

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Macintosh Medical, P.C.
(Applicant)

- and -

The Standard Fire Insurance Company
(Respondent)

AAA Case No. 17-23-1291-3828

Applicant's File No. JL23-134449

Insurer's Claim File No. 272 PP IIK3394
F-003

NAIC No. 19070

ARBITRATION AWARD

I, Ritesh Mallick, 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: AD

1. Hearing(s) held on 11/13/2023
Declared closed by the arbitrator on 11/13/2023

Robert Bott, Esq. from The Licatesi Law Group, LLP participated virtually for the Applicant

Marcy Miller-Melchiona, Esq. from Law Offices of Tina Newsome-Lee participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,499.45**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amends the amount claimed to \$2,354.85 to conform with its fee schedule position.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The Assignor AD was injured in a motor vehicle accident that occurred on 5/26/21. AD was a 30-year-old male passenger at the time of accident. In dispute is the billing for 3/3/22 injections with guidance in addition to 3/14/22 injections, and 3/19/22 E/M services. Respondent has denied reimbursement of the claim asserting that the claimant

violated the conditions of the policy by failing to appear for two (2) duly scheduled independent medical examinations (hereinafter "IME"). The issue to be decided is the validity of Respondent's asserted defense.

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. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

IME NO-SHOW

The prescribed policy endorsement set forth at 11 NYCRR § 65-1.1 states that an eligible injured person shall submit to medical examination by physicians selected by, or acceptable to, the insurance carrier when, and as often as, the carrier may reasonably require. To make out its IME no-show defense an insurer must establish that it mailed the notices of the IMEs to the Assignor and that the Assignor failed to appear for the IMEs. Stephen Fogel Psychological, P.C. v Progressive Cas. Ins. Co., 35 A.D.3d 720 (2d Dep't 2006). An insurer must demonstrate that two (2) separate requests for an IME were duly mailed to the Assignor and that there was no appearance by the Assignor on either of the dates scheduled pursuant to the requests. Apollo Chiropractic Care, P.C. v. Praetorian Ins. Co., 27 Misc. 3d 139(A), 2010 NY Slip Op 50911(U) (App. Term, 1st Dep't 2010). An insurer asserting an IME no-show defense is entitled to a decision in its favor if it establishes that the Assignor failed to attend the IMEs and that the scheduling letters for the IMEs were timely sent pursuant to the standard office practice or procedure designed to ensure such items are properly addressed and mailed. Vega Chiropractic, P.C. v. Clarendon Natl. Ins. Co., 25 Misc. 3d 144(A), 2009 NY Slip Op 52536(U) (App. Term, 2d Dep't, 2nd, 11th, & 13th Jud. Dists. 2009). An IME no-show defense must be established by proof corroborating the scheduling of the IMEs and non-appearance of the Assignor at the IMEs. E.g., Careplus Med. Supply, Inc. v. AutoOne Ins. Co., 24 Misc. 3d 132(A), 2009 NY Slip Op 51372(U) (App. Term, 2d Dep't, 9th & 10th Jud. Dists. 2009).

Applicant argues that Respondent's IME no-show defense must fail because there is no proof of mailing in evidence which corresponds to Respondent's submitted IME scheduling notices, which consequently means that the subject IMEs were not properly scheduled. Respondent's evidentiary submission does not include competent proof of mailing for the IME scheduling notices germane to Respondent's denials.

Respondent's no-show defense is therefore unestablished and Applicant is due reimbursement for its claim. Notwithstanding this determination, Respondent asserts Applicant has billed above the amount it is entitled to for the services at issue.

A fee schedule defense may be raised at any time pursuant to 11 NYCRR § 65-3.8 (g) (1) (ii) for those claims arising on or after April 1, 2013. E.g., Saddle Brook Surgicenter, LLC v. All State Ins. Co., 48 Misc. 3d 336 (Civ. Ct., Bronx County 2015).

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. E.g., Robert Physical Therapy PC v. State Farm Mut. Auto Ins. Co., 13 Misc. 3d 172, 822 N.Y.S.2d 378 (Civ. Ct., Kings County 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, Cont. Med. PC v. Travelers Indem. Co., 11 Misc. 3d 145A, 819 N.Y.S.2d 847 (App. Term, 1st Dep't 2006, per curiam).

If an insurer presents sufficient evidence to substantiate its reduction of a bill pursuant to the Workers' Compensation Medical Fee Schedule, the burden shifts to the medical provider to rebut the carrier's fee schedule interpretation. See, Natural Acupuncture Health, P.C. v. Praetorian Ins. Co., 30 Misc. 3d 132A (App. Term, 1st Dep't 2011).

Both parties have submitted fee schedule evidence in support of their respective positions.

Respondent has submitted the 11/13/23 affidavit of CPC Monica Brett in support of its proposed reductions to Applicant's billing. Ms. Brett states date of service 3/3/22 is reimbursable at a rate of \$783.01 upon reduction of the reimbursement rate for CPT codes 64483, 64484, and 20553. Ms. Brett supports her proposed reductions with reference to relevant fee schedule authority in connection with this date of service. Turning to date of service 3/14/22, CPT codes 76942, J1094, and 99358 are reduced. Ms. Brett states CPT code J1094 is non-reimbursable without proof as to its utilization. Ms. Brett's position regarding CPT code 76942 is that it may be billed for only once under the circumstances presented. Ms. Brett's affidavit indicates the CPT Assistant served as the basis for her conclusion regarding the number of reimbursable units for CPT code 76942. Lastly, CPT code 99358 was apparently also performed on 3/14/23 per the date borne on the report and is non-reimbursable when billed with CPT code 99213 per Ms. Brett. Respondent's fee schedule position is thus substantiated by credible evidence. As such, the burden now shifts to the medical provider to rebut the carrier's fee schedule interpretation. Id.

Applicant has submitted the responsive affidavit of Michael Miscoe, who is listed as a CPC in Applicant's summary of the affidavit. Mr. Miscoe interprets the applicable provisions in a manner such that billing for CPT code 76942 more than once would be possible if distinct sites/muscle groups were treated. The rationale underpinning Mr. Miscoe's position is crystallized at paragraph "77" of his affidavit, and the logic therein is deemed probative as it is predicated upon reference to relevant fee schedule materials. Moreover, paragraphs "97" - "103" of the affidavit synthesizes the convincing rationale Mr. Miscoe advanced in furtherance of distinguishing the CPT Assistant provisions Ms. Brett relied upon in her analysis from the medical services rendered, rendering Ms. Brett's rationale rebutted from an applicability standpoint.

Turning to CPT code 99358, Ms. Brett concluded it was inappropriate to bill for this code on a date when another E/M service was billed for. Mr. Miscoe, at paragraph "89" of his affidavit, sets forth why CPT code 99358 may be billed for on a date where another E/M service is performed and relies upon relevant authority in doing so. Applicant is due the balance it seeks for this portion of its claim.

Applicant has not submitted any meaningful fee schedule evidence that serves to rebut Ms. Brett's analysis regarding the injectate. Respondent's fee schedule position for this component of the claim is substantiated and reimbursement will be denied.

11 NYCRR § 65-4.5 (o) (1) states that 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.

Accordingly, Applicant's claim is granted to the extent delineated.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of hearing.

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
	Macintosh				

	Medical, P.C.	03/03/22 - 03/03/22	\$934.17	\$934.17	Awarded: \$783.01
	Macintosh Medical, P.C.	03/14/22 - 03/19/22	\$1,565.28	\$1,420.68	Awarded: \$1,221.93
Total			\$2,499.45		Awarded: \$2,004.94

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/19/2023 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. Interest shall be 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 (a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." 11 NYCRR § 65-3.9 (c). The Superintendent and the New York Court of Appeals have interpreted this provision to apply regardless of whether the particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (Ct. App. 2009).

C. Attorney's Fees

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

As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR § 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee in accordance with the mandate of 11 NYCRR § 65-4.6 (d). For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360."

- 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 Putnam

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

12/13/2023
(Dated)

Ritesh Mallick

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:

4d90495e998ec7de3b9d74072c53e610

Electronically Signed

Your name: Ritesh Mallick
Signed on: 12/13/2023