



**STATE OF NEW YORK
INSURANCE DEPARTMENT**
25 BEAVER STREET
NEW YORK, NEW YORK 10004

George E. Pataki
Governor

Gregory V. Serio
Superintendent

The Office of General Counsel issued the following opinion on June 16, 2004, representing the position of the New York State Insurance Department.

Re: No-Fault Fees for Durable Medical Equipment

This is in response to your request for an opinion from the Office of General Counsel as to the maximum amount that a provider of Durable Medical Equipment can charge under No-Fault.

QUESTION PRESENTED

When a provider of Durable Medical Equipment and supplies ("DME") under "No-Fault" bills for the maximum permissible charge of 150% of the documented cost of the equipment, pursuant to N.Y. Comp. Codes R. & Regs. § 68 (Appendix 17-C, Part E (b)(1)) (Regulation 83), are there any limitations on the "documented cost" of the equipment?

CONCLUSION

Yes. Pursuant to N.Y. Comp. Codes R. & Regs. § 68 (Appendix 17-C, Part E (b)(1)) (Regulation 83), the "documented cost" of Durable Medical Equipment is limited to costs incurred by a provider in a bona fide arms-length transaction.

FACTS PRESENTED

None.

ANALYSIS

N.Y. Ins. Law § 5102(a)(1) mandates that "basic economic loss", which means up to \$50,000 in reimbursement for No-Fault expenses, subject to the fee schedule limitations of Section 5108, shall include: "(1) All necessary expenses incurred for: (l) medical, hospital...surgical, nursing, dental, ambulance, x-ray, prescription drug and prosthetic services;". Included under the category of prosthetic services is durable medical equipment and supplies (DME) provided by a licensed health provider or medical equipment supplier.

The Legislature established No-Fault as a social reparations system for injuries resulting from motor vehicle accidents, with a goal of providing prompt and fair payment for those injuries, up to an amount of \$50,000 in benefits. The Legislature recognized that in order for an injured person to be treated without any single element taking a disproportionate share out of the \$50,000 in benefits, limitations would have to be placed on fees charged by both health providers and attorneys (pursuant to N.Y. Ins. Law § 5106(a)) (McKinney 2000).

While Section 5102 defines what services are reimbursable under No-Fault, N.Y. Ins. Law § 5108 (McKinney 2000) places limitations on the fees that may be charged for these services. See Goldberg v. Corcoran 549 N.Y.S. 2d 503 (App. Div. 2d Dept) (1989), appeal dismissed 555 N.Y.S. 2d 699 (N.Y. 1990) upholding the constitutionality of § 5108, the court stated that "the purpose of the statute and the fee schedules promulgated thereunder is to significantly reduce the amount paid by insurers for medical services and thereby help contain the no-fault premium". Section 5108(a) mandates that No-Fault health service fees shall not exceed the amounts permissible under the Workers' Compensation fee schedule. Pursuant to Section 5108(b), when the Workers' Compensation Board has not established a fee schedule for a particular health service, the Superintendent of Insurance is authorized to do so. That section states that:

(b) The superintendent, after consulting with the chairman of the workers' compensation board and the commissioner of health, shall promulgate rules and regulations implementing and coordinating the provisions of this article and the workers' compensation law with respect to charges for the professional health services specified in paragraph one of subsection (a) of section five thousand one hundred two of this article, including the establishment of schedules for all such services for which schedules have not been prepared and established by the chairman of the workers' compensation board.

In the case of DME, the Department promulgated, N.Y. Code R. & Reg. § 68 (Appendix 17-C, Part E (b)(1)), which states that:

For medical equipment and supplies (e.g. TENs units, soft cervical collars) provided by physician or medical equipment supplier, the maximum permissible charge is 150 percent of the documented cost of the equipment to the provider.

When the Superintendent does not establish a fee schedule, health services fees are governed by Section 68.5(b) of Regulation 83. N.Y. Codes R. & Regs. § 68.5(b) states that:

(b) if the superintendent has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service shall be the prevailing fee in the geographic location 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.

In implementing Section 68.5(b), the Department intended that fees must be reasonable in the absence of schedules by limiting them to the prevailing fee in the geographic area but further subject to limitations on fees

established under comparable procedures.

Similarly, pursuant to Section 68 of Reg. 83 (Appendix 17-C, Part E (b)(1)), "documented cost" must be limited to costs incurred by a provider in a bona fide arms length transaction. To hold otherwise would turn the No-Fault reparations system on its head if the provision for DME permitted reimbursement for 150% of **any** documented cost that was the result of an improper or collusive arrangement.

Moreover, an injured person, with a finite amount of No-Fault benefits available, having assigned his rights to a provider in good faith, would have DME items of inflated fees constituting a disproportionate share of benefits, be deducted from the amount of the person's No-Fault benefits, resulting in less benefits available for other necessary health related services that are based upon reasonable fees.

Therefore, the documented costs for DME must be limited to costs incurred by a provider in a bona fide arms-length transaction, as described above, to effectuate the public policy established by the legislative enactment of the New York No-Fault reparations system.

For further information you may contact Supervising Attorney Lawrence M. Fuchsberg at the New York City Office.