - 08/29/19	\$490.92	Awarded: \$118.32
	RES Physical Medicine & Rehab. Services	10/01/19 - 10/01/19	\$490.92	Awarded: \$118.32
	RES Physical Medicine & Rehab. Services	10/29/19 - 10/29/19	\$490.92	Awarded: \$118.32
	RES Physical Medicine & Rehab. Services	11/26/19 - 11/26/19	\$490.92	Awarded: \$118.32
Total			\$3,356.67	Awarded: \$709.92

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/24/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when 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 Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. *See*, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's 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 Erie

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

02/09/2021
(Dated)

Tasha Dandridge-Richburg

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:
7088f0c749afefbf18609e67e5528b94

Electronically Signed

Your name: Tasha Dandridge-Richburg
Signed on: 02/09/2021