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In the Matter of the Arbitration between:

Forest Park Acupuncture PC / **Applicant**  
**1**  
(Applicant)

- and -

**Progressive Insurance Company**  
(Respondent)

AAA Case No. 412010004102  
AAA Assessment No. 17 991 04533 10  
Applicant's File No.  
Insurer's Claim File No. 09341971602

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### ARBITRATION AWARD

I, Maria G. Schuchmann, Esq., 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: Claimant

**1. Hearing(s) held on**

☒ 07/28/10

and declared closed by the arbitrator on 7/28/10.

Steven Czuchman, Esq participated in person for the Applicant.

Jennifer Zeidner, Esq participated in person for the Respondent.

**2. The amount claimed in the Arbitration Request, \$3,709.20, was AMENDED and permitted by the arbitrator at the oral hearing. (Amendments, if any, set forth below).**

Applicant has withdrawn the claim for dates of service up to July 2, 2009 with prejudice. The new amount at issue is \$2,965.45.

STIPULATIONS were not made by the parties regarding the issues to be determined.

**3. Summary of Issues in Dispute**

Whether acupuncture treatments from July 2, 2009 through September 11, 2009 performed on Claimant as a result of injuries allegedly sustained in a motor vehicle accident were medically necessary.

**4. Findings, Conclusions, and Basis Therefor**

Claimant was involved in a motor vehicle accident on May 15, 2009. On that same day she saw Kaihong Qiu, an acupuncturist complaining of pain in her neck, low back and right shoulder. That exam was positive for decreased cervical and lumbar spine. There was no exam, however, of her right shoulder.

Claimant then began treatment for her neck, back and, according to the SOAP notes, her right shoulder.

Respondent has denied payment for all treatment after July 2, 2009 based upon the results of an independent medical exam performed by Dr. Goldin that found that Claimant did not require any further treatment.

However, that report notes that Dr. Goldin did note tenderness to palpation of her cervical and thoracolumbar spine.

In addition, Applicant has submitted a follow-up report by Kaihong Qiu that indicated that Claimant was still complaining of pain in her neck, low back and right shoulder and was still exhibiting pain on flexion of her neck and back.

After a review of all of the evidence, I find that based upon both the IME and her own medical records Claimant was still symptomatic and in need of treatment. Therefore, the services at issue were medically necessary.

Applicant then billed Respondent \$61.43 for the initial office visit and thereafter for follow-up exams..

Applicant, thereafter, billed for services at the rate of \$89.99 - the rates applicable to a medical doctor performing the same services.

Respondent has paid \$61.56 – the fee schedule rate applicable to chiropractors performing acupuncture.

The issue, then, is the proper amounts that should be paid for the services at issue.

Applicant maintains that the amounts billed are reasonable and that, because there is no fee schedule applicable to licensed acupuncturists, the fees charged were reasonable and should be paid as billed.

Generally speaking, a medical provider may not bill or recover benefits for No-Fault based treatment in excess of the prevailing Workers' Compensation Fee Schedule for the services billed. In this case, however, there is no fee schedule is existence applicable to licensed acupuncturists. The question arises, therefore, what the proper charge should be for an acupuncturist providing acupuncture treatment.

This matter was handled very recently in a case called Power Acupuncture PC v State Farm Mut. Auto Ins. Co., 2006 Slip Op 50393(U) (Civil Court, Kings County) (March 20, 2006). In that case, Judge Battaglia noted the fact that there is, in fact, acupuncture services are compensated a different rate for a licensed medical doctor than for a licensed chiropractor.

Most importantly, however, “there is no coverage under the Workers’ Compensation schedules for acupuncture services rendered by a licensed acupuncturist.

Judge Battaglia then goes on to reason that, because the Superintendent of Insurance has not adopted a fee schedule applicable to licensed acupuncturists “the permissible charge for such services shall be the prevailing fee in the geographic area of the provider subject to review by the insurer for consistency with charges permissible for similar procedures under schedules already adopted or established by the Superintendent’ (11NYCRR 68.5[b]).” Power Acupuncture PC, supra.

Judge Battaglia then went on to set forth the burden of proof of the parties. While he acknowledged that the prevailing rate is subject to review by the insurer, he put the burden on the insurer to “at least, [come] forward with evidence that the provider’s fee is not ‘consisten[t] with charges permissible for similar procedures” Power Acupuncture PC, supra.

In essence, then, the acupuncturist is permitted to charge the prevailing rate in the geographical area, but it must be consistent with existing fee schedules for similar procedures.

In Ava Acupuncture P.C. v Elco Admin Services, (Civil Ct., Kings Co.) NYLJ, March 3, 2006, the court held that “the burden of coming forward with evidence of ‘the prevailing fee in the geographic location of the provider’ (see *Id.*) is on the provider ...”

In this case, Respondent has alleged that the fees charged are in excess of those prevailing rates. The burden then shifts to the provider to show otherwise.

However, no such evidence has been provided. Therefore, I am left to find that the proper prevailing rate is comparable to the chiropractic rate already paid by Respondent.

The portion of the claim for reimbursement of charges for the initial exam and follow-up exam is denied. Applicant also billed for a treatment for the same day and, therefore, is only entitled to reimbursement for those charges and, finally, an acupuncturist cannot properly bill for an initial office visit under the medical fee schedule. Only licensed medical doctors may bill under those codes.

Accordingly, Applicant is awarded \$1,969.92 plus applicable interest computed from January 27, 2010. Applicant is also awarded statutory attorneys’ fees on the amount awarded herein plus interest as well as return of the applicable filing fee.

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.

Accordingly, the applicant is AWARDED the following:

A.

Benefits	Amount Claimed	Amount Awarded
Health Service Benefits	2,965.45	1,969.92

<b>Totals:</b>	<b>\$2,965.45</b>	<b>\$1,969.92</b>
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- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 01/27/2010, which is a relevant date only to the extent set forth below.)

Applicant is awarded \$1,969.92 plus applicable interest computed from January 27, 2010.

- C. Attorney's Fees

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

Applicant is also awarded statutory attorneys' fees on the amount awarded herein plus interest.

- 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 New York

SS :

County of Suffolk.

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

7/30/10  
(Dated)



(Maria G. Schuchmann, Esq.)

#### 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.*