American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Recovery Solution, Inc (Applicant)	AAA Case No.	17-21-1202-7938
	Applicant's File No.	FL21-51541
- and -	Insurer's Claim File No.	272 PP IEI9323 K
St. Paul Travelers Insurance Co. (Respondent)	NAIC No.	38130

ARBITRATION AWARD

I, Patricia Daugherty, 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 06/23/2023
   Declared closed by the arbitrator on 06/23/2023

   Nancy Orlowski from Field Law Group, P.C. participated virtually for the Applicant

   Sheridan Chu from Law Offices of Tina Newsome-Lee participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$767.20**, 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

   Assignor, "JG," was injured in a motor vehicle accident on October 18, 2020. At issue herein is a claim in the amount of $767.20 for the balance of the rental of a SAM unit from March 8, 2021 through March 21, 2021. Respondent issued a partial payment for the services, denying the balance pursuant to the fee schedule. At the hearing, Respondent argued that Applicant has not established its prima facie case for reimbursement of the device billed under E1399. The issues to be determined are: 1.) whether Applicant established its prima facie case; and, if so 2.) whether Respondent properly reimbursed Applicant pursuant to the fee schedule.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon 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.

Prima Facie

It is well settled that an applicant establishes its prima facie entitlement to payment by proving it submitted a claim setting forth the facts and the amount of the loss sustained and that payment of no fault benefits were overdue (see Insurance Law § 5106[a]; Viviane Etienne Med. Care v Country-Wide Ins. Co., 25 NY3d 498, 501 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742, 774 N.Y.S. 2d 564 (2nd Dept., 2004).

Respondent, relying on 11 NYCRR 65-3.8(g), argues that Applicant cannot establish its prima facie case for the SAM unit billed under CPT E1399 because Applicant has not submitted proof of the regional geographical rate for the prescribed equipment. Applicant counters that it is Respondent's burden to establish that Applicant seeks reimbursement in excess of the fee schedule and that it is not part of Applicant's prima facie case to establish that its billing is in compliance with the fee schedule.

11 NYCRR 65-3.8(g) states:

> (1) Proof of the fact and amount of loss sustained pursuant to Insurance Law section 5106(a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed medical services under any circumstances:
>
> (i) when the claimed medical services were not provided to an injured party; or
>
> (ii) for those claimed medical service fees that exceed the charges permissible pursuant to Insurance Law section 5108(a) and (b) and the regulations promulgated thereunder for services rendered by medical providers.

The issue turns on which party bears the initial burden of establishing the proper fee schedule rate. After a thorough analysis of 11 NYCRR 65-3.8(g) I disagree with Respondent's contentions and find that Applicant does not have the initial burden to establish that its fees are in compliance with the respective fee schedule.

The use of the language "for those claimed medical services fees that exceed the charges permissible" indicates that proof of the fact and amount of loss sustained is deemed supplied for the fees leading up to and including the fee schedule. Therefore, a determination would be required on whether the fees charged are in excess of the fee schedule. The courts have consistently held that Respondent has the burden of establishing that the services are billed in excess of the fee schedule. 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). This is true even after the Regulations were amended in 2013 to include provision 11 NYCRR 65-3.8(g). See Oleg's Acupuncture, P.C. v. Hereford Ins. Co., 2018 NY Slip Op 50095(U) (App. Term 2nd Dept 2018); Excel Surgery Ctr., LLC v. Metropolitan Prop. & Cas. Ins. Co., 65 Misc 3d 149(A) (App Term 2nd Dept 2019).

Moreover, to hold otherwise to would require the same application of the initial burden for the first prong of the provision and require every Applicant to establish that the services were provided to the injured party. Such application would run afoul of the purpose and intent of the No-Fault regulations.

As such I find that Respondent's denial of claim acknowledging receipt of Applicant's bill satisfies Applicant's prima facie case and Applicant is not required to submit documentation supporting its fee as part of its prima facie case.

Fee Schedule

Respondent alternatively argued that it properly reimbursed Applicant for the rental of the SAM unit pursuant to the 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).

11 NYCRR 65-3.8(g)(1), in effect as of April 1, 2013, provides that proof of the fact and amount of loss sustained pursuant to Insurance Law section 5106 (a) shall not be deemed supplied by an applicant to an insurer and no payment shall be due for such claimed medical services under any circumstances for those claimed medical service fees that exceed the charges permissible pursuant to Insurance Law sections 5108(a) and(b) and the regulations promulgated thereunder for services rendered by medical providers. As such Respondent is not required to establish that it preserve a fee schedule defense in a timely denial of claim.

The Superintendent of Insurance has adopted the fee schedule of the Worker's Compensation Board for the purposes of the no-fault insurance law. In 12 NYCRR 442.2 the Worker's Compensation Board adopted the New York State Medicaid program fee schedule, therefore the fee for the rental of DME for a no-fault claim is governed by 12 NYCRR 442.2(a)(2) which states:

> The maximum permissible monthly charge for the rental of durable medical equipment shall be the rental price listed in the Official New

> York Workers' Compensation Durable Medical Equipment Fee Schedule multiplied by the total number of months or weeks respectively for which the durable medical equipment is needed. In the event the total rental charge exceeds the purchase price, the maximum permissible charge for the durable medical equipment shall be the purchase price listed in the Official New York Workers' Compensation Durable Medical Equipment Fee Schedule, whether or not the claimant keeps the durable medical equipment or returns it when no longer needed.

The New York State Department of Health area office has not determined a set price for the rental of the unit. Pursuant to the Medicaid policy guidelines, DME that are not assigned a Maximum Reimbursement Amount (MRA) in the Medicaid DME fee schedule are reimbursable at one tenth of the provider's acquisition cost.

Neither the Department of Health nor the Medicaid Fee Schedule expressly provide a rental fee for the subject equipment, however both 12 NYCRR 442(b) and the Medicaid Policy Guidelines have "catch-all" clauses to set forth a fee for circumstances like this. The question turns on which "catch-all" clause governs no-fault claims.

Applicant argued that as the Department of Health has not set a rental fee for the equipment, the proper fee is the fee charged to the general public.

Respondent argued that the monthly rental rate should be the equivalent to one tenth of the acquisition cost of the equipment pursuant to Medicaid Policy Guidelines. Respondent also referred to the Thirty-Sixth Amendment to Regulation 83 which effective June 1, 2023 sets the maximum monthly rental rate to one-tenth of the acquisition cost. Respondent argued that while the relevant portion of the Thirty-Sixth Amendment was not effective for the dates of service herein, the promulgation of the Amendment provides guidance on the what the fee schedule rate should be.

Pursuant to 11 CRR-NY App 17-C, effective June 1, 2023 the maximum permissible monthly rental charge for durable medical equipment not listed in the New York State Workers' Compensation Durable Medical Equipment Fee Schedule shall be on-tenth of the acquisition cost to the provider. Rental charges for less than one month shall be calculated on a pro-rata basis using a 30-day month. Additionally, the total accumulated rental charge shall be the least of the acquisition cost plus 50%; the usual and customary price charged by durable medical equipment providers to the general public; or the purchase fee for the durable medical equipment established in the New York Compensation Durable Medical Equipment Fee Schedule.

Pursuant to 442.1(a) Applicability:

> This durable medical equipment fee schedule is applicable to durable medical equipment, medical/surgical supplies and other such items prescribed in the course of medical care or treatment for an injured employee dispensed on or after the most recent effective date of section 442.2 of this Part, regardless of the date of accident or date of disablement for an occupational disease. Durable medical equipment,

> medical/surgical supplies and other such items dispensed on or after July 11, 2007, but prior to the most recent effective date of section 442.2 of this Part, shall be reimbursed pursuant to the fee schedule in section 442.2 of this Part in effect on the date the durable medical equipment, medical/surgical supply or other such time was dispensed.

Taking into consideration 12 NYCRR 442.2(g) which states:

> [t]he Medicaid provider manual and the policy guidance for durable medical equipment are not included as part of the durable medical equipment fee schedule used in workers' compensation cases except to the extent such documents contain the Medicaid durable medical equipment fee schedule

I find that the "catch-all" clause contained in 12 NYCRR 442(b) supersedes the Medicaid Policy Guidelines and governs no-fault claims where the reimbursement for the rental of DME is not identified in the New York State Medicaid DME fee schedule. While the Thirty-Sixth Amendment adopts the one-tenth rule, its promulgation does not usurp the legal authority of the governing regulation effective prior thereto. Therefore, when the rental fee for DME is not identified in the NYS Medicaid DME fee schedule the proper reimbursement for the rental of the equipment is the equivalent of the fee charged to the general public.

In support of its defense, Respondent submitted a fee audit from Monica Brett, a certified professional coder. Ms. Brett concluded that the fee for the rental of the equipment is $153.58 by calculating one tenth of the invoice cost. Ms. Brett does not address the price charged to the general public.

Respondent has not presented any evidence or other information regarding the price charged to the general public. As such, I find that Respondent has not established that Applicant billed in excess of the fee schedule for the rental of the equipment.

Based on the foregoing, Applicant's claim is granted.

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**
	Advanced Recovery Solution, Inc	**03/08/21 - 03/21/21**	**$767.20**	**Awarded: $767.20**
Total			**$767.20**	**Awarded: $767.20**

B. The insurer shall also compute and pay the applicant interest set forth below. 05/04/2021 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. A claim is overdue when it is not paid within 30 days after an insurer receives proof of claim. (Insurance Law §5106[a];11 NYCRR 65-3.8(a)(1). All overdue benefits shall bear interest 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(c).

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee, in accordance with 11 NYCRR §65-4.6. Therefore, the insurer shall pay the applicant an attorney's fee of 20% of benefits plus interest, with no minimum fee and a maximum fee of $1,360.00. 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 NY
SS :
County of Suffolk

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

06/25/2023
(Dated)

Patricia Daugherty

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:
014817d730020b21ff3b13a0ee14b00e

Electronically Signed

Your name: Patricia Daugherty
Signed on: 06/25/2023