American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Cool Med Supply, Inc. (Applicant)	AAA Case No.	17-23-1288-4956
	Applicant's File No.	M23-713088 ,
- and -	Insurer's Claim File No.	8717880490000001
	NAIC No.	22055
Geico Insurance Company (Respondent)		

ARBITRATION AWARD

I, Paul Weidenbaum, 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: IP

1. Hearing(s) held on 12/07/2023
   Declared closed by the arbitrator on 12/07/2023

   James Errera from Shapiro & Associates, P.C. participated virtually for the Applicant

   Rachel Hochhauser from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$3,841.18**, 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 arbitration arises out of the dispensation of durable medical equipment to the injured person, a 44 year old male, who was involved in a motor vehicle accident which occurred on 4/22/21.

   Whether the dispensation of the DME at issue was medically necessary in light of the peer review report of Dr. Patel dated 7/15/21?

4. Findings, Conclusions, and Basis Therefor

This arbitration arises out of the dispensation of durable medical equipment to the injured person, a 44 year old male, who was involved in a motor vehicle accident which occurred on 4/22/21. Applicant seeks reimbursement in the sum of $3,841.18. Respondent timely denied payment of the services based upon peer reviews by Dr. Patel dated 7/15/21.

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]).

The burden shifts to the insurer to prove that the services were not medically necessary. If an insurer asserts that the medical test, treatment, supply or other service was medically unnecessary, the burden is on the insurer to prove that assertion with competent evidence such as an independent medical examination, a peer review or other proof that sets forth a factual basis and a medical rationale for denying the claim. (See A.B. Medical Services, PLLC v. Geico Insurance Co., 2 Misc. 3d 26 [App Term, 2nd & 11th Jud Dists 2003]; Kings Medical Supply Inc. v. Country Wide Insurance Company, 783 N.Y.S. 2d at 448 & 452; Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc. 3d 128 [App Term, 2nd and 11th Jud Dists 2003]).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

In his peer review report of 7/15/21, Dr. Patel asserts the following in relevant part:

Standard of care for musculoskeletal pain or any joint pain is to start with physical therapy and NSAID for pharmacologic therapy. Diathermy or Extracorporeal Shockwave Therapy is a type of heat treatment using either short wave or microwave energy. It does not appear to be more effective than placebo diathermy or conventional heat therapy. "The benefits and potential risks associated with different therapeutic ultrasound methods vary widely and should be appreciated by the operator. ..Physical therapy ultrasound appears to have a low risk of harm in the hands of skilled physical therapists, but the expectation of therapeutic benefit is also low." See *Overview of therapeutic ultrasound applications and safety considerations. J Ultrasound Med 2012; 31(4): 623-634.*

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed.]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)].

Applicant submitted the rebuttal of Dr. Shapiro dated 10/13/23, in which he asserts the following:

An advantage of using therapeutic ultrasound at lower intensities is that it can be safely used in the home setting for long treatment times. As per *Home Use Ultrasound Therapy Machine for Instant Pain Relief: Major uses of ultrasound therapy in different conditions:*

Neck Pain

Chronic back pain

Myofascial pain syndrome describes recurring pain and spasms in an area of the body

Osteoarthritis is a chronic inflammatory condition that impacts the joints

Bone breaks

Painful bone cancer

Nerve Pain

Pain due to non-cancerous tumors, or abnormal growths

Tendinitis

Bursitis

Portable ultrasound treatment machines for home use are helpful in medical procedures that use very high-frequency sound waves. See *https://ultracarepro.in/blog/home-use-ultrasound-therapy-machine-for-instant-pain-relief*

Comparing the evidence submitted by each of the parties against the other, I find that I am more persuaded by the Applicant. I find that the peer review report of Dr. Patel has not set forth an adequate factual basis and medical rationale to support his determination of a lack of medical necessity for the dispensation of the durable medical equipment at issue, and Applicant has refuted this contention of the peer reviewer by a preponderance of the credible evidence. Accordingly, I find for the Applicant on the issue of medical necessity for the dispensation of the DME at issue.

That leaves for determination the question of whether the Respondent's fee schedule defense predicated upon the one-tenth rule can be sustained.

Respondent timely denied reimbursement, contending that the Applicant billed in excess of the allowable rate of reimbursement for the DME at issue, which Respondent notes are not listed in the DME fee schedule, and thus, argues Respondent, are subject to the one-tenth rule. Briefly, 12 NYCRR 442.2(b) states that the maximum permissible monthly rental charge for equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. Pursuant to the New York State Department of Health area office, the maximum monthly rental fee is calculated 1/10th of the equipment provider's acquisition cost.

Pursuant to the Policy Guidelines of the New York State Medicaid DME Fee Schedule, the monthly rental fee is calculated at 1/10th of the equipment providers acquisition cost for DME items that have not been assigned a Maximum Reimbursement Amount (MRA) in New York State Medicaid Program DME Fee Schedule. (After 7/1/2016, the rental fee shall be 1/10th of the rental cost). It is the Applicant's prima facie obligation to establish its entitlement to payment for each service for which reimbursement is sought.

It is well-settled that a health care provider establishes its prima facie entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law Section 5106(a); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128(A), 784 N.Y.S. 2d 918, 2003 N.Y. Slip Op 51701U [App. Term, 2nd and 11th Jud. Dists.]).

I find that the Applicant has met its *prima facie* burden in the instant matter in that Respondent has acknowledged receipt of the bill in question through the issuance of a denial. Respondent has not submitted competent evidentiary proof in the form of a fee audit prepared by a professional fee coding expert to establish that the fees billed by the Applicant were in excess of the allowable rate of reimbursement for the DME dispensed between 5/20/21 and 6/16/21 on a 28 day rental basis. The argument underpinning the Respondent's reduction is predicated upon the 150% of invoice cost rule. This arbitrator, in all of my prior decisions addressing this issue, has repeatedly and consistently rejected the one-sixth rule or, as here, the one-tenth rule, advanced as an argument in support of the reduction of an Applicant medical supplier's claims.

Specifically, in a decision and award issued by this arbitrator on 8/22/19 [AAA Case Number 17-18-1097-1748], this arbitrator has written the following with respect to the one-tenth rule [or one-sixth rule]: Applicant's counsel argues that 12 NYCRR 442.2(b) should control. That section provides as follows: "The maximum permissible monthly rental charges for such equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule."

This arbitrator takes judicial notice of the Ingenix HCPCS Fee Analyzer, together with a number of prior arbitration awards upholding the validity of using the Ingenix HCPCS Fee Analyzer to determine the rental charge to the general public. The burden rests with the Respondent to establish that the fees charged were excessive and/or not in accordance with the applicable fee schedule. St. Vincent Medical Services, P.C. v. GEICO Ins. Co., 29 Misc. 3d 141(A), 2010 NY Slip Op 52153(U) (App. Term 2d Dept. 2010); see also Rogy Med. P.C. v. Mercury Cas. Co., 23 Misc. 3d 132(A), 2009 NY Slip Op 50732(U) (App. Term 2d Dept. 2009).

Here, the Respondent has not demonstrated that the NYS Department of Health has determined a rental price for the DME at issue. A review of the applicable fee schedule indicates that the NYSDOH has not done so. In addition, Respondent has failed to present any authority to sustain its claim that the amount it reimbursed was the appropriate rate in the geographic location for the provider. A Respondent may interpose a defense in a timely denial that the claim exceeds the fees permitted by the Workers' Compensation Fee Schedules, but Respondent must, at a minimum, establish by competent evidentiary proof, that the charges exceeded that permitted by law. Abraham v. Country-Wide Ins. Co., 3 Misc.3d 130A, 787 N.Y.S. 2d 678, 2004 N.Y. Slip Op 50388(U), 2004 N.Y. Misc. LEXIS 544 (App. Term, 2d Dept. 2004). In support of its position, the Respondent submits a letter issued by the New York State Department of Health dated 7/3/14, which states in relevant part as follows: "The New York State Department of Health's Office of Health Insurance Programs has established a Medicaid reimbursement program policy for durable medical equipment [DME] rentals of items that have not been assigned a Maximum Reimbursement Amount [MRA]. For DME items that do not have an MRA, the rental fee is calculated at one-sixth of the equipment provider's acquisition cost. Acquisition cost is the line item cost to the DME provider from a manufacturer or wholesaler, net of any rebates, discounts, or valuable consideration, mailing, shipping, handling, insurance or sales tax. This policy is disseminated to all providers and the general public in the Medicaid Durable Medical Equipment provider Manual available for review at www.emegny.org..."

A subsequent letter from Ms. Criscione of the New York state Department of Health dated 6/8/16 states in relevant part: "Thank you for your recent correspondence seeking clarification of my letter of July 3, 2014. That correspondence…merely recited the Medicaid reimbursement policy for durable medical equipment [DME] rental of items which have not been assigned a Maximum Reimbursement Amount [MRA]. Your correspondence advises that insurance carriers are characterizing my July 3, 2014 letter as 'setting' or 'establishing' a reimbursement rate applicable to workers' compensation claims, while your reading of my letter is that it merely states the Medicaid reimbursement policy as that policy is described in the Medical Provider Manual and Policy Guidelines. Please be advised that your reading of my letter is correct. My letter of July 3, 2014 was not a determination by a Department of Health area office establishing the reimbursement rate applicable to workers' compensation claims, nor do I have any authority to do so. My letter merely states the Medicaid reimbursement policy as that policy is set forth in the Medicaid Provider Manual for Durable Medical Equipment."

Respondent's counsel also cites the 2/17/16 decision of Justice Modica of Supreme Court of Queens County, which I will discuss at length below, in support of Respondent's argument that the one-sixth rule is the proper method of reimbursement. I have reviewed the decision of Justice Modica, as well as the Fee Audit set forth in the Affidavit of Paul Ryan, C.P.C. dated 12/26/17. I also note that an arbitration decision issued by Arbitrator Donna Ferrara in AAA Case No. 412014017435, favoring the Respondent's position, stated the following in relevant part: "Mary Beth Perdikos, in her Affidavit of Merit, for applicant, states that she has been a medical biller for over 15 years, and is familiar with the New York State Medicaid Fee Schedule. She further states 'the New York State Department of Health area office has not determined a price for the services at issue. There is no code in the Medicaid Fee Schedule for code E0936. Therefore, as per 12 NYCRR 442.2(b), the fee should be the monthly rental charge to the general public.' She indicates that Ingenix has provided the fees by national percentiles of the national data base, and that 15% of the nation's providers charge higher prices than the dollar amount listed in the study, thus, the 85 percentile of fees for Code th E0936 billed by the Applicant for a CPM rental for the shoulder is $85.00 per day x 42 days=$3,570.00 less the $848.40 already paid by Respondent, leaving a balance due of $2,721.60, the amount in dispute. She also states that 'Applicant is located in New York City, which has one of the highest costs of living in America', purportedly to substantiate why she selected the percentile which she did. Applicant does not provide any other evidence as to what the general charge to the public is for this device in the New York area. As heretofore mentioned, Ms. Perdikos calculates the fee as $85.00 per day x 42 days. However, this arbitrator notes that the Ingenix analyzer shows the highest 85th percentile as $88.00 per day. No indication is given for this discrepancy." Arbitrator Ferrara notes that Mercy Acuna, in her Affidavit supporting the Respondent's position, states that she is a certified professional coder, and has reviewed the NF-3, and the copy of the invoice for the CPM. She states, as per Section 442.2(b) of the fee schedule "the maximum permissible monthly rental charge for such equipment, supplies or services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charges shall not exceed the fee amount allowed under the Medicaid fee schedule."

Ms. Acuna indicates that the Applicant billed E0936 which does not have a maximum reimbursement amount [MRA] in the Medicaid fee schedule. Ms. Acuna adds "For durable medical equipment items that do not have a MRA, the rental fee is calculated at one-sixth of the equipment provider's acquisition cost. The acquisition cost of the CPM per the invoice submitted is $3,995.00 The monthly rental of the machine would be $665.97 [this is one-sixth of $3,995.00]; the daily rental is calculated by dividing the monthly rental by thirty [30] days=$22.20, and the allowable amount is $932.40 [$22.20 x 42 days]. Respondent previously paid the sum of $848.40, and Applicant is due the additional amount of $84.00

Arbitrator Ferrara noted that Arbitrator Richard M. Horowitz, in the arbitration award in AAAMG Leasing Corp. v. Allstate Property and Casualty Insurance Company, AAA Case No. 412013034217 [April 1, 2014], which was affirmed by Master Arbitrator Victor J. Hershdorfer [July 9, 2014], stated "the relevant authority is in accord that the permissible charge for the rental of this equipment is, in the absence of any price

determined by the New York State Department of Health, the rental charge to the general public, with that amount capped by the fee allowed under the Medicaid fee schedule. Neither the New York State Department of Health not Medicaid has established a monthly rental fee for a CPM. Therefore, the maximum allowable fee is the monthly rental charged to the general public. See, e.g., Master Arbitrator award from Frank G. Godson, AAA Case no. 412007037023 [5/12/08], in which it was held that since no price has been determined by the Department of Health area office for the CPM machine, the Applicant 'presented no evidence satisfactory to the arbitrator as to the monthly charge to the general public in the New York area.', the lower arbitrator's decision that no additional reimbursement was warranted was arrived at on a reasonable basis, and no sufficient evidence was submitted disputing that conclusion."

Arbitrator Ferrara went on to state" "I agree with Arbitrator Horowitz's reasoning in the aforementioned case, and find that the Applicant herein did not submit evidence as to what the monthly rental charges to the general public in the New York area would be, nor did the Applicant establish how Ms. Perdikos determined in the Applicant's affidavit that Applicant, based in Ozone Park, New York, would be at the 85th percentile… "Moreover, Applicant did not explain how it arrived at the amount of $85.00 per day when the Ingenix Fee Analyzer which was submitted indicated that the 85th percentile was $88.00 per day. For these reasons, I find that Respondent has persuasively established that its reductions were proper and Applicant has submitted no persuasive evidence to the contrary. Therefore, no further reimbursement is warranted. Accordingly, the within arbitration is denied." See also Medical Records Retrieval v. Liberty Mutual Insurance Company, AAA Case No. 17-15-1025-3727 [Arbitrator Andrew Horn, 1/20/17]; Horizon Ortho Supply corp. v. Liberty Mutual Insurance Company, AAA Case No. 17-15-1014-0624 [Arbitrator Evelina Miller, 6/5/16]; US Tech Rehab, Inc. v. Liberty Mutual Insurance Company, AAA Case No. 99-14-1001-2311 [Master Arbitrator Victor D'Ammora, 2/1/16]; Medco Tech, Inc. v. State Farm Mutual Automobile Insurance Company, AAA Case no. 17-14-9051-5173 [Arbitrator Bonnie Link, 5/4/15]; Accelerated DME recovery, Inc. v. State Farm Mutual Automobile Insurance Company, AAA Case no. 17-14-9025-1497 [Arbitrator Michael Korshin, 7/8/15]; Advanced Recovery Equipment & Supplies v. State Far, Mutual Automobile Insurance Company, AAA Case No. 17-14-9023-4537 [Arbitrator Rhonda Barry, 10/30/15].

I find that the instant matter is governed by the provisions of 12 NYCRR Section 442.2(b), which states: The maximum permissible monthly rental charge for such equipment, supplies and services provided on a rental basis shall not exceed the lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office. The total accumulated monthly rental charge shall not exceed the fee amount allowed under the Medicaid fee schedule." Since neither the NYS Department of Health nor Medicaid has established a monthly rental fee for a CPM machine and/or a water circulating pump, I find that the maximum allowable fee is "the monthly rental charge to the general public". See AAAMG Leasing Corp. v. Progressive Insurance Company, AAA Case No. 412013017372 [Arbitrator Karen Fisher-Isaacs, 7/11/13].

Neither New York State nor Medicaid has established a rental fee schedule for this equipment. Therefore, by default, the proper fee is that charged to the general public. In 2007, 12 NYCRR Section 442.2 was enacted. It is now the applicable regulation and calculations of the rental rate based on the acquisition/invoice cost [either 150%, one-sixth of the acquisition cost] are incorrect. As a result, pursuant to 12 NYCRR Section 442.2(b) the public rate would now be applicable. The Respondent urges that the rental rate should be one-tenth of the acquisition cost of the equipment. The Respondent's position is incorrect because that rate calculation is only contained in the DME Manual Policy Guidelines. With respect to the Manual and Guidelines, 12 NYCRR Section 442.2(g) expressly states: (g) The Medicaid provider manual and the policy guidance for DME are not included as part of the DME fee schedule used in Workers' Compensation cases except to the extent such documents contain the Medicaid DME fee schedule. Indeed, the section specifically addressing DME rental in the guidelines does not contain the Medicaid DME fee schedule. The Respondent's calculation of one-tenth of the acquisition cost is from the guidelines. Respondent's position would essentially render 442.2(g) meaningless. Statutory construction is subject to the strict construction standard, and so "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted and excluded". See East Acupuncture, P.C. v. Allstate Ins. Co., 61 A.D.3d 202, 209 (2nd Dept. 2009). A court or other tribunal may not re-write a regulation. See Stearns v. Perales, 163 A.D. 2d 392 (2nd Dept. 1990); appeal denied 77 N.Y. 2d 803 (1991). Any interpretation of a regulation that renders it meaningless is invalid. See Adamides v. Chu, 134 A.D.2d 776, 778 (3rd Dept. 1987), lv denied 71 N.Y. 2d 806 (1988). Therefore, allowing language from the guidelines which are expressly excluded would render 442.2(g) meaningless and would constitute an impermissible re-writing.

Recently, the New York State Workers' Compensation Board General Counsel, David F. Wertheim, Esq., issued a correspondence dated 7/27/17.

Mr. Wertheim specifically states the following: '…Section 442.2 of 12 NYCRR requires most DME items supplied to Workers' Compensation claimants to be paid for at the New York Medicaid Fee Schedule rate, but 12 NYCRR 442.2(g) specifically prevents the application of the other provisions of the Medicaid provider manual or policy guidance.' Another letter was also issued by the New York State Department of Health on 6/8/16 by Joanne Criscione. The letter clarified that the fraction of acquisition cost calculation was being incorrectly applied by carriers. The acquisition cost does not establish the public rate and thus the Respondent's calculations are irrelevant and of no consequence. By her latter dated 6/8/16, Ms. Criscione, Senior Attorney at the Bureau of Health Insurance Programs, Division of Legal Affairs of the DOH, expressly stated that the DOH had not established a reimbursement rate applicable to Workers' Compensation claims for DME, and that any interpretation to that effect based on her 7/3/14 correspondence is incorrect. Ms. Criscione clarified that she never indicated the DOH adopted the Medicaid reimbursement policy for the rental of items that do not have a listed MRA [Maximum Reimbursement Amount]. In fact, she specifically stated that she did not set a reimbursement rate and that she lacks the authority to do so. In a case from the Bronx County Supreme Court; Global Liberty Ins. Co. v. Town Supply, Inc. a/a/o Vicente Clavijo Sergio, Index No. 28101/16; Hon. Mary Ann Briganti, decision 9/21/17.

Therein, Justice Briganti expressly noted that Judge Modica did not have the benefit of the 6/8/16 letter in which the DOH attorney expressly stated she was not determining a DME reimbursement rate. Justice Briganti thereafter upheld the public rate as the correct rate applicable to the codes herein. The Respondent must reimburse the Applicant at the rate available to the general public.

In support of its contention that the one-tenth limitation on rental fees for DME is applicable herein, the Respondent cites the decision by Justice Salvatore Modica of Supreme Court, Queens County in Accelerated DME Recovery v. State Farm Mutual Auto Ins. Co., Index No. 706132/2015, issued on February 17, 2016. In that case, Justice Modica upheld a decision by a lower Arbitrator and a Master Arbitrator finding that the appropriate rate for the rental of the DME items in dispute therein was one-sixth of the equipment provider's acquisition cost. In support of his decision to affirm the award of the lower arbitrator and the Master Arbitrator, Justice Modica placed primary reliance upon a letter dated July 3, 2014 from Joanne Criscione, a Senior Attorney at the Bureau of Health Insurance Programs, Division of Legal Affairs, Department of Health. As the content of that letter has been quoted at length above, I need not repeat it here. In his decision, Justice Modica concluded the following: "In sum, this Court cannot find that decisions of the arbitrator or master arbitrator were 'arbitrary, capricious or irrational' or without plausible basis. After reviewing the record in this case, the court concludes that there was substantial evidentiary support for the decision reached by the arbitrator. First, 12 NYCRR Section 442.2(b) required the arbitrator to consider the 'lower of the monthly rental charge to the general public or the price determined by the New York State Department of Health area office.' He also considered the opinion letter from the New York State Department of Health area office.

It is well settled that 'an agency's interpretation of its regulations must be upheld unless the determination is irrational or unreasonable. Given the gap in the regulations, it was appropriate for the New York State Department of Health to provide its interpretation of how reimbursement should be calculated in this case. That determination was neither arbitrary or irrational." However, as noted above, Ms. Criscione issued a subsequent letter on 6/8/16 in which she clarified that her letter of 7/3/14 was not a determination by the Department of Health are office establishing the reimbursement rate applicable to Workers' Compensation/No-Fault claims and that, in any event, she did not have authority to do so. As specifically noted by Ms. Criscione in her letter of 6/8/16, which was also quoted from at length above. Inasmuch as Justice Modica did not have the benefit of reviewing Ms. Criscione's subsequent letter of 6/8/16 when he issued his February 17, 2016 decision, I am not persuaded by Justice Modica's decision and decline to follow same. I note that numerous other Arbitrators and Master Arbitrators have also refused to follow Justice Modica's decision. See US Tech Rehab, Inc. v. Allstate Insurance Company, AAA Case No. 17-15-1010-9529 [Arbitrator Rhonda Barry, 11/4/16]; Accelerated DME Recovery, Inc. v. American Transit Insurance Company, AAA Case No. 17-15-1019-6987 [Arbitrator Michael Korshin, 6/12/16]; Accelerated DME Recovery, Inc. v. American Transit Insurance Company, AAA Case No. 17-15-1015-0817 [Arbitrator Burt Feilich, 3/30/16]; Accelerated DME Recovery, Inc. v. State Farm Mutual Automobile Insurance Company, AAA Case No. 17-16-1026-7994 [Arbitrator Natia Pavel, 10/15/16]; Medical Records Retrieval/D/B/A Karma Supplies v. Merchants Group, AAA Case no. 17-15-1023-1018 [Arbitrator Bryan Hiller, 10/31/16];

Advanced Recovery Equipment & Supplies, LLC v. State Farm Mutual Automobile Insurance Company, AAA Case no. 99-16-1028-1663 [Master arbitrator Robyn Weisman, 1/26/17]; Isurply v. State Farm Mutual Automobile Insurance Company, AAA Case No. 99-15-1020-9938 [Master Arbitrator Robert Trestman, 9/26/16].

In fact, Arbitrator Tali Philipson, who had previously upheld the validity of the one-sixth limitation on fees advocated by the Respondent based upon Ms. Criscione's letter of 7/3/14, reversed her position after reviewing the subsequent letter of 6/8/16. As noted by Arbitrator Philipson in Accelerated DME Recovery, Inc. v. State Farm Mutual Automobile Insurance Company, AAA Case No. 17-15-1004-2713 on 9/13/16: "Now, I have once again been presented with new evidence requiring a re-analysis of my position. On June 8, 2016 Joanne Criscione, the Senior Attorney at the New York State Department of Health and signatory to the July 3, 2014 letter was asked to clarify her position regarding DME…Thus, the current letter serves to correct my erroneous interpretation that the July 3, 2014 letter served to function as a determination by the Department of Health area office that the proper reimbursement rate was one-tenth of the acquisition cost."

In the instant case, both Applicant and Respondent have submitted numerous prior arbitration awards which favor their respective positions, and I have considered each of these. I note that 12 NYCRR Section 442.2(g) provides: "The Medicaid Provider Manual and the Policy Guidelines 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." Neither the New York State Department of Health nor Medicaid has established a rental fee schedule for the DME at issue. It is, therefore, pursuant to the provisions of 12 NYCRR Section 442.2(b), by default that the proper fee for these items should be the fee charged to the general public.

It is my determination that since the above-referenced codes are not listed in the New York DME Fee Schedule, that the appropriate rental charge for such equipment, supplies and services would be the monthly rental charge to the general public per the above-referenced regulations. I further note that my decision herein finds support in AAA Case No. 99-14-1001-2311, wherein Master Arbitrator D'Ammora reversed the award of a lower arbitrator which was based upon only one-sixth of the provider's acquisition cost. In his decision, Master Arbitrator D'Ammora found that the lower arbitrator "erred by allowing the Respondent to use a legally prohibited fee schedule to reduce the claim." Accordingly, it is my determination that the Respondent's fee schedule defense cannot be sustained, and the Applicant's claim for eimbursement in the total sum of $3,841.18 is granted.

This decision is in full disposition of all claims for reimbursement of No-Fault benefits presently pending 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 applicant is AWARDED the following:

A.

Medical		**From/To**	**Claim Amount**	**Status**
	Cool Med Supply, Inc.	**05/20/21 - 06/16/21**	**$3,841.18**	**Awarded: $3,841.18**
Total			**$3,841.18**	**Awarded: $3,841.18**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/28/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

   Interest runs from the filing date for this case, 2/28/23, until payment has been made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

   After calculating the sum total of the first party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a minimum of $60 and a maximum of $850. See 11 NYCRR

Section 65-4.6(c) and (e). However, if the benefits and interest awarded thereon are less than or equal to Respondent's written offer during the conciliation process, the attorney's fee shall be based upon the provisions of 11 NYCRR Section 65-4.6(b). For cases filed after February 4, 2015 there is no minimum fee and a maximum fee of $1,360.00.

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

12/09/2023
(Dated)

Paul Weidenbaum

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
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Electronically Signed

Your name: Paul Weidenbaum
Signed on: 12/09/2023