

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bay Medical, P.C.  
(Applicant)

- and -

Countryway Insurance Company (Formerly  
Agway Insurance)  
(Respondent)

AAA Case No. 17-21-1220-4002  
Applicant's File No. 17673  
Insurer's Claim File No. AP20225764-1213  
NAIC No.

**ARBITRATION AWARD**

I, Kent Benziger, 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: Z.C.

1. Hearing(s) held on 06/21/2022  
Declared closed by the arbitrator on 06/21/2022

Frank S. Patruno, Esq. from Frank S. Patruno Law Offices, P.C participated for the Applicant

Countryway Insurance Company from Countryway Insurance Company (Formerly Agway Insurance) participated by written submission for the Respondent

2. The amount claimed in the Arbitration Request, **\$412.21**, 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

On December 13, 2020, the Assignor/Eligible Injured Party, a 30-year-old male, was, by history, involved in a motor vehicle accident. In dispute are fee schedules for five bills. The issues involve the proper fee scheduled for an evaluation, physical therapy treatment and COVID-19 supplies. Applicant contends the new 2018 New York Workers' Compensation Fee Schedule was in affect for this treatment between December 18, 2020 and January 22, 2021. Applicant also contends that the Carrier has failed to sustain its burden as to any fee schedule defense as to CPT 99072 for COVID-19 supplies.

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

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

On December 13, 2020, the Assignor/Eligible Injured Party, a 30-year-old male, was, by history, involved in a motor vehicle accident. Following the accident, the Assignor was evaluated at the emergency room at Brooklyn Hospital. On December 18, 2020, the Assignor was evaluated at Bay Medical, P.C. for complaints of neck pain with numbness in the fingers and toes as well as low back pain. Following an examination, the impression included cervical and lumbar sprain/strains and radiculitis, a right finger injury and a right hip strain. In dispute are fee schedules for five bills. The issues involve the proper fee schedule for an evaluation, physical therapy treatment and COVID-19 supplies.

DOS: 12/21/20. On The above date, the Applicant performed a physical therapy evaluation (97161) and billed \$99.25. The Carrier reimbursed \$8.81 stating that the bill has been reviewed in accordance with the New York No-Fault Fee Schedule.

On April 1, 2019, the new 2018 New York Workers' Compensation Fee Schedule went into effect. However, pursuant to the NYS Department of Financial Services (DFS) issuance of an Emergency Amendment to Regulation 68 officially known as the Thirty-Fourth Amendment to Part 68 of Title 11 of the Official Compilation of Codes, Rules and Regulations of the State of New York (Insurance Regulation 83) stated that the implementation of the amounts that providers can charge for services will not impact the No-Fault system until health care providers bill for services rendered on and after October 1, 2020. The bills in dispute are all after October 1, 2020. The Respondent's fee coder failed to address the changes to the fee scheduled as of October 1, 2020. CPT 97161 has a RVU of 9.47 while Physical Therapy has a conversion factor in Region IV of \$10.48. The Applicant correctly billed for the service.

DOS: 12/21/20, 1/5/21-1/15/21, 1/20/21-1/22/21. For these claims the Applicant billed for physical therapy modalities and COVID-19 supplies. This arbitrator shall first address the modalities including CPT 97014, 97124, 97124 and 970261. As a finding of fact, the Applicant has used the correct conversion factor (\$10.48) and proper RVUs for these modalities which were also billed under the 12-unit rule. Applicant is awarded reimbursement.

COVID-19. Reimbursement for COVID-19 Supplies is not in the Workers Compensation Fee Schedule. Yet, on September 8, 2020, the American Medical Association published an update to the Current Procedural Terminology (CPT) code to address the COVID-19 pandemic. The AMA Press Release clarified its purpose:

"The CPT code set continues to quickly adapt during the COVID-19 pandemic to streamline the reporting of innovative tools and services now available to help reduce the COVID-19 disease burden, improve health outcomes and reduce long-term care costs," said AMA President Susan R. Bailey, M.D. "This update is the latest in a series of modifications to the CPT codes set to meet the needs of the health care industry as medical advancements expand the fight against COVID-19."

The first addition, CPT code 99072, was approved in response to sweeping measures adopted by medical practices and health care organizations to stem the spread of the novel coronavirus (SARS-CoV-2), while safely providing patients with access to high-quality care during in-person interactions with health care professionals. The additional supplies and clinical staff time to perform safety protocols described by code 99072 allow for the provision of evaluation, treatment or procedural services during a public health emergency in a setting where extra precautions are taken to ensure the safety of patients as well as health care professionals.

The Secretary of Health and Human Services has periodically determined that a Public Health Emergency Exists, including for the dates in dispute:

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.

The CPT Assistant, Special Edition (Vol. 30, 2020) defined the service:

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.

The CPT Assistant states the requirements of CPT 99072:

Time over what is included in the primary service of clinical staff time (registered nurse [RN]/ licensed practical nurse [LPN]/ medical technical assistant [MTA]) to conduct a pre-visit phone call to screen the patient (symptom check), provide instructions on social distancing during the visit, check patients for symptoms upon arrival, apply and remove PPE, and perform additional cleaning of the examination/procedure/imaging rooms, equipment, and supplies

Three surgical masks

Cleaning supplies, including additional quantities of hand sanitizer and disinfecting wipes, sprays, and cleansers

To further delineate the use of code 99072, a parenthetical note has been added to code 99070 directing users to the new code when the additional supplies, materials, and preparation time meeting its criteria are utilized.

Code 99072 is to be reported only once per in-person patient encounter per provider identification number (PIN), regardless of the number of services rendered at that encounter.

In RES Physical Medicine & Rehab Services, AAA No. 17-21-1218-4773 (July 14, 2022) Arbitrator Lutzen states how CPT 99072 is incorporated into the New York Workers Compensation Fee Schedule:.

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. Likewise, 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

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.

The next issue is the proper fee schedule or amount to be billed. This arbitrator relies on Master Arbitrator Burt Feilich's decision in *RES Physical Med & Rehab Services v. American Transit*, AAA Case No. 99-21-1204-7071 (April 10, 2022). The Master Arbitrator considered a lower arbitrator's determination that since CPT 99072 is not specifically included in the NYS Workers Compensation Fee Schedule, it should be billed as a non-listed CPT code and/or a "By Report" procedure code that requires an Applicant to submit documentation to justify the billed amount. The Master Arbitrator found the Respondent still has the burden of proof for a fee schedule defense and that both parties must have notice if an arbitrator considers an outside sources for determining fee schedule valuations:

Under prevailing case law, respondent had the evidentiary burden of establishing a fee schedule defense to the claim (see: *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 2006 NY Slip Op 26240, 13 Misc.3d 172, 822 NYS2d 378 (Civil Court, Kings County, 2006; *Power Acupuncture PC v. State Farm Mutual Automobile Ins. Co.*, 2006 NY Slip Op 50393(U), 11 Misc.3d 1065(A), 816 NYS2d 700 (Civil Court, Kings County, 2006).

The record under review does not include any specific evidentiary submission by respondent setting forth a fee schedule defense to the claim, such as an affidavit and/or report from a fee coding or medical billing expert. Nevertheless, after having reviewed the evidence submitted in support of applicant's billing rate for the services/supplies claimed, Arb. Dandridge Richburg came to the factual determination that the rate billed by applicant of \$20.00 per date of services for CPT # 99072 was excessive and unreasonable under all of the circumstances. Instead, the award noted that on December

21st , 2020 the AMA asked the Center for Medicare and Medicaid Services (CMMS) to reimburse CPT code # 99072 in the amount of \$6.57. Even though CMMS did not allow separate reimbursement for CPT # 99072 at that time, Arb. Dandridge-Richburg found that \$6.57 was the proper amount to reimburse applicant for the services claimed, which constituted what she believed to be a reasonable and fair amount for those services.

Before determining the outcome of this appeal, the parties should both note that Arb. Lutzen seems to have also taken judicial notice of fee schedule and/or medical billing documentation and evidence outside of the hearing process in the two awards he made that were submitted by applicant in support of the claim. Thus, given the latitude bestowed on an arbitrator by the regulations to independently raise any issue that she deemed relevant to making an award, as well as to determine the materiality and relevance of the evidence offered, it cannot be said that the arbitrator's determination to take judicial notice of an alternative valuation for the services claimed was a clear violation of established law. However, it cannot be denied that since the outside source relied upon by the arbitrator was not included in the evidentiary record nor apparently discussed by the parties and the arbitrator during the hearing of the claim, the arbitrator prejudiced the ability of applicant to fully argue in support of its claim since the website information referred to Arb. Dandridge-Richburg in her award was not known by applicant until the time the award was issued

The Master Arbitrator then remanded the arbitration to the lower arbitrator to determine the amount to be awarded. He affirmed the portion of the award that the Applicant was entitled to reimbursement for CPT 99072. He then offered the following as guidance:

it is hereby found that it was appropriate and proper for CPT # 99072, not presently found in the fee schedule, to be deemed an unlisted "By Report" code such that applicant should be required to submit evidence to justify the rate billed ((see: 11 NYCRR 68.5(a) and/or (b))). Furthermore, given that applicant had previously submitted some evidence seeking to support the valuation of the services claimed, respondent is required to submit some expert evidence setting what it contends is the proper alternative valuation for those services

Master Arbitrator Feilich's decision also noted arbitrators may, in their discretion, find that CPT 99072 is not a "By Report" code requiring the Applicant to submit documentation to justify the amount billed. Therefore, the Respondent has the burden

to request verification and submit expert evidence to challenge the Applicant's stated fee for the service. In *RES Physical Medicine & Rehab. Services v. LM General Insurance*, AAA Case No. 17-22-1236-1997 (June 18, 2022) Arbitrator Marianne Zack found as follows:

There is no question that the services provided were during the time of the public health emergency known as the COVID-19 pandemic. CPT code 99072 would not be in the Workers' Compensation Fee Schedule because it is brand new and created to address billing for increased use of PPE during the pandemic.

Accordingly, I find that the Applicant's charge under CPT code 99072 in the amount of \$20.00 was permissible

Therefore, at the very least, the Respondent has the burden to come forward with competent evidentiary proof to support its defenses. *Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co.*, 13 Misc.3d 172 (Civil Ct, Kings Co. 2006). In this proceeding, the Respondent has failed to submit any such proof. As a finding of fact, Applicant billing of \$15.00 for CPT 99072 was permissible. However, Applicant's billing of \$30.00 for one unit of CPT 99072 on December 18, 2020 is inconsistent with the billing of \$15.00 on the other dates and is not substantiated. Further, as noted in CPT Assistant:

Code 99072 is to be reported only once per in-person patient encounter per provider identification number (PIN), regardless of the number of services rendered at that encounter.

Therefore, Applicant is awarded \$15.00 for one unit of CPT 99072 on December 18, 2020. For the additional dates, Applicant is awarded reimbursement as claimed.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

**Interest.** The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

**Attorney's Fees.** As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: *LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co.*, 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$397.20, TOGETHER WITH INTEREST AND ATTORNEYS' FEES.

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
	Bay Medical, P.C.	12/18/20 - 12/18/20	\$30.00	Awarded: \$15.00
	Bay Medical, P.C.	12/21/20 - 12/21/20	\$8.81	Awarded: \$8.81
	Bay Medical, P.C.	12/21/20 - 12/31/20	\$126.79	Awarded: \$126.79
	Bay Medical, P.C.	01/05/21 - 01/15/21	\$178.24	Awarded: \$178.24
	Bay Medical, P.C.	01/20/21 - 01/22/21	\$68.37	Awarded: \$68.37
<b>Total</b>			<b>\$412.21</b>	<b>Awarded: \$397.21</b>



- B. The insurer shall also compute and pay the applicant interest set forth below. 09/27/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 Orange

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

07/16/2022  
(Dated)

Kent Benziger

**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:**  
1d59d2a1208a13b0bb30548685a220cb

### **Electronically Signed**

Your name: Kent Benziger  
Signed on: 07/16/2022