

**DISTRICT COURT OF NASSAU COUNTY
FIRST DISTRICT: CIVIL PART 4**

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CABRERA ANESTHESIA SERVICES, PC
a/a/o CECILIA MORGAN,

Plaintiff

-against-

DECISION and ORDER

Index No. 042985/11 1

Present:
Hon. Andrea Phoenix

STATE FARM FIRE and CASUALTY COMPANY,

Defendant.

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Papers Considered:

Notice of motion with affirmation, affidavits and exhibits.....1
Affirmation in opposition with exhibits.....2
Defendant's affirmation in reply.....3

Defendant's motion for summary judgment, *inter alia*, pursuant to CPLR 3212, is denied, as there are genuine triable issues of fact that require a plenary trial.

This is an action to recover assigned first-party no-fault benefits. A review of the summons and complaint in the court file reveals that there is one (1) no-fault claim in the total amount of \$1,614.70 of which \$269.13 was paid, leaving \$1,345.57. Defendant's denial of no-fault claim herein (*see* Exhibit "D" to the attached motion of the defendant) is based upon "[u]nless otherwise noted, all reductions are in accordance with the medical fee schedule as per the rules and regulations authorized by the State of New York, Department of Insurance, 28 Amendment to Regulation No. 83".

In the instant motion, defendant established through evidentiary material its *prima facie* entitlement to summary judgment by evidencing timely denial of the herein no-fault claim through the affidavits of Aimee Connett, defendant's no-fault claim representative, and Melvin Asencio, defendant's claim support services supervisor, and based upon the ground that the fees charged by the plaintiff exceeded the maximum allowance under the New York State Worker's Compensation fee schedule (*see AVA Acupuncture, P.C. v. Geico General Ins. Co.*, 23 Misc 3d 140 [A] [App Term, 2nd, 11th and 13th Jud Dists

2009]; *Sung Bok Lee, L.Ac v. Metropolitan Property and Casualty Ins. Co.*, 30 Misc 3d 135[A] [App Term, 2nd, 11th and 13th Jud Dists 2011]).

Further, “[f]or the reasons stated in *Great Wall Acupuncture v. Geico Gen. Ins. Co.* (16 Misc 3d 23 [App Term, 2d and 11th Jud Dists 2007]; *see also Great Wall Acupuncture, P.C. v. Geico Ins. Co.*, 26 Misc 3d 23 [App Term, 2d, 11th and 13th Jud Dists 2009]), it was proper for defendant to use the Worker’s Compensation Fee Schedule for acupuncture services performed by chiropractors to determine the amount which plaintiff was entitled to receive for the acupuncture services rendered by its licensed acupuncturist” (*Olga Bard Acupuncture, P.C. v. Geico Ins. Co.*, 29 Misc 3d 132[A] [App Term, 2nd, 11th and 13th Jud Dists 2010]). In this case the defendant has adjusted the no-fault claim herein to reflect the NYS Workers’ Compensation Fee Schedule as in the *Olga Bard* case. The defendant buttresses the adjustment in the no-fault claim/bill through the affidavit of Mercy Acuna, CPC (certified professional coder) of Signet Claim Solution, LLC. Ms. Acuna avers that “NYS Form N-F 3 from Cabrera Anesthesia Services PC, PO Box 3757 Lake Success, NY 11042 for date of service 3/30/2011” contains CPT code 20553 which has a “BR” (By Report) as a relative value unit (RVU) similar to CPT code 20552. “Pay using national RVU for CPT code 20553 which is $1.82 \times \$229.04 = \416.85 OR. Pay by using the RVU of CPT code 20552 for the 1st two muscles and each two additional muscles (injections) using 50% of the RVU for CPT code 20552. Total # of muscles injected = 10. First two muscles (injections) paid with the RVU for CPT code 20552 = $.47 \times \$229.04 = \107.65 . Additional 8 muscles (injections) @50% of the RVU for 20552 for each two additional muscles (injections) = $4 \times .235$ (50% of .47) = $0.94 \times \$229.04 = \215.30 . Total payment for CPT code 20553 = $\$322.95$ (previously paid in the amount of $\$269.13$); **provider is due the additional amount of \$53.82**”.¹ Therefore, the defendant has met its burden and the burden shifts to the plaintiff to come forward with a genuine triable issue of fact (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

In opposition, plaintiff submits the affirmation of Pedro Cabrera, MD, the treating physician in this case, who avers that CPT code 20553 was the proper billing code not CPT code 20552 as Ms. Acuna avers in her affidavit in support of defendant’s instant motion. Dr. Cabrera also avers that “[w]hen I administer trigger point injections into a patient’s muscle groups, I consider the total amount of muscle groups I am injecting in that person that day. If I inject 3 or more muscle groups in that person on that day, as is the case in this particular matter, then I utilize the code 20553. For each muscle group I inject, as long as I am injecting 3 or more muscle groups of that individual that day, I

¹ Defendant’s certified professional coder admits that the reimbursement of $\$269.13$ to plaintiff on the no-fault claim/bill herein is incorrect and should be $\$322.95$.

properly bill each muscle group I inject at code 20553. All of the muscle groups to which trigger point injections are administered receive multiple injections on that day at that time over my course of that days' treatment. In the case of, Ms. Morgan, I personally administered the trigger point injections. Upon my review of my own notes, I can attest that Ms. Morgan received 3 or more injections to 3 or more muscle groups that day, which is why I utilized CPT code 20553". In other words, Dr. Cabrera contradicts the affidavit of Ms. Acuna in the instant motion. These affidavits present conflicting facts that cannot be resolved on the papers herein. The conflicting affidavits constitute competent evidence (*see Clearwater Realty Company v. Hernandez*, 256 AD2d 100 [1st Dept 1998]). The plaintiff has raised a genuine triable issue of fact.

Accordingly, defendant's motion is denied.

This constitutes the Decision and Order of the court.


ANDREA PHOENIX
J.D.C.

Dated: Hempstead, New York
July 27, 2012

cc Friedman, Harfenist, Kraut & Perlstein, LLP
DeMartini & Yi, LLP