

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

S & R Medical PC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-22-1271-7754
Applicant's File No.	00105264
Insurer's Claim File No.	0611780990000003
NAIC No.	35882

ARBITRATION AWARD

I, Rebecca Novak, 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 ["NA"]

1. Hearing(s) held on 10/24/2023
Declared closed by the arbitrator on 10/24/2023

Mikhail Guseynov, Esq. from Drachman Katz, LLP participated virtually for the Applicant

Dustin Mule from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,794.26**, was AMENDED and permitted by the arbitrator at the oral hearing.
Applicant amended the amount in dispute to \$1,947.27 to reflect partial payments made and to conform to its interpretation of fee schedule.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that Applicant established a prima facie case of entitlement to No-Fault compensation with respect to its bills and to the timeliness of Respondent's denials.

3. Summary of Issues in Dispute

Whether Applicant established additional entitlement to No-Fault insurance compensation for performing office visits and physical therapy treatment, and providing Personal Protection Equipment (PPE), in the course of treating Assignor, a 21-year-old female, from April 28, 2021 to July 27, 2022, subsequent to being injured in a motor vehicle accident on April 25, 2021.

Whether Respondent's timely denials for physical therapy treatment and Personal Protection Equipment (PPE) provided on dates of service between May 25, 2022 and July 27, 2022, based on an independent medical exam ("IME") conducted by Dr. Howard Kiernan on March 9, 2022 with a cutoff date of May 21, 2022, should be sustained.

Whether Respondent properly denied reimbursement of five of the bills at issue based on the 45-day rule.

Whether fees were not in accordance with fee schedule.

4. Findings, Conclusions, and Basis Therefor

In this No-Fault insurance arbitration, Applicant is seeking as additional compensation \$1,947.27 remaining unpaid from that which it billed for performing office visits and physical therapy treatment, and providing Personal Protection Equipment (PPE), from April 28, 2021 to July 27, 2022, to Assignor, a 21-year-old female, who was injured in a motor vehicle accident on April 25, 2021. This amount sought by Applicant reflects a reduction from the original amount sought when the arbitration was commenced. Respondent denied payment of five of the bills based on the fact that Applicant failed to provide proof of claim within 45 days of the date the services were rendered; denied payment on five other bills based on an IME cutoff effective May 21, 2022; and made partial or no payments on the remaining bills based on fee defenses.

Both parties appeared at the hearing via Zoom (Applicant by counsel, Respondent by employee), who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

Assignor, a 21-year-old female, was a restrained driver of a motor vehicle involved in an accident which occurred on April 25, 2021. The record reflects that there was no reported loss of consciousness, but Assignor initially sustained injuries to her head, neck, mid back, low back, and right knee. She was transported by ambulance to the emergency room of NYU Langone Hospital for evaluation. Assignor underwent MRIs of the neck, back, chest and abdomen, and ultrasound of the chest and abdomen. She was then discharged that same day with advice to rest. A few days later, Assignor came under the care of various physicians for further assessment. She was started on a course of physical therapy, chiropractic care, acupuncture treatment, and massage therapy.

Additional x-rays of the neck and back, as well as MRIs of the neck and back were performed. Applicant now seeks reimbursement for office visits and physical therapy treatment performed from April 28, 2021 to July 27, 2022, as well as for PPE.

Fee Defense Regarding PPE

Applicant billed \$7.55 for PPE on 14 of its bills from April 28, 2021 to June 15, 2022. Respondent reimbursed \$0, stating in its denials:

Pursuant to New York Physical and Occupational Therapy Fee Schedule Ground Rule 5, a physical or occupational therapist may only use the procedure codes contained in the Physical and Occupational Therapy Fee Schedule for billing of treatment. There is no allowance for this procedure in the New York State Worker's Compensation Fee Schedule under the provider's specialty.

Reimbursement is denied. Based upon guidance received from the New York State Department of Financial Services (DFS), the New York No-Fault law does not contemplate reimbursement of Personal Protective Equipment (PPE). See OGC opinion letter 01-06-07, No Fault Health Service Reimbursement, stating that only qualifying professional health services licensed under New York Law and provided to the claimant in the treatment of his/her injuries are reimbursable in No-Fault. Further, the New York State Worker's Compensation Fee Schedule Ground Rules state that only supplies and materials provided over and above those usually included with the office visit or other services rendered may be charged for separately.

Ground Rule 5 of the Introduction and General Guidelines of the Physical and Occupational Therapy Fee Schedule states: "A physical or occupational therapist may only use CPT codes contained in the Physical and Occupational Therapy Fee Schedule for billing of treatment. A physical therapist or occupational therapist may not use codes that do not appear in the Physical and Occupational Therapy Fee Schedule."

CPT code 99072 is not contained within the Physical and Occupational Therapy Fee Schedule. Since Ground Rule 5 of the fee schedule states that a healthcare provider may not bill outside of its applicable fee schedule section, I find Respondent's defense to be valid based on the clear language of the Ground Rule.

Furthermore, with regard to Code 99072, which was recently created by the American Medical Association during the Covid pandemic, the Department of Financial Services issued Circular Letter No. 14, dated August 5, 2020, advising that insured may not be charged additional fees beyond that for the services performed, and may not be charged for the increased costs for PPE. Insureds may not be charged for PPE. The Assignee in no fault has only whatever rights to reimbursement the Assignor had and as he may not be charged for PPE, there would be no allowable charge by the biller assignee. Furthermore, the Code is not contained in the fee schedule and has not been adopted by No-Fault. It is a new code fashioned by the AMA during the Covid pandemic. It is not a separate covered expense, as it is in its very nature included in the allowance for the services rendered.

Neither in its submission nor at the hearing did Applicant offer any counter argument to Applicant's position.

I therefore sustain the defense asserted in the denials regarding the fees for PPE and this defense prevails over the Applicant's prima facie case of entitlement to No-Fault compensation.

Dates of Service April 28, 2021 to May 27, 2021

Applicant's billing overcharged at the doctor rate. Respondent made partial payment, properly making payment as per the physical therapist rate for the codes billed. At the hearing, Applicant amended its amount in dispute to conform to fee schedule and to acknowledge Respondent's partial

Date of Service December 21, 2021

With regard to date of service December 21, 2021, included in the bill for dates of service December 21, 2021 to January 11, 2022, Applicant billed for physical therapy treatment and Respondent made partial payment, asserting in its denial that "A portion of the current procedure has been included in the calculation of the daily RVU cap that applies to all providers treating the same patient on the same day for the same accident as stated in the NYS Medical Fee Schedule Ground Rules. The cap is now exhausted."

Respondent alleges that that it also reimbursed another healthcare provider for physical medicine procedures/modalities, and it, therefore, properly issued less than full reimbursement to the Applicant for services rendered on the same treatment date. Applicant now asserts its claim for an unpaid balance while the Respondent defends its partial payment as proper pursuant to the "12-unit rule" described in the various New York Worker's Compensation Fee Schedules.

Defendant has the burden to come forward with competent evidentiary proof to support its fee schedule defenses. Robert Physical Therapy PC v. State Farm Mutual Auto Ins.Co., 2006 NY Slip Op. 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If an insurer presents sufficient evidence to substantiate its fee schedule calculation, the burden shifts to the medical provider to raise a triable issue of fact regarding the insurer's fee schedule interpretation. Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc.3d 132(A) (App Term 1st Dept. 2011).

In this case, Applicant noted, and Respondent conceded, that Respondent failed to submit evidence that payment was issued to another provider. Respondent failed to submit proof of payment of a combined 12 RVUs to the Applicant and other providers for Applicant's billed date of service. As a result, Respondent has not supported its defense to payment with substantive evidence.

I therefore deny Respondent's 12-Unit Rule defense. Applicant's prima facie case of entitlement to No-Fault compensation stands. Crediting its partial payments, Applicant is awarded the amount sought which was denied based on the 12-unit rule, i.e., \$4.00.

IME Cutoff

Respondent timely denied five of the bills for dates of service May 25, 2022; June 2, 2022 to June 15, 2022; June 29, 2022; July 11, 2022; and July 27, 2022, based on an independent medical exam ("IME") conducted by Dr. Howard Kiernan on March 9, 2022 with a cutoff date of May 21, 2022.

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2002), because the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102.

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

Dr. Kiernan began his IME report with a brief review of the history of Assignor's treatment and included a recitation of the medical records he reviewed. He then conducted an orthopedic examination with the assistance of a hand-held goniometer, and cited the normal ranges of motion as per the AMA Guidelines to the Evaluation of Permanent Impairment, Fifth and Sixth Editions. At the time of the IME, Assignor complained of pain in the neck, mid back, low back, bilateral shoulders, bilateral wrist/hand, right knee, and ankle/foot. Dr. Kiernan conducted an examination of the cervical, thoracic, and lumbar spine, both shoulders, both wrists and hands, right knee, right ankle, and right foot. Examination of all areas was unremarkable, with range of motion in all planes tested indicated as normal, no tenderness on palpation, and all provocative orthopedic tests conducted were negative.

Dr. Kiernan stated that the cervical, thoracic, and lumbar spine sprains/strains were resolved; and the right and left shoulders, right and left wrist/hand, right knee, and right ankle/foot sprains/strains were also resolved. He determined that there was no need for further orthopedic treatment, including no need for physical therapy, massage therapy, injections, surgery, DME, diagnostic testing, prescription medication, or other enumerated services.

I find that Dr. Kiernan's IME report set forth an adequate factual basis and medical rationale. It established for Respondent a prima facie case in support of its IME cutoff that no further services were medically necessary. The burden shifted to Applicant to rebut the IME report.

To rebut the IME, Applicant relied on the medical records it submitted, noting specifically a follow-up exam dated May 25, 2022 indicating some decreased range of motion and positive orthopedic tests. At the hearing, Respondent argued that this one exam appeared to be SOAP notes, it did not indicate that a goniometer was used to measure range of motion, and was insufficient to rebut the IME. Applicant countered that the "follow-up" was signed by a physician and was clearly not SOAP notes.

After careful review of both parties' medical reports and evidence, I am not persuaded by Applicant's evidence. While it is not clear whether or not the May 25, 2022 "follow-up" was SOAP notes or not, I find that it did not reflect the thorough and detailed testing reflected in Dr. Kiernan's IME. And although there was decreased mobility noted, the degrees noted are not clear, do not identify what movements were tested on range of motion, and fail to state what the normal range of motion was and whether it was based on any guidelines. I find Applicant's evidence to be of less probative value than the IME itself. Applicant, having failed to submit a detailed evaluation contemporaneous to the IME or include sufficiently detailed progress notes, provided no medical evidence that would serve to rebut the IME and justify continued treatments beyond the date of a normal IME. Thus I find that Applicant has not rebutted Respondent's defense and has not sustained Applicant's burden of proof by a preponderance of credible evidence regarding the medical necessity of the services provided.

45-Day Rule

The No-Fault Regulations; Mandatory Personal Injury Protection endorsement states:

Proof of Claim; Medical, Work Loss, and Other Necessary Expenses. In the case of a claim for health service expenses, the eligible injured person or that person's assignee or representative shall submit written proof of claim to the Company, including full particulars of the nature and extent of the injuries and treatment received and contemplated, as soon as reasonably practicable but, in no event later than 45 days after the date services are rendered. The eligible injured person or that person's representative shall submit written proof of claim for work loss benefits and for other necessary expenses to the Company as soon as reasonably practicable but, in no event, later than 90 days after the work loss is incurred or the other necessary services are rendered. The foregoing time limitations for the submission of proof of claim shall apply unless the eligible injured person or that person's representative submits written proof providing clear and reasonable justification for the failure to comply with such time limitation.

Respondent denied payment of five of the bills at issue based on the fact that Applicant failed to provide proof of claim within 45 days of the date the services were rendered. Since Respondent's denials were timely in that they were issued within 30 days of receipt of the bills, it was within its right to assert as a defense Applicant's late submission of the bills.

Date of Service February 23, 2022

For date of service February 23, 2022 Applicant's proof of claim was dated March 24, 2022. Respondent's denial admitted receipt of the claim on June 1, 2022. This is clearly more than 45 days from the date the services were rendered.

Applicant provided proof to establish the bill was mailed on March 24, 2022. Applicant submitted a copy of a fax transmission sent to Respondent corresponding with the date of service and amount of the bill at issue. Also submitted by Applicant was a copy of a letter faxed to Respondent explaining that Applicant was resubmitting the bill along with a copy of proof of emailing showing that the original bill was submitted to Respondent within the scope of 45 days.

Date of Service April 25, 2022

For date of service April 25, 2022 Applicant's proof of claim was dated May 26, 2022. Respondent's denial admitted receipt of the claim on August 9, 2022. This is clearly more than 45 days from the date the services were rendered.

Applicant provided proof to establish the bill was mailed on May 26, 2022. Applicant submitted a copy of a fax transmission sent to Respondent corresponding with the date of service and amount of the bill at issue. Also submitted by Applicant was a copy of a letter faxed to Respondent explaining that Applicant was resubmitting the bill along with a copy of proof of emailing showing that the original bill was submitted to Respondent within the scope of 45 days.

Dates of Service May 4, 2022 to May 12, 2022

For dates of service May 4, 2022 to May 12, 2022 Applicant's proof of claim was dated May 26, 2022. Respondent's denial admitted receipt of the claim on August 9, 2022. This is clearly more than 45 days from the date the services were rendered.

Applicant provided proof to establish the bill was mailed on May 26, 2022. Applicant submitted a copy of a fax transmission sent to Respondent corresponding with the date of service and amount of the bill at issue. Also submitted by Applicant was a copy of a letter faxed to Respondent explaining that Applicant was resubmitting the bill along with a copy of proof of emailing showing that the original bill was submitted to Respondent within the scope of 45 days.

Date of Service June 29, 2021

For date of service June 29, 2021 Applicant's proof of claim was dated July 13, 2021. Respondent's denial admitted receipt of the claim on January 28, 2022. This is clearly more than 45 days from the date the services were rendered.

Applicant provided proof to establish the bill was mailed on July 13, 2021. Applicant submitted a copy of a fax transmission sent to Respondent corresponding with the date of service and amount of the bill at issue, stating that the date sent was July 13, 2021.

Date of Service June 29, 2022

For date of service June 29, 2022 Applicant's proof of claim was dated July 28, 2022. Respondent's denial admitted receipt of the claim on August 29, 2022. This is clearly more than 45 days from the date the services were rendered.

Applicant provided proof to establish the bill was mailed on July 28, 2022. Applicant submitted a copy of a fax transmission sent to Respondent corresponding with the date of service and amount of the bill at issue. Also submitted by Applicant was a copy of a letter faxed to Respondent explaining that Applicant was resubmitting the bill along with a copy of proof of emailing showing that the original bill was submitted to Respondent within the scope of 45 days.

Pursuant to 11 NYCRR 65-4.5(o)(1), the arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. Submission by fax is permissible pursuant to 11 NYCRR 65-3.5(k), and I note that Respondent did not submit any affidavit denying receipt within 45 days. I therefore determine in this case that with regard to four of the five bills denied based on the 45-day rule, the evidence submitted is in fact credible and I find that Applicant has submitted proof establishing that Applicant mailed those bills within the 45-day time limit. Respondent's denials based on its claim of Applicant's late submission of the bills is not sustained.

With regard to the bill for date of service June 29, 2021, I find Applicant's evidence lacking in that there is only a copy of the letter faxed to Respondent without the proof of emailing which accompanied the other bills. I therefore sustain Respondent's defense with regard to the bill for date of service June 29, 2021.

Accordingly, Applicant is awarded \$127.41 for date of service February 23, 2022; \$127.41 for date of service April 25, 2022; \$222.68 for dates of service May 4, 2022 to May 12, 2022; and \$0 for June 29, 2022 (denied on IME cutoff).

Conclusion

Accordingly, the within arbitration claim is granted to the extent of \$481.50.

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	Amount Amended	Status
	S & R Medical PC	02/01/22 - 02/17/22	\$51.92	\$30.20	Denied
	S & R Medical PC	04/14/22 - 04/14/22	\$12.98	\$7.55	Denied
	S & R Medical PC	02/23/22 - 02/23/22	\$127.41		Awarded: \$127.41
	S & R Medical PC	02/24/22 - 03/10/22	\$38.94	\$20.65	Denied
	S & R Medical PC	04/25/22 - 04/25/22	\$127.41		Awarded: \$127.41
	S & R Medical PC	04/28/21 - 05/27/21	\$549.20	\$40.56	Denied
	S & R Medical PC	05/04/22 - 05/12/22	\$274.60	\$252.88	Awarded: \$222.68
	S & R Medical PC	06/02/22 - 06/15/22	\$274.60	\$252.88	Denied
	S & R	05/25/22 -			

	Medical PC	05/25/22	\$127.41		Denied
	S & R Medical PC	06/03/21 - 06/29/21	\$105.40	\$75.50	Denied
	S & R Medical PC	07/11/22 - 07/11/22	\$68.65	\$63.22	Denied
	S & R Medical PC	06/29/21 - 06/29/21	\$280.12		Denied
	S & R Medical PC	08/10/21 - 09/07/21	\$142.40	\$75.50	Denied
	S & R Medical PC	06/29/22 - 06/29/22	\$127.41		Denied
	S & R Medical PC	07/01/21 - 08/03/21	\$105.96	\$67.95	Denied
	S & R Medical PC	09/22/21 - 09/29/21	\$66.72	\$30.20	Denied
	S & R Medical PC	10/07/21 - 11/04/21	\$77.88	\$45.30	Denied
	S & R Medical PC	11/11/21 - 12/09/21	\$64.90	\$39.06	Denied
	S & R Medical PC	12/21/21 - 01/11/22	\$42.94	\$26.65	Awarded: \$4.00
	S & R Medical PC	07/27/22 - 07/27/22	\$127.41		Denied
Total			\$2,794.26		Awarded: \$481.50

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- B. The insurer shall also compute and pay the applicant interest set forth below. 10/24/2022 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The date set forth above is the date when the American Arbitration Association received the arbitration request.

Applicant did not commence arbitration within 30 days after receipt of the denial(s). Therefore, the interest accrual date shall be the said date the American Arbitration Association received the arbitration request. The end date for the period of interest shall be the date of payment of the claim. Interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. See 11 NYCRR 65-3.9, 65-4.5(s)(3).

- C. Attorney's Fees

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

Applicant is entitled to an attorney's fee pursuant to Insurance Law §5106(a). After calculating the sum total of the first-party (No-Fault) benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, subject to the following limitations: In the event the above filing date was prior to Feb. 4, 2015, the attorney's fee is subject to a minimum of \$60.00 and a maximum of \$850.00, per 11 NYCRR 65-4.6(e). In the event the above filing date was on or after Feb. 4, 2015, the attorney's fee is subject to a maximum of \$1,360.00, per 11 NYCRR 65-4.6(d). In the event the above filing date was on or after Feb. 4, 2015 and first-party (No-Fault) benefits are awarded to more than one Applicant herein, the attorney's fee shall be calculated separately for each Applicant, each Applicant's attorney fee being subject to the \$1,360.00 maximum.

- 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 Nassau

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

11/05/2023
(Dated)

Rebecca Novak

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:
29a6503b0fdaaeb6c2742cac62055cd

Electronically Signed

Your name: Rebecca Novak
Signed on: 11/05/2023