American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

RES Physical Medicine & Rehab. Services (Applicant)	AAA Case No.	17-21-1204-7954
	Applicant's File No.	21-26993
- and -	Insurer's Claim File No.	20000033336
	NAIC No.	40703
Unitrin Safeguard Insurance Company (Respondent)		

ARBITRATION AWARD

I, Fred Lutzen, 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 or "Assignor"

1. Hearing(s) held on 01/11/2022
   Declared closed by the arbitrator on 01/11/2022

   Nicole Jones, Esq., from The Morris Law Firm, P.C. participated for the Applicant

   R.J. McDonald, Esq., from Mura Law Group, PLLC participated for the Respondent

2. The amount claimed in the Arbitration Request, **$ 39.60**, 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

   This male EIP (first initial "L") was 28-years-old when he was injured as the driver in a motor vehicle accident on 9/22/2020. He subsequently came under the care of Applicant, who seeks additional reimbursement of $39.60 for additional materials/services for DOS 2/5/2021.

   Respondent paid $229.44 of the $269.04 billed for the primary services rendered on 2/5/2021 but asserted fee schedule defenses as to CPT Codes 99072 ($20.00) and 99070 ($19.60).

   The issues to be determined are whether additional reimbursement is owed for CPT Codes 99072 and/or 99070.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the parties as contained in the electronic file ["MODRIA"] maintained by the American Arbitration Association, and the oral arguments of the parties' representatives.

Counsel appeared at the hearing via Zoom video conference and there were no live witnesses.

Fee Schedule

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. *See*, Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). *See also*, Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co., 11 Misc.3d 1065A, 816 N.Y.S.2d 700, 2006 NY Slip Op 50393U, 2006 N.Y. Misc. LEXIS 514 (Civil Ct, Kings Co. 2006).

However, I also take appropriate evidentiary notice of the applicable fee schedules.

CPT Code 99072 ($20.00)

Applicant billed $20.00 under CPT Code 99072. This is a new code placed into effect due to Covid-19 Protocols.

Respondent's denial asserts that this code is not in the NYS WC Fee Schedule and is, therefore, not reimbursable. Respondent also submitted a copy of the NYS DFS Circular Letter No. 14, dated 8/5/2020 [see, https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_14] This letter responds to recent "complaints regarding participating providers charging insureds fees for the providers' use of PPE during in-person visits for covered services under health or dental insurance policies or contracts. These fees for PPE are ***in addition to the insureds' cost-sharing for covered services***." [emphasis added]. DFS stated that the patients should "not [be] charged fees by participating providers for covered services that go beyond the insureds' financial responsibility as described in the insureds' policies or contracts." I fail to appreciate how this letter has relevance to claims made under a no-fault policy or no-fault statutory benefit.

On 10/15/2021, Xavier Becerra of the the U.S. Department of Health and Human Services stated:

"As a result of the continued consequences of the Coronavirus Disease 2019 (COVID-19) pandemic, on this date and after consultation with public health officials as necessary, I, Xavier Becerra, Secretary of Health and Human Services, pursuant to the authority vested in me under section 319 of the Public Health Service Act, do hereby renew, effective October 18, 2021, the January 31, 2020, determination by former

Secretary Alex M. Azar II, that he previously renewed on April 21, 2020, July 23, 2020, October 2, 2020, and January 7, 2021, and that I renewed on April 15, 2021 and July 19, 2021, that a public health emergency exists and has existed since January 27, 2020, nationwide."

https://www.phe.gov/emergency/news/healthactions/phe/Pages/COVDI-15Oct21.aspx

Applicant stated in a letter submitted to MODRIA, "The American Medical Association (AMA) released new CPT code 99072, which became effective on Sept. 8, 2020. 99072 - Additional supplies, materials, and clinical staff time over and above those usually included in an office visit or other non-facility service(s), when performed during a Public Health Emergency as defined by law, due to respiratory-transmitted infectious disease. As the Covid-19 pandemic continues, there is direct financial impact on businesses in order to comply with CDC guidelines. Our office has seen a dramatic increase in the need for PPE, cleaning, and disinfectant supplies. On top of the increased use of supplies, there is also a rise in costs of these products due to the high demand. Please refer below to the cost of common products and there increase in price since the Covid19 pandemic began." Applicant then itemized additional costs and expenses involved.

Applicant is correct. The AMA stated that "addition of code 99072 for the additional supplies and clinical staff time required to mitigate transmission of respiratory infectious disease while providing evaluation, treatment, or procedural services during a public health emergency, as defined by law." https://www.ama-assn.org/practice-management/cpt/covid-19-cpt-coding-and-guidance.

I take appropriate evidentiary notice of these reliable websites.

Respondent's representative argued that no-fault claims are reimbursed according to the NYS WC Fee Schedules and not the AMA. Respondent's argument is compelling.

However, the NYS WC Fee Schedule, Introduction and General Guidelines states in its opening paragraph to "[p]lease refer to the CPT book for an explanation of coding rules and regulations ***not listed in the schedule***" [emphasis added] and "CPT is a registered trademark of the American Medical Association (AMA)."

It should also be noted that between publications of the fee schedule and/or amendments, there are sometimes code changes. When this occurs, providers and coders refer to documentation outside of the fee schedule (the AMA's CPT Assistant updates, etc.) to determine the correct code and/or rate. This supports that a bill need not reflect a code that is specifically listed in the schedule. If a code is changed by the AMA's CPT Assistant, then the correct code would not be in the schedule.

Additionally, the recently revised fee schedule contains similar codes for supplies and materials. CPT Code 99070 and 99071 are for additional supplies. The recently amended Medicine Fee Schedule Ground Rule 4 states: "Special Services and Reports: Adjunctive services are reported using codes 99000-99091 as illustrated in the code description. Charges for services generally provided as an adjunct to common medical

services should be made only when circumstances clearly warrant an additional charge over and above the scheduled charges for basic services." CPT code 99072 falls within this ground rule.

Respondent's representative also argued that the $20.00 charge is excessive for clean-up materials. While this may or may not be true, I have no way of determining that Applicant's charge was excessive without some helpful analysis, such as from a coder or by illustration through invoices and other items. If Applicant did not submit the items, this would be an issue subject to the verification process. If Respondent disagrees with the calculations, then a coder or fee audit should explain and provide guidance to the factfinder.

I find that Respondent has failed to submit sufficient evidence that no reimbursement should be allowed despite the AMA's implementation of the new code and the guidance by the Department of Health and Human Services.

Since the code is brand new due to the Public Health Emergency as defined by law, it would not be in the WC Fee Schedule. Without a coder's affidavit or legal support demonstrating that a physician is not permitted to bill for any code not specifically listed in the fee schedule, the defense cannot be sustained. I am not persuaded that the referenced Circular Letter was meant to address claims presented under the no-fault system as the letter specifically references participating providers under health or dental policies or contracts.

CPT Code 99070 ($19.60)

Applicant billed $19.60 for 2.5 CCs each of Lidocaine and Bupivacaine. These are the materials injected into the trigger points. The trigger point injections were billed under CPT Code 20552. The code descriptors are as follows:

CPT Code 99070, "Supplies and materials (except spectacles), provided by the physician or other qualified health care professional over and above those usually included with the office visit or other services rendered [list drugs, trays, supplies, or materials provided)."

CPT Code 20552, "Injection(s); single or multiple trigger point(s), 1 or 2 muscle(s)."

The Lidocaine and Bupivacaine are not "above those usually included" with the trigger point injection services. These are the very items being injected. Without these items, nothing would be injected at all. Under these circumstances, CPT Code 99070 is bundled into CPT Code 20552 and no additional reimbursement is allowed.

Respondent's fee schedule defense is sustained.

Conclusion

Having carefully considered the submissions of the parties, the relevant case law, and the arguments of respective counsel, I conclude that the preponderance of the credible

evidence supports a finding in favor of Applicant as to code 99072 and in favor of Respondent as to code 99070.

Applicant is awarded $20.00.

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	**02/05/21 - 02/05/21**	**$39.60**	**Awarded: $20.00**
Total			**$39.60**	**Awarded: $20.00**

B. The insurer shall also compute and pay the applicant interest set forth below. 05/21/2021 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); and OGC Op. No. 10-09-05 (interest accrues from date Applicant "*actually requests arbitration*" or commences a lawsuit). The Superintendent and the New York Court of Appeals have 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 Onondaga

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

01/13/2022
(Dated)

Fred Lutzen

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:
7f92b53a0005b75cc4db2b620bb77bcb

Electronically Signed

Your name: Fred Lutzen
Signed on: 01/13/2022