

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Medical Monitoring PC  
(Applicant)

- and -

21st Century Centennial Insurance Company  
(Respondent)

AAA Case No. 17-22-1240-0863

Applicant's File No. NA

Insurer's Claim File No. 7001841503-1-1

NAIC No. 34789

**ARBITRATION AWARD**

I, Diane Flood Taylor, 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 04/12/2023  
Declared closed by the arbitrator on 04/12/2023

Dino R. DiRienzo from Dino R. DiRienzo Esq. participated virtually for the Applicant

Kenneth Popper from Law Offices of Rothenberg & Burns participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$10,222.84**, 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

Whether Applicant established entitlement to additional No-Fault insurance compensation for intra-operative neurophysiology monitoring.

Applicant is seeking additional reimbursement in the amount of \$10,222.84 for intra-operative neurophysiology monitoring in connection with the management of injuries sustained by the Assignor, MB, a then 41-year-old eligible injured person who, on 9/17/20, was involved in a collision with the insured motor vehicle.

Respondent issued partial reimbursement of Applicant's bill premised on fee schedule grounds.

The decision below is based upon a review of the documents that have been submitted electronically, as well as the arguments of counsel and/or representatives appearing via video conference on behalf of the parties.

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

In dispute in this arbitration is a bill for intra-operative neurophysiology monitoring associated with cervical fusion surgery performed on 12/8/84. Applicant established its prima facie case in this matter by submission of the subject bills evidencing the amount charged for these services. See, Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004). Once an Applicant has established its prima facie case, the burden shifts to the insurer to establish that it timely and properly reimbursed/partially denied the claim, and the basis of its denial.

#### **Fee Schedule Defense**

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., NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006.

An insurance carrier's timely asserted defense that the bills submitted were not properly No-Fault rated or that the fees charged were in excess of the Workers' Compensation fee schedule is sufficient, if proven, to justify a reduction in payment or denial of a claim. See, East Coast Acupuncture, P.C. v. New York Cent. Mut. Ins., 2008 NY Slip Op 50344(U) (App. Term 2d Dept., Feb. 21, 2008).

It is well established that a medical provider must limit its charges to those permitted by approved fee schedules. An insurer who raises a fee schedule defense will prevail if it demonstrates that it was correct in its application of the fee schedule. See, Jesa Medical Supply, Inc. v. Geico Ins. Co., 25 Misc. 3d 1098 (2009).

Pursuant to 11 NYCRR 65-4.5 (o) (Regulation 68-D) the arbitrator shall be the judge of the relevance and materiality of the evidence offered. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the

Insurance Law and Department regulations. Arbitrators sit in equity and have the powers to enforce the spirit and intent of the No-fault law and regulations. See Bd. of Education, et. al. v. Bellmore-Merrick, 39 N.Y. 2d. 167 (1976).

"Although an arbitration panel may not overtly disregard the law, arbitrators are not strictly tethered to substantive and procedural laws and may do justice as they see it, provided that they do not violate a strong public policy, do not exceed a specifically enumerated limitation on their power and their decisions are not totally irrational [citations omitted]." Matter of Solow Building Co., LLC v. Morgan Guarantee Trust Co. of New York, 6 A.D.3d 356, 356, 776 N.Y.S.2d 547, 548 (1st Dept. 2004).

## **Discussion**

Applicant billed for intra-operative neurophysiology monitoring, 1 unit: CPT 95938, 1 unit CPT 95939 and 2 units: CPT 95941 in the total amount of \$11,109.00.

Respondent issued partial reimbursement in the amount of \$886.16, representing \$102.57 paid for CPT 95938, \$267.51 paid for 95939 and \$516.08 paid for 2 units of CPT 95941, and stated with regard to CPT 95941, "Continuous intraoperative neurophysiology monitoring, from outside the operating room (remote or nearby) or for monitoring of more than one case while in the operating room, per hour."

## **Evidence**

Respondent submitted the affidavit of Terri Lohr, RN, BA, CPC, in support of its position. After a review of the operative monitoring report, the bill submitted by Applicant, and the applicable fee schedules, Ms. Lohr indicated that reimbursement for CPT 95941 in this case = \$443.81.

Ms. Lohr found that CPT 95938 is reimbursable at a rate of \$102.57. It is noted that Respondent paid this amount for this code.

Ms. Lohr found that CPT 93939 is reimbursable at a rate of \$267.51, which Respondent previously paid.

In support of its billing, Applicant submitted an affidavit from Priti Kumar, CPC. It is noted that Respondent previously reimbursed CPT 95938 at \$102.57 and CPT 93939 at \$267.51. Applicant's coder, Ms. Kumar, adopted this position as well.

The remaining code is CPT 95941, and the rate of reimbursement differs between the opinions of the two coders.

Ms. Kumar performed an analysis of CPT 95941 and concluded, "based on a review of the bill and related documentation, it is my professional opinion that the services billed under code 95941 at \$2,909.00 is fair and reasonable as per NY Workers' Compensation Fee Schedule."

In addition, Applicant submitted an affidavit from Alexandre DeMoura, MD, dated 3/4/23. Dr. DeMoura stated that, "Here, CPT 95940/CPT 95941: As per CPT Assistant (shown below) the technician/technologist, cannot use 95940. Both 95940/95941 are intended to be reported by a physician or qualified health care professional (e.g. neurophysiologist). The technician is not a qualified health care professional and his/her work may not be reported separately with a CPT code. 95940/95941 is a global complete service. There is no split for a professional/technical service. There is no CPT code for the technical component monitoring time. Thus, CPT code 95941 is the only appropriate code for Intraoperative Neurophysiology report."

Dr. DeMoura stated, further, "Intraoperative neurophysiological monitoring (JONM) was continuously carried out during the procedure in order to safeguard the patient. A connection to the reading physician was established via a real-time screen sharing application (Cascade Pro) and live communication maintained throughout the duration of the procedure. The description of code 95941: is 'continuous intraoperative neurophysiology monitoring from outside the operating room per hour.' Hence he confirmed that the code 95941 was appropriate."

## **Findings**

I find no further reimbursement for is due for CPT 95938 and 95939 as Respondent previously reimbursed the amounts that Applicant's coder concluded were appropriate.

In weighing the fee schedule evidence submitted by the parties with regard to CPT 95941, I find the analysis and conclusion reached by Ms. Lohr on behalf of Respondent is more persuasive. Ms. Lohr concluded that the proper rate of reimbursement for CPT 95941 in this case is \$443.81.

Respondent previously reimbursed \$516.08 for this portion of the bill; therefore, I find no further reimbursement is due.

In another case heard on 4/12/23 before me, AAA Case No. 17-22-1240-4280, a matter involving this Applicant, also involving a cervical fusion surgery, but with a different claimant, Applicant's expert, Ms. Kumar, stated: "based on a review of the bill and related documentation, it is my professional opinion that the services billed under code 95941 at \$4,581.70 per unit is fair and reasonable as per NY Workers' Compensation Fee Schedule."

In the instant case, as reflected above, Ms. Kumar stated, "based on a review of the bill and related documentation, it is my professional opinion that the services billed under code 95941 at \$2,909.00 is fair and reasonable as per NY Workers' Compensation Fee Schedule."

It must be noted that both of the above statements cannot be true. Even without the comparison of these two statements, I find Ms. Kumar's analysis and conclusions regarding CPT 95941 unpersuasive.

I find that Respondent conclusively demonstrated in a "coherent manner" the proper fee schedule rate of payment for the services rendered. Viviane Etienne Med. Care v. Country-Wide, 2013 NY Slip Op 50199(U) (App. Term 2d Dep't 2013)

Accordingly, after reviewing the entire record and after careful consideration of the parties' oral arguments, I find in favor of Respondent. Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing. This decision is in full disposition of all claims for No-Fault benefits presently before 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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of NY

SS :

County of Westchester

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

04/19/2023  
(Dated)

Diane Flood Taylor

### **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:**  
97e6b26127ea11ff33fc06e81430e18d

### **Electronically Signed**

Your name: Diane Flood Taylor  
Signed on: 04/19/2023