

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Eugene J. Liu MD  
(Applicant)

- and -

Geico Insurance Company  
(Respondent)

AAA Case No. 17-19-1150-1408  
Applicant's File No. 2350359  
Insurer's Claim File No. 0368349640101033  
NAIC No.

**ARBITRATION AWARD**

I, Wendy Bishop, 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 (C.M.G.)

1. Hearing(s) held on 07/22/2021  
Declared closed by the arbitrator on 07/22/2021

Gary Pustel, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Robert LoFurno, Claims Rep. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,256.91**, 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 Assignor is a 37-year-old female who was involved in a motor vehicle accident on March 28, 2019. Following the accident, the Assignor complained of pain to his head, neck, shoulders, back and left knee. The Assignor underwent a course of treatment that included physical therapy. On September 16, 2019, the Assignor underwent a drug screening, which Respondent denied based on a peer review performed by Gary Florio, M.D. on October 22, 2019. Respondent also raises a defense based on the Worker's Compensation fee schedule.

#### 4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in the ADR CENTER. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ADR CENTER maintained by the American Arbitration Association.

It is now well settled that Applicant establishes "a prima facie showing of their entitlement to judgment as matter of law by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 In the case at bar, Applicant has met this burden.

##### Peer

Respondent submits the peer review report of Gary Florio, M.D. dated October 22, 2019 in support of its contention that the drug screening performed on September 16, 2019 was not medically necessary. Dr. Florio discusses the findings of the clinical examination of the Assignor performed on September 16, 2019. Dr. Florio asserts that urine toxicology drug screening is only indicated where the patient requires narcotic or other controlled medication. Dr. Florio cites medical authorities concerning the proper grounds for prescribing opioids. Dr. Florio asserts that the length of time since the accident until the drug screening - five and a half months - and the nature of the Assignor's condition on clinical examination on the date of the drug screening do not support the prescription of opioids or the corresponding performance of the drug screening.

Therefore, the burden shifts to Applicant to demonstrate the medical necessity of the urine toxicology and drug testing at issue. Applicant submits the rebuttal affidavit of Eugene Liu, M.D., the Assignor's treating doctor, dated June 11, 2021. Dr. Liu states that the Assignor's severe level of pain on clinical examination by Dr. Liu on September 16, 2019 indicated the potential need for narcotic pain medication, and that the drug screening was therefore necessary to aid in determining if the prescription of such medication was safe and appropriate for the Assignor herein. Dr. Liu cites medical authority supporting the performance of the drug screening herein. Dr. Liu's rebuttal affidavit effectively rebuts Dr. Florio's peer review report and demonstrates the medical necessity of the drug screening.

##### Fee

The defendant has the burden to come forward with competent evidentiary proof to support its fee schedule defenses. Robert Physical Therapy, P.C. v. State Farm Mut. Auto. Ins. Co., 13 Misc. 3d. 172 (Civ. Ct. Kings Co. 2006). A lay person is not qualified to evaluate the CPT codes or to change if the code is used by a health provider in its bills. See Abraham v. Country-Wide Ins. Co., 3 Misc. 3d. 130A (App. Term 2d. Dept. 2004). When a defendant fails to demonstrate by competent evidentiary proof that a plaintiff's claim was in excess of the appropriate fee schedules, the defendant's defense of noncompliance with the appropriate fee schedule cannot be sustained. Continental Medical, P.C. v. Travels Indemnity Co., 11 Misc. 3d. 145A (App. Term 1st Dept. 2006). While amended Regulations section 65-3.8(g)(1) states proof of the fact, and amount of loss sustained pursuant to Insurance Law section 5106(a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed medical services under any circumstances: ... (ii) for those claimed medical service fees that exceed the charges permissible pursuant to Insurance Law sections 5108(a) and (b) and

the regulations promulgated thereunder for services rendered by medical providers; I do not believe the amended regulations were put into effect to shift the burden from the respondent to establish that a charge submitted by the applicant was above fee schedule. To do so would be to erode the holding in Viviane Etienne Med. Care v Country-Wide Ins. Co. 25 NY3d 498, 501 (2015) and to de facto require the applicant to establish the fee schedule for the service provided as an element of their prima facie case.

I believe the regulations were put into effect to prevent an applicant from receiving reimbursement for a service provided at a rate clearly in excess of the fee schedule where the respondent issued an untimely or even failed to issue any denial for the service. Therefore, the respondent may allege a fee schedule defense at any time, and it is not subject to preclusion. Further, if an insurer presents sufficient evidence to substantiate its reduction of a bill pursuant to the Workers' Compensation Medical Fee Schedule, the burden shifts to the medical provider to rebut the carrier's fee schedule interpretation. See Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc. 3d 132A (App Term 1st Dep't 2011).

Applicant billed the amount of \$1,256.91. Respondent submits the fee affidavit of Carolyn Mallory, CPC dated May 20, 2020. Coder Mallory sets forth the proper reimbursable amount for each CPT code billed by Applicant pursuant to the New York fee schedule. Coder Mallory explains that the proper total reimbursement pursuant to the appropriate CPT codes under the New York fee schedule is \$639.11. Coder Mallory explains that CPT Codes 82542, 80154, 83925, and 82145 are only appropriately billed for one unit each in this instance. Coder Mallory also explains that "by report" CPT Code 80307 is closest in relativity to CPT Code 80104 (Drug screen, qualitative). I find that Coder Mallory's fee affidavit satisfies Respondent's burden in support of its fee schedule defense.

Applicant submits the fee affidavit of Mary Beth Perdikos, an employee of Applicant's attorneys' law firm. Ms. Perdikos asserts that the CPT Codes billed by Applicant were appropriate for the services provided. However, I do not find Ms. Perdikos's contentions to be adequately supported or persuasive.

Accordingly, Applicant's claim is awarded in the amount of \$639.11 in accordance with Respondent's fee schedule position.

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
	Eugene J. Liu MD	09/16/19 - 09/16/19	\$1,256.91	Awarded: \$639.11
Total			\$1,256.91	Awarded: \$639.11

B. The insurer shall also compute and pay the applicant interest set forth below. 12/07/2019 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 \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). 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(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 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 Nassau

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

07/23/2021  
(Dated)

Wendy Bishop

#### **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:**  
76d5b25af039c003834a621d350e904f

### **Electronically Signed**

Your name: Wendy Bishop  
Signed on: 07/23/2021