

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Quality Laboratory Service
(Applicant)

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

AAA Case No. 17-21-1197-7653

Applicant's File No. ST. 19196.21

Insurer's Claim File No. 32-09X5-73M

NAIC No. 25178

ARBITRATION AWARD

I, Glen Wiener, 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 10/05/2021
Declared closed by the arbitrator on 10/05/2021

Michael Lamond, Esq. from Michael J. Lamond PC participated for the Applicant

James Karins, Esq. from James F. Butler & Associates participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,829.23**, was AMENDED and permitted by the arbitrator at the oral hearing.

Amended to \$679.40. Applicant withdrew as paid the claim seeking additional reimbursement for the services billed under CPT code 87899.

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

3. Summary of Issues in Dispute

Assignor M.G. was injured in an automobile accident on August 12, 2020. On November 12, 2020, Applicant Quality Laboratory Service conducted pre-surgical Covid-19 testing on Assignor.

Applicant billed \$726.02 under CPT code 87999 (unlisted microbiology procedure). CPT code 87999 is a "By Report" code. Respondent State Farm Mutual Automobile Insurance Company only reimbursed Applicant \$46.62 but now contends \$51.33 is due for Covid 19 testing under CPT code 87635 (Infectious agent detection by nucleic acid (DNA or RNA) for SARS-CoV-2). Medical necessity of the testing is not in dispute. The only issue presented is how much Applicant should be reimbursed for the services provided?

4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents on file in the Electronic Case Folder maintained by the American Arbitration Association as of the date of this hearing and on oral arguments of the parties. No witness testimony was produced at the hearing.

Assignor M.G. was injured in an automobile accident on August 12, 2020. Applicant Quality Laboratory Service, as assignee of M.G. seeks \$679.40 additional reimbursement, with interest and counsel fees, under the No-Fault Regulations, for pre-surgical Covid-19 testing conducted on Assignor on November 12, 2020.

Respondent State Farm Mutual Automobile Insurance Company insured the motor vehicle involved in the automobile accident. Under New York's Comprehensive Motor Vehicle Insurance Repairation Act (the "No-Fault Law"), New York Ins. Law §§ 5101 et seq., Respondent was obligated to reimburse the injured party (her assignee) for all reasonable and necessary healthcare expenses arising from the use or operation of the insured vehicle.

Applicant billed \$726.02 under CPT code 87999 (unlisted microbiology procedure). CPT code 87999 is a "By Report" code. Respondent only reimbursed Applicant \$46.62 but now contends only \$51.33 is due for Covid-19 testing under CPT code 87635 (Infectious agent detection by nucleic acid (DNA or RNA) for SARS-CoV-2). Medical necessity of the testing is not in dispute. The only issue presented is how much Applicant should be reimbursed for the services provided?

An insurer has the burden of showing as a matter of law that the claim reflects the incorrect amount for services provided. *Jamil M. Abraham, M.D., P.C. v. Country Wide Ins. Co.*, 3 Misc.3d 130[A], 787 N.Y.S.2d 678 (App. Term 2d & 11th Jud. Dist 2007); *New Era Massage Therapy, P.C. v. Progressive Cas. Ins. Co.*, 2009 N.Y. Misc. Lexis 2554, 242 N.Y.L.J. 2 (Sup. Ct. Queens Co. June 26, 2009).

In support of its position, Respondent submitted an analysis from Lori Ercolini, RN, CPC. Ms. Ercolini is a Certified Professional Coder through the American

Academy of Professional Coders. A Certified Professional Coder has proven by rigorous examination and experience that they know how to read a medical chart and assign the correct diagnosis (ICD-9), procedure (CPT®), and supply (HCPCS Level II) codes for a wide variety of clinical cases and services. Accordingly, she is deemed an expert in the field of medical coding.

Ms. Ercolini stated, "the BR code of 87999 is being used to bill for a Covid test and the NY insurance regulation indicates that code 87635 is the code to use". The RVU for CPT code 87635 is 39.18, resulting in a fee of \$51.33 in Region IV.

In support of its request for \$726.02 total reimbursement, Applicant submitted an unsigned letter explaining its use of CPT code 87999 and contending "the New York worker's (sic) compensation fee schedule lacks any code for the services provided."

Under the New York State Workers' Compensation Medical Fee Schedule, CPT code 87999 has no relative value and fees for such procedures need to be justified by report. Fees that are designated "by report" are usually for services that "are too variable in the nature of their performance to permit assignment of unit values." See, *Ground Rule 3 of the NYS Workers' Compensation Fee Schedule*. "Pertinent information concerning the nature, extent, and need for the procedure or service, the time, the skill, the equipment necessary, etc., is to be furnished. . . It must be emphasized that reviews are based on records; hence the importance of documentation. . . For any procedure where the relative value unit is listed in the schedule as 'BR' the physician shall establish a relative value consistent with other relative value units shown in the schedule. The insurer shall review all submitted "BR" relative value units to ensure relativity consistency is maintained."

The unsigned letter goes on to note:

We have determined that the COVID testing performed is most comparable to the CPT 87633, which has an RVU of 461.85 and conversion factor of 1.31 yielding \$605.02 per diagnostic result under routine circumstances.

However, the testing is not being performed under routine circumstances. Given the nature of the pandemic and the time constraints set forth by the New York Department of Health, this testing qualifies as an "emergency" service. Based upon our review, emergency services are customarily 20-30% more than routine services. Therefore, an additional 20% surcharge to reflect the emergency circumstances is warranted. Thus, we have determined that \$726.02 is an appropriate charge.

Furthermore, we have compared our charges to the amount charged by other laboratories in the geographic area. Based upon the limited

information available, our charge is comparable to other providers in the geographic area, and we ask that you render payment in the amount of \$726.02 as soon as practicable.

Two divergent opinions are proffered regarding the proper code and reimbursement for Covid-19 testing. For the reasons explained below, it is determined Respondent's position is correct and there is an assigned CPT code for the PCR (RNA) Covid-19 testing performed by Applicant.

Covid-19 is the illness caused by the SARS-CoV-2 virus. There are two types of diagnostic tests used to detect if you have an active COVID-19 infection; an antigen-based test which looks for protein markers outside the virus and molecular-based test (including PCR) which look for genomic material (RNA) specific to the virus. Antigen tests are generally faster and cheaper. Applicant billed for and performed a PCR test to ascertain if any "RNA from SARs-CoV-2 was detected".

On March 13, 2020, days after the World Health Organization declared the spread of COVID-19 to be a global pandemic, the American Medical Association's CPT Editorial Panel approved a new CPT code, CPT Code 87635, to report laboratory testing for the novel coronavirus (SARS-CoV-2).

In the face of the COVID-19 pandemic, the CPT Editorial Panel has expedited approval of a unique CPT code to report laboratory testing services that diagnose the presence of the novel coronavirus," said AMA President Patrice A. Harris, M.D., M.A.

<https://www.ama-assn.org/press-center/press-releases/new-cpt-code-anno>

The new code and descriptor were:

87635 *Infectious agent detection by nucleic acid (DNA or RNA); severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) (Coronavirus disease [COVID-19]), amplified probe technique*

Two months later, on May 18, 2020 the New York State Workers' Compensation Board issued an emergency amendment to the regulations, adopting the use of CPT Code 87635, "to provide reimbursement for COVID-19 testing when it is necessary. . . to confirm current presence of the COVID-19 virus." *NY Reg.* June 3, 2020 at 20. The emergency amendment, 11 NYCRR 329-1.3 (d) states:

When workers' compensation benefits are sought due to a work-place exposure to COVID-19, reimbursement for serological, molecular or other reliable testing to confirm a current COVID-19 viral infection may be made using CPT code 87635.

(1) The RVU for CPT code 87635 shall be 39.18, and the total fee for such test shall be 51.33 for Region IV, 47.41 for Region III, and 41.53 for Regions I and II.

The above code and fees are also applicable to no-fault. Trying to contain the costs of No-Fault automobile insurance, the Legislature established a schedule of maximum permissible charges for health care providers seeking payment under the No-Fault Regulations. *Goldberg v. Corcoran*, 549 N.Y.S.2d 503 (2d Dept. 1989); See, N.Y. INS. LAW § 5108 (McKinney 2001); 11 NYCRR 68.01. In furtherance of New York State's cost control policy, the Superintendent of Insurance adopted the Official New York Workers' Compensation Medical Fee Schedule prepared and used by the Worker's Compensation Board. 11 NYCRR 68.1[b].

The New York State Department of Financial Services (the successor agency to the Insurance Department) confirmed the usage of CPT code 87635 in its *Frequently Asked Questions About Regulation 83 And The No-Fault Fee Schedule*. Therein the Department stated:

Q: What CPT code is to be used when billing for testing of the novel coronavirus ("Covid-19") under No-Fault?

A: Refer to the Workers' Compensation Board's Adoptions and rulemaking on Covid-19 Testing for the appropriate CPT code and rules to be utilized.

https://www.dfs.ny.gov/apps_and_licensing/property_insurers/faqs_reg83_

It is absolutely clear CPT code 87635 is applicable to no-fault claims and reimbursement is limited to \$51.33.

Moreover, Applicant's assertion the fee for COVID testing should be \$726.02 because it is most comparable to the CPT code 87633 is also flawed. Applicant is correct that CPT code 87633 is proper when a test is performed to detect an infectious agent by nucleic acid. However, CPT code 87633 is used when targeting 12-15 different viruses.

A review of the Workers' Compensation Pathology and Laboratory Fee Schedule CPT codes 87471 - 87801 reveals that nucleic acid (DNA or RNA) testing for a single virus such as *Borrelia burgdorferi*, *Candida* species, *Chlamydia* etc. have RUVs ranging from 24.64 to 49.60, resulting in reimbursements of \$32.28 to \$64.96 depending on the technique used.

Thus the \$51.33 set by the Workers' Compensation Board for Covid testing appears to be in accord with similar services in the Fee Schedule. Since Applicant was only reimbursed \$46.62, an additional \$4.71 is owed.

Accordingly, Applicant is awarded an additional \$4.71 and Respondent's denial is otherwise sustained. This award is in full disposition of all No-Fault benefit claims submitted to 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	Quality Laboratory Service	11/12/20 - 11/12/20	\$2,829.23	\$679.40	Awarded: \$4.71
Total			\$2,829.23		Awarded: \$4.71

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/18/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after Apr. 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR §65-3.9(a). If an applicant does not request arbitration or

institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element of claim until such action is taken. 11 NYCRR §65-3.9 (c).

In accordance with 11 NYCRR §65-3.9(c), interest shall be paid on the claim from above noted date, which according to the timeline in the ECF is the date the arbitration was filed with the American Arbitration Association.

C. Attorney's Fees

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

In accordance with 11 NYCRR §65-4.6(d), the insurer shall pay Applicant an attorney's fee equal to 20% of the total amount awarded in this proceeding plus interest, with NO MINIMUM FEE and the maximum fee capped at \$1,360.

- 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 New York

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

10/06/2021
(Dated)

Glen Wiener

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:
4b33eeb46dca528e675fecaadfa34b43

Electronically Signed

Your name: Glen Wiener
Signed on: 10/06/2021