American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bronx Boro Acupuncture PC (Applicant)	AAA Case No.	17-21-1193-4055
	Applicant's File No.	67886
- and -	Insurer's Claim File No.	0571972223 UTC
Allstate Insurance Company (Respondent)	NAIC No.	19232

ARBITRATION AWARD

I, Tali Philipson, 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 10/18/2021
   Declared closed by the arbitrator on 10/18/2021

   John Faris, Esq. from Law Offices of Eitan Dagan (Elmhurst) participated in person for the Applicant

   Olga Gromyko, Esq. from Law Offices Of Karen L. Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 2,790.87**, 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 FM, a 40-year-old female, was injured as a pedestrian struck by a car on December 11, 2019. In dispute are the Applicant's claims for acupuncture and cupping provided to the Assignor from July 14, 2020 through September 29, 2020.

   Respondent issued partial payments for some dates of service, denying the balance on fee schedule grounds. The remaining dates of service were denied the claims on the ground that these services were not medically necessary.

4. Findings, Conclusions, and Basis Therefor

The case was decided on 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 the electronic file for both parties and make my decision in reliance thereon.

A review of the competent evidence in the record reveals that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Fee Schedule

Respondent asserted a fee schedule defense with regards to cupping for dates of service 7/14/20-8/6/20. (The acupuncture modalities billed over this time were fully paid). Applicant billed for two cupping sessions on each of 9 dates utilizing CPT Code 97799, a By Report (BR) code. ($50.00 for each session).

Respondent relied upon an affidavit by Lana Zolon, a Certified Outpatient Coder. Ms. Zolon considered several CPT Codes before concluding that the most appropriate one for cupping would be 97039. Ms. Zolon reasoned, in pertinent part, as follows:

> …
>
> 16. Assigning CPT to 97039 does not result in a definite relative value of the service, but merely requires the provider to supplement the claim with a report that upon review should substantiate the provider's claim for payment for services rendered, in this case service being cupping therapy.
>
> …
>
> CPT 97139 - unlisted therapeutic procedure.
>
> 19. According to AMA CPT, Therapeutic Procedures are in "a manner of effecting change through the application of clinical skills and/or services that attempt to improve function." Alternatively, AMA CPT states that Modality is "any physical agent applied to produce therapeutic changes to biologic tissue; includes but not limited to thermal, acoustic, light, mechanical, or electric

> energy." Since cupping therapy utilizes thermal energy to produce therapeutic changes, it should be categorized as a modality. Therefore, CPT 97039 (unlisted modality) is much more suitable. (Exhibit 8).
>
> CPT 97016 -Application of a modality to 1 or more areas; vasopneumatic devices.
>
> 20. In this procedure, the provider applies the vasopneumatic device to an extremity for the purpose of reducing edema, or swelling. According to Samuel A Collins, "while cupping does create suction and pressure to tissue, it would not fit the definition for use of CPT code 97016.ll (Exhibit 1, Acupuncture Today February 2016, Vol. 17, Issue 02, "Billing and Coding for Moxibustion" by Samuel A Collins).
>
> 21. In conclusion, it is my opinion that CPT 97039 (unlisted modality) is the best CPT code to represent "cupping therapy" when utilizing NYS Worker's Compensation fee schedule. As instructed by New York Workers' Compensation fee schedule, each CPT 97039 claimed must be "By Report", i.e. a report should be provided to ascertain whether cupping therapy had been in fact provided.

I note that while Ms. Zolon opined that CPT Code 97039 is the correct code she did not say what the monetary value should be for that code.

Given Ms. Zolon's opinion, Respondent justified its reductions as follows:

> On the dates of service billed 7/14 16, 21 + 23 2020, 0 RVU's of physical medicine procedures are available for reimbursement, as 8 RVU's have already been reimbursed to a Physical Therapist. In addition to the foregoing reason for denial, the amount charged and sought to be reimbursed exceeds the amount permitted under the applicable Workers' Compensation Fee schedule and is not reimbursable as billed. Code 97799 is a By Report code. Per the NY WC ground rules the Insurer is required to review this billing to ensure consistency and accuracy. Upon review, the provider described the procedure as "moxibustion/cupping." Therefore, based upon our review, code 97799 is being classified as procedure code 97039, as "moxibustion/cupping" is a modality not a service or procedure. All other ground rules then apply, including Multiple Physical Medicine Procedures and Modalities.

Thus, Respondent issued payment as follows:

7/14/20 - $2.02

7/16/20- $0.00

7/21/20- $0.00

7/23/20- $0.00

In essence, what Respondent did was change the CPT Code to 97039, a code subject to the 8 Unit Rule, and then apply the 8 Units as between the acupuncturist and the physical therapist. Respondent reasoned that since the physical therapist already received the maximum 8 units on these dates of service, there were no additional units available for the acupuncturist.

As for dates of service 7/28/20 - 8/6/20, Respondent issued payment as follows:

7/28/20- $46.24

7/29/20 - $46.24

7/30/20 - $46.24

8/5/20 - $46.24

8/6/20 - $46.24

Here the rationale was that "Reimbursement was reduced to be consistent with charges permissible for similar procedures under schedules already adopted or established by the Workers Compensation Boards, as adopted by the Superintendent, including but not limited to acupuncture rendered by a chiropractor." Accordingly, Respondent reimbursed Applicant the maximum allowable amount for chiropractors for two sessions of cupping on each date.

Applicant argued that Respondent cannot change the CPT Code from 97799 to 97039 and then benefit from a restriction (8 Unit Rule) that applies to the new code (97039) which otherwise would not have applied to the original code (97799) billed. I agree. Moreover, I find Ms. Zolon's affidavit deficient in that she failed to offer a relative value unit for CPT Code 97039. She merely changed the CPT Code from one BR Code to another BR Code without proposing a monetary amount. As per the Workers Compensation Fee Schedule, Ground Rule #3 entitled "Procedures Listed Without Specified Relative Value Units", with any procedure where the unit value is listed as By Report (BR), the physician shall establish a unit value consistent in relativity with other relative value units shown in the schedule. Here there was no established unit value set forth in her affidavit. Finally, she offered no opinion as to why Applicant was not permitted to bill cupping twice per date of service.

I note that I have previously ruled that the proper amount for cupping is $19.07. The nature of this modality involves a "pulling" or "suctioning" of skin. Given that there is a CPT Code that describes this exact therapy, I do not see a reason to apply an alternate CPT Code. Furthermore, I believe CPT Code 97016 already accounts for the time spent and attention necessary in administering the modality as these are considerations that go into creating a relative value for a particular service. Finally, I rely upon the following rationale:

> Cupping involves creating a heat vacuum with cups which are placed on a person's skin causing the skin to rise and redden as blood vessels expand. CPT Code 97016 described the use of a vasopneumatic device which incorporates suction force to treat soft tissue and therefore most closely resembles cupping.

Therefore, for purposes of consistency and based upon the description of service, I continue to find 97016 the more appropriate code. Given my position, I find for the Applicant as follows:

7/14/20 - $36.12 (2 x $19.07 = $38.14 - $2.02 = $36.12)

7/16/20- $38.14 (2 x $19.07)

7/21/20- $38.14 (2 x $19.07)

7/23/20- $38.14 (2 x $19.07)

Applicant is not entitled to additional reimbursement for the following dates of service since Applicant was already reimbursed for more than the $38.14 I would have allowed:

7/28/20- $0.00

7/29/20 - $0.00

7/30/20 - $0.00

8/5/20 - $0.00

8/6/20 - $0.00

Total Due: $150.54

IME

Respondent's evidence established that the remaining claims (8/10/20-9/29/20) were timely denied on an IME by John Iozzio, DC. Dr. Iozzio examined the Assignor on July

7, 2020. The effective cutoff date for further treatments was August 10, 2020. The Assignor presented to Dr. Iozzio with complaints of pain in her low back pain radiation to her legs and pain in her bilateral knees. Dr. Iozzio performed a physical examination along with an acupuncture exam and reported no positive objective finding. With regards to the Assignor's acupuncture exam her vitality, complexion and pulse were noted to be normal, and her voice and respiration were both clear. Dr. Iozzio concluded that she had resolved sprain/ strains and that her Qi and blood stagnation in the UB, DU, LI, ST and GB channels were also resolved, and no additional acupuncture treatments were medically necessary.

Applicant relied upon an acupuncture reexamination dated July 21, 2020. The report merely noted that Assignor current subjective complaints which included pain in the neck, left shoulder and low back, and recommended continued treatment to reduce pain.

After careful review of the records, I find for the Respondent. The July 21, 2020, acupuncture reexamination failed to offer a comprehensive re-evaluation of the Assignor's condition as it merely noted her subjective complaints and recommended additional treatment based upon those subjective complaints. There was no Traditional Chinese Medicine exam on that date that identified specific channels of Qi and blood stagnation. Since Dr. Iozzio's IME is a thorough and complete physical, and included an acupuncture exam, I find it is the better objective measure of the Assignor's condition. Accordingly, Applicant failed to justify the need for continued acupuncture treatments beyond the date of a normal acupuncture IME. I sustain the defense asserted in the denials. Applicant's claims are denied.

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
	Bronx Boro Acupuncture PC	**07/14/20 - 07/29/20**	**$529.31**	**Awarded: $150.54**
	Bronx Boro Acupuncture PC	**07/30/20 - 08/11/20**	**$484.40**	**Denied**
	Bronx Boro Acupuncture PC	**08/27/20 - 09/10/20**	**$969.36**	**Denied**
	Bronx Boro Acupuncture PC	**09/15/20 - 09/29/20**	**$807.80**	**Denied**
Total			**$2,790.87**	**Awarded: $150.54**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/08/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from February 8, 2021 (the date Applicant filed its AR1 with AAA) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a maximum fee of $1,360. See, 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, Tali Philipson, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

11/04/2021
(Dated)

Tali Philipson

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:
80ff9ab81f3bfa8ede1a60d84e7a8e7c

Electronically Signed

Your name: Tali Philipson
Signed on: 11/04/2021