

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Autumn PT, PC
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-24-1344-6007

Applicant's File No. 160512

Insurer's Claim File No. 23-57 14319

NAIC No. 21727

ARBITRATION AWARD

I, Hersh Jakubowitz, 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: EIP

1. Hearing(s) held on 09/11/2024
Declared closed by the arbitrator on 09/11/2024

Edlaine D'Arse from Law Offices of Eitan Dagan (Woodhaven) participated virtually for the Applicant

Erin Ferrone from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,425.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Claim amended to \$343.80.

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

The Parties stipulated that Applicant had met its prima facie burden of proof and that Respondent's denials were interposed in a timely fashion.

3. Summary of Issues in Dispute

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with Applicant administering an Activity Limitation Measurement on November 29, 2023, September 6, 2023 and August 9, 2023 in connection with injuries allegedly sustained by EIP in a motor vehicle accident on July 20, 2023. The payment, for the Activity Limitation Measurement was denied, based on the Applicant billing in excess of the fee schedule. The denial was timely. This decision is based upon the written submissions of counsel for the respective parties contained within the electronic case file maintained by the American Arbitration Association as well as oral argument at the hearing conducted on September 11, 2024.

4. Findings, Conclusions, and Basis Therefor

History

The dispute arises from an automobile accident on July 20, 2023, in which the EIP, a then 42-year-old male, was involved as a restrained front seat passenger and sustained numerous injuries.

EIP consulted Dr. Jordan Fersel, M.D. complaining of headaches, neck pain, knee pain, right shoulder pain, right elbow pain and back

pain. Physical exam revealed positive orthopedic tests, limited range of motion and tenderness. The EIP was referred to Applicant

and on November 29, 2023, September 6, 2023 and August 9, 2023 underwent an activity limitation measurement and training provided by the Applicant who seeks reimbursement.

Prima Facie

An Applicant establishes its prima facie entitlement to reimbursement 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 § 5106a; Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498 (2015); Mary Immaculate Hosp. v. Allstate Ins. Co., 5 A.D. 3d 742 (App. Div. 2d Dept. 2004). Once an Applicant has established its prima facie case, the burden shifts to the Respondent to establish that it timely and properly denied the claim(s), and to submit evidence to sustain the basis of its denial(s).

I find that the Applicant has submitted sufficient evidence to establish its prima facie case for the claims at issue, thus shifting the burden to the Respondent, who must produce sufficient evidence to sustain their fee schedule denial.

Denial

Respondent's denial states "*Based on your documentation, we disagree with your opinion of the proper Relative Value Unit (RVU) for this procedure. Per NY Workers' Compensation Ground Rules, the insurer shall review all submitted BR relative value units to ensure that the relativity consistency is maintained. Based on the documentation submitted, reimbursement is being made equivalent to 4 units of code 97750.*"

Analysis

Insurance Law § 5102(a)(1) defines "basic economic loss" as including "all necessary expenses incurred for...professional health services" subject to the limitations of Insurance Law § 5108. Insurance Law § 5108 limits the amounts to be charged by providers of health services, and states that charges for services specified in Insurance Law § 5102(a)(1) "shall not exceed the charges permissible under the schedules prepared and established by the chairman for the workers' compensation board...except where the insurer...determines that unusual procedures or unique circumstances justify the excess charge." 11 NYCRR § 65-3.16(a) provides that "[p]ayment for medical expenses shall be in accordance with fee schedules promulgated under section 5108 of the Insurance Law and contained in Part 68 of this Title (Regulation 83)." 11 NYCRR § 68.1 provides that the "existing fee schedules prepared and established by the chairman of the Workers' Compensation Board...are hereby adopted

by the Superintendent of Insurance with appropriate modifications so as to adapt such schedules for use pursuant to section 5108 of the Insurance Law."

The Respondent has the burden of coming 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 26240 (Civil Ct. Kings Co. 2006). If the Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were billed in excess of the appropriate fee schedules, the defense of noncompliance with the fee schedule cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A (App. Term 1st Dept. per curiam, 2006).

Respondent's Fee Coder

Respondent submitted an affidavit by Darlene L. Buttner, Certified Professional Coder, wherein she indicated that The procedure billed was 97039 (Unlisted modality (specify type and time if constant attendance)). In the New York State Worker's Compensation Fee Schedule CPT procedure code 97039 is listed among the codes subject to Physical & Occupational Therapy Physical Medicine Ground Rule 3 in the Physical & Occupational Therapy Fee Schedule, which limits the maximum allowable reimbursement to 12 relative value units per patient per day. The provider submitted documentation indicating they are comparing 97039 to 97750- physical performance testing, each 15 minutes at RVU=5.41; 97545-work hardening conditioning initial 4 hours), at RVU=28.00 and 97800-functional capacity evaluation, RVU="refer to Physical Medicine Ground Rule 14- Reg IV= \$475.00. Progressive disagrees with the provider comparison of 97545 (Work Hardening/Conditioning). Progressive disagrees with the provider comparison of CPT 97800 (Functional Capacity Evaluation)... Based on the information submitted by the provider, New York State Fee Schedule and CPT Assistant, the proper code to use for the procedure performed would be procedure code 97750... Progressive verified physical performance testing was performed. Per the New York Workers Compensation Fee Schedule effective 10/1/20 procedure code 97750 has an RYU of 0.00, therefore no payment would be allowed.

Applicant did not proffer an affidavit by a certified professional coder.

Analysis

In comparing the codes, Activity Limitation Measurement is most similar to a Physical Performance Test . But there are differences between the Activity Limitation Measurement and Physical Performance Test. Ms. Buttner does not explain why these differences are de minimis. I find that Activity Limitation Measurement has a wider purpose and application than a Physical Performance Test. In addition, reading of CPT 97039 states "Unlisted modality (specify type and time if constant attendance)". Pursuant to the definition of modality "*A **modality** refers to a **specific method or approach** used for **treatment or intervention**.*

- *It encompasses various techniques, tools, or strategies employed by healthcare professionals to address specific health conditions.*
- *Examples of modalities include **physical modalities** (such as heat therapy, cold therapy, and electrical stimulation) and **imaging modalities** (such as X-rays, MRI, and ultrasound).*
- *Modalities are often **non-specific** to a particular condition and can be applied across different patient cases. I find that pursuant to said definition, the Activity Limitation Measurement is a modality.*

12 Unit Rule

I agree with Ms. Buttner's analysis of the "12 Unit Rule" of the Workers Compensation Fee Schedule which limits payment for certain physical medicine services to a total of twelve units per day. Ground Rule 3 of the Physical Medicine Section of the Workers Compensation Physical and Occupational Therapy Fee Schedule provides, in pertinent part, that: Multiple Physical Medicine Procedures and Modalities When multiple physical therapy or occupational therapy procedures and/or modalities are performed on the same day, reimbursement is limited to 12.0 RVUs per patient per accident or illness or the amount billed, whichever is less.. The services were provided in Region IV, so the maximum amount of daily reimbursement to a physical therapist for services covered by the 12 unit rule is limited to \$114.60 [9.55 x 12 RVU]. Given that CPT Code

97039 is subject to the 12 Unit Rule, the maximum fee allowable is \$114.60. Applicant's claim for compensation for activity limitation measurement is awarded in the amount of \$114.60 per session, a total for 3 sessions which equals to \$343.80.

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
	Autumn PT, PC	08/09/23 - 11/29/23	\$1,425.00	\$343.80	Awarded: \$343.80
Total			\$1,425.00		Awarded: \$343.80

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/18/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Based on the submission of a timely denial, interest shall be paid from the above date, until the date that payment is made at a rate of 2% per month.

C. Attorney's Fees

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

As this matter was filed 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 fee, in accordance with newly promulgated 11 NYCRR 65-4(d). After calculating the sum total of the first party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of the sum total, subject to no minimum and a maximum 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, Hersh Jakubowitz, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/17/2024
(Dated)

Hersh Jakubowitz

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:
08a543755e8c5e0a03fceff3e604604c

Electronically Signed

Your name: Hersh Jakubowitz
Signed on: 09/17/2024