

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Van Loon DME USA Inc.  
(Applicant)

- and -

State Farm Mutual Automobile Insurance  
Company  
(Respondent)

AAA Case No. 17-20-1165-3829

Applicant's File No. none

Insurer's Claim File No. 32-02X0-98P

NAIC No. 25178

**ARBITRATION AWARD**

I, Ioannis Gloumis, 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 10/11/2021  
Declared closed by the arbitrator on 10/11/2021

Ian Besso, Esq. from The Sigalov Firm PLLC participated for the Applicant

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

2. The amount claimed in the Arbitration Request, **\$ 1,641.28**, 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

Applicant seeks reimbursement of charges for the rental of a Sustained Acoustic Medicine ("SAM") unit and bandages dispensed to the EIP from December 17, 2019 through January 13, 2020, following an October 12, 2019 motor vehicle accident. Respondent issued payments and denied the balance of Applicant's charges based upon the defense that Applicant's billing was not in accordance with the maximum allowance under the applicable fee schedule.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's Electronic Case Folder in MODRIA, said submissions constituting the record in this case. This award is based upon the arguments made by the parties during the arbitration hearing and the admissible documentary evidence submitted by the parties. There were no witnesses that testified during the arbitration hearing for this matter.

#### *SUMMARY OF FACTS*

The EIP, then a 50-year-old male driver, was injured when he was involved in a motor vehicle accident on October 12, 2019. The evidence shows that the EIP's vehicle sustained impact to the rear. Following the accident, the EIP sought private medical attention for injuries to the neck, mid back, and low back, and initially came under the care of Rummel Mendoza, D.C. on October 23, 2019. Dr. Mendoza prescribed a conservative rehabilitation program for the spine and referred the EIP for MRIs, an MUA consultation, EMG/NCV testing or pf-NCS testing, range of motion testing, and manual muscle testing. On November 26, 2019, Dr. Mendoza prescribed a SAM unit for the EIP to use on the cervical and lumbar spine.

Applicant submitted its billing for the SAM unit in the total amount of \$1,958.60 related to dates of service December 17, 2019 through January 13, 2020 to Respondent. The evidence shows that the billing was received by Respondent on January 17, 2020 and January 24, 2020. Respondent issued payments in the total amount of \$317.32 for the bills and denied the balance based upon the defense that Applicant's billing was not in accordance with the maximum allowance under the applicable fee schedule.

#### *LEGAL STANDARDS FOR PRIMA FACIE CASE*

To establish a prima facie case, a claimant is required to submit proof that it timely sent its claim for no-fault benefits to the insurer, that the insurer received the claim, and that the insurer failed to pay or deny the claim within 30 days. See *Amaze Med. Supply Inc. v Allstate Ins. Co.*, 3 Misc 3d 133(A) (App Term, 2d & 11th Jud Dists 2004); *King's Med. Supply Inc. v Country-Wide Ins. Co.*, 5 Misc 3d 767 (Civ Ct, NY County 2004).

An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the insurer received the claim. *Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co.*, 9 Misc.3d 97 (App. Term 9th & 10th Dists. 2005).

### *APPLICATION TO THE CLAIMS*

Since Respondent's denials acknowledge that the bills for the SAM unit rental were received by Respondent on January 17, 2020 and January 24, 2020, I find that Applicant has established its prima facie case for the claims. Furthermore, Applicant acknowledged that Respondent issued payments in the amount of \$317.32 and denied the balance of the charges based upon the defense that Applicant's billing was not in accordance with the maximum allowance under the applicable fee schedule.

### *DEFENSE - BILLING IN EXCESS OF THE NEW YORK STATE WORKERS' COMPENSATION FEE SCHEDULE*

Respondent submitted a judgment from the litigation titled *Government Employees Insurance Company, Geico Indemnity Co., Geico General Insurance Company and Miisupply LLC*, from the Supreme Court of the state of New York, Nassau County, index number 616953/2018, entered on January 17, 2020, wherein the Hon. Thomas Feinman, JSC, held that insurer GEICO was not legally obligated to pay that provider's billing for rentals of the SAM unit in excess of \$11.33 per day. Judge Feinman specifically held that the DME rental rules in the policy guidelines to the New York State Medicaid program's DME fee schedule apply to New York No-Fault claims billed under the Healthcare Common Procedure Coding System ("HCPCS") code E1399; and that the maximum monthly amount of No-Fault reimbursement for DME rented on or after July 1, 2016 and billed under HCPCS Code 1399 is 10% of the provider's acquisition cost.

In this case, Applicant argued that the Medicaid Policy Guidelines are not applicable per 12 NYCRR 442.2 (g) for durable medical equipment that is not listed in the Fee Schedule, that its charges are not listed in the Fee Schedule, and that it properly billed for the rental charge using the rental charge to the general public. Applicant further argued that it used the daily rental charges for the unit pursuant to the recommendation in the manufacturer's opinion letter, which recommends \$65.77 per day.

Applicant billed for a 28-day rental of the SAM unit using CPT code E1399 (\$69.95 per charge) and CPT Code E1399 for the bandages (0.00 per charge), for a total of \$1,958.60.

### *LEGAL STANDARDS FOR FEE SCHEDULE*

It is Respondent's burden to come forward with competent evidentiary proof to support its fee schedule defenses. See *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 13 Misc.3d 172 (Civil Ct, Kings Co. 2006). See also, *Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co.*, 11 Misc.3d 1065A (Civil Ct, Kings Co. 2006).

If Respondent fails to demonstrate by competent evidentiary proof that a plaintiff's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See *Continental Medical PC v. Travelers Indemnity Co.*, 11 Misc.3d 145A (App. Term, 1st Dep't, per curiam, 2006). A Respondent may interpose a defense in a timely denial that the claim exceeds the fees permitted by the Workers' Compensation schedules, but Respondent must, at minimum, establish, by evidentiary proof, that the charges exceeded that permitted by law. *Abraham v. Country-Wide Ins. Co.*, 3 Misc.3d 130A (App. Term, 2d Dept. 2004).

However, this Arbitrator may take judicial notice of the New York State Workers' Compensation fee schedule. See, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 61 A.D.3d 13, 20 (2d Dept. 2009); *LVOV Acupuncture, P.C. v. Geico Ins. Co.*, 32 Misc.3d 144(A) (App Term 2d, 11th & 13th Jud Dists. 2011); *Natural Acupuncture Health, P.C. v. Praetorian Ins. Co.*, 30 Misc.3d 132(A) (App Term, 1st Dept. 2011).

#### *APPLICATION TO THE CLAIMS*

The doctrine of collateral estoppel precludes a party from re-litigating, in a subsequent action or proceeding, an issue clearly raised in a prior action or proceeding and decided against that party, whether or not the tribunals or causes of action are the same. See *Ryan v. New York Telephone*, 62 NY2d 494 (1984).

Two requirements must be met before collateral estoppel can be invoked: there must be an identity of issues which has been decided in the prior action and is decisive in the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling. See *Gilberg v. Barbieri*, 441 NYS2d 49 (1981).

Firstly, I find that the doctrine of collateral estoppel does not apply to this arbitration as the Court's decision in *Government Employees Insurance Company, Geico Indemnity Co., Geico General Insurance Company and Miisupply LLC* issued by the Supreme Court of the State of New York, Nassau County under index number 616953/2018 involved unrelated no-fault claims, a different provider, and a different insurer.

Moreover, the decision in *Government Employees Insurance Company, Geico Indemnity Co., Geico General Insurance Company and Miisupply LLC, supra.* was issued following a summary judgment motion relating to the rental of a SAM unit under the HCPCS Code E1399. Insurer GEICO presented an affidavit from Jeffrey Futoran, CPC, in that case. The Decision notes that Mr. Futoran relied upon the Policy Guidelines as well as Workers' Compensation Board web pages containing DMEFS instructions and frequently asked questions, applying *12 NYCRR 442.2(b)* to the claims in dispute. The court concluded that for DME items that do not have a maximum reimbursement amount listed, as is the case with the SAM device, the rental fee is calculated at 10% of the equipment provider's acquisition cost. The court held that insurer GEICO had established its burden for summary judgment, while the defendant failed to raise an issue of fact in relying upon *Matter of Global Liberty Ins. Co. v. Isurply, LLC*, 80 N.Y.S.3d 43. The court stated that in *Global*, the issue concerned the proper reimbursement of rental costs for a continuous passive motion device and a cold therapy unit, items with Codes that are not listed in the "Medicaid fee Schedule" or DMEFS, where the DMEFS clearly lists the code used by the defendant, Code E1399.

The NYS Medicaid DME Fee Schedule effective September 1, 2018 does not contain codes for a continuous passive motion device, a cold therapy unit, or a SAM unit; therefore, CPT Code E1399 appears to be the proper CPT Code to use for DME items that are not assigned specific CPT Codes in the NYS Medicaid DME Fee Schedule. While CPT Code E1399 is listed in the NYS Medicaid DME Fee Schedule (*described as Durable medical equipment, misc.*), there is no maximum reimbursement rate assigned to CPT Code E1399.

In AAA Case Number 17-16-1036-6837, an arbitration previously before this Arbitrator, this Arbitrator made a finding that *12 NYCRR 442.2(g)* specifically prohibits the application of the Medicaid provider manual or policy guidelines; that the method of reimbursement using calculations based upon a percentage of the acquisition cost of the item has been abandoned since 2004; and, that an Applicant should be reimbursed at the usual and customary price charged to the general public for the rental of DME items that do not have an assigned maximum reimbursement rate. The DME item in dispute in this arbitration was billed under CPT Code E1399, which does not have an established maximum reimbursement rate by the New York State Department of Health or the Medicaid DME Fee Schedule. Therefore, the monthly rental charge available to the general public is the correct allowance. Applicant has provided the manufacturer's opinion letter that recommends a recommended rental to the patient of \$65.77 per day. Applicant rented the SAM unit to the EIP for 28 days. The 65.77 daily rental charge multiplied by 28 days is \$1,841.56. Applicant was already reimbursed the amount of 317.32. Therefore, Applicant is awarded the balance of \$1,524.24 for the claims.

Accordingly, Applicant is awarded the amount of \$1,524.24 for its claims.

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
	Van Loon DME USA Inc.	01/07/20 - 01/13/20	\$410.32	Awarded: \$381.06
	Van Loon DME USA Inc.	12/17/19 - 12/23/19	\$410.32	Awarded: \$381.06
	Van Loon DME USA Inc.	12/24/19 - 12/30/19	\$410.32	Awarded: \$381.06
	Van Loon DME USA Inc.	12/31/19 - 01/06/20	\$410.32	Awarded: \$381.06
Total			\$1,641.28	Awarded: \$1,524.24

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/15/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay Applicant the amount of interest computed from the date of filing, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of *11 NYCRR 65-3.9(c)* (stay of interest).

C. Attorney's Fees

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

Respondent shall also pay Applicant an attorney's fee in accordance with *11 NYCRR 4.6*.

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

10/17/2021  
(Dated)

Ioannis Gloumis

**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:**  
abb39a8737ddb08de14059b98c06a160

### **Electronically Signed**

Your name: Ioannis Gloumis  
Signed on: 10/17/2021