

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ortho Pro Services, Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-16-1029-5452

Applicant's File No.

Insurer's Claim File No. 009999050101165

NAIC No.

ARBITRATION AWARD

I, Meryem Toksoy, 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: Assignor (LR)

1. Hearing(s) held on 02/21/2017
Declared closed by the arbitrator on 02/21/2017

Helen Mann Ruzhy, Esq. from Israel, Israel & Purdy, LLP participated in person for the Applicant

Ms. Christa Varone from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 806.64**, was NOT AMENDED at the oral hearing.
Stipulations WERE NOT made by the parties regarding the issues to be determined.
3. Summary of Issues in Dispute

In dispute is a claim by Applicant, Ortho Pro Services, Inc., as the assignee of a 33-year-old female who was injured as a pedestrian in a motor vehicle accident on June 3, 2015.

The claim, totaling **\$806.46**, is for a **lumbosacral orthosis (LSO)** that was provided to the assignor on October 5, 2015 pursuant to a prescription issued by Ali Guy, MD.

With regard to this bill, Respondent asserts the **defense of lack of medical necessity** and relies upon the **peer review** of Jay Weiss, MD to sustain its position.

In opposition, Applicant has submitted a rebuttal affirmation by Dr. Guy.

During the hearing, no arguments were presented with respect to the fee schedule, Applicant's prima facie case, or the timeliness and/or propriety of Respondent's denial. The parties agreed that the only issue for me to decide is whether the LSO was medically necessary.

4. Findings, Conclusions, and Basis Therefor

The case was decided on 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.

OVERVIEW OF THE ASSIGNOR'S TREATMENT HISTORY:

The assignor is identified as a 33-year-old female who was injured as a pedestrian in a motor vehicle accident that occurred on June 3, 2015. The Police Accident Report indicates that the assignor was struck while attempting to cross the street.

The following is an overview of her treatment history.

NOTE: Some of the services were provided in London, England (the assignor's place of residence).

06-03-15	Date of Accident
06-03-15	<p>Transported by ambulance to New York Presbyterian/Weill Cornell Medical Center. According to Emergency Room (ER) records:</p> <p>There was no loss of consciousness;</p> <p>The assignor was documented as having pain in her right knee and right hand;</p> <p>X-rays of the right knee and right hand were taken and the results were negative for fracture;</p>

	<p>The assignor was treated, consulted (she was told to apply ice and take ibuprofen as needed), and discharged.</p>
06-05-15	<p>Note by Michael Errico, MD.</p> <p>The note recounts the results from the x-rays that were taken at the hospital. It states that the assignor has started to develop pain in her neck, right leg, and right rib area.</p> <p>It sets forth physical examination findings, and x-ray results for the cervical spine (straightening of the curvature) and right side of the ribs (negative for fracture).</p> <p>The diagnostic impression is listed as: cervical sprain, contusion of the ribs, and contusion of the knee.</p> <p>There is no mention of the lumbar spine.</p>
07-13-15	<p>Referral by Dr. Velgia Kugananthan for orthopaedic consultation following telephone conversation with the assignor. It states:</p> <p><i>Telephone encounter with pt.</i></p> <p><i>[B]ack, knee, left elbow and left foot pain since RTA 6/52 ago.</i></p> <p><i>[L]eant on L elbow 2 days ago and now more painful - has spoken to a physiotherapist and was advised to see orthopaedics for this.</i></p>
07-21-15	<p>Report by orthopaedic surgeon, Damian Fahy, MB, BS, FRCS. The following is an excerpt:</p> <p><i>[After the accident, the assignor] began to develop neck pain and generalized spinal discomfort, which built over the first two weeks. Initially she had a concussion with headache and some short-term memory loss. She also complains of pain in her right hand. With regard to the spinal pain, this is felt in the neck radiating to the mid scapular and posterior scapular area. She also has some low back discomfort. It is constant but variable in intensity scoring between 4 and 5/10. It does not radiate truly into the arms or legs and there is no true neurological</i></p>

	<p><i>disturbance. She has been having physiotherapy but feels that overall she is not improving.</i></p> <p><i>I note that she has been reviewed by an upper limb surgeon with regard to her shoulders and her right hand. The results of the investigations are awaited. She is currently taking no analgesia. She works in marketing in a sedentary role. She is currently swimming and practicing Pilates. She would normally run and attend gym classes. She is unable to do that at the moment due to pain.</i></p> <p><i>On examination, she has normal spinal contour. She was generally tender to palpation throughout the spine with no specific bony tenderness. There was no deformity or bruising. Cervical and lumbar spine had a full range of movement. She could flex to touch the floor. Neurological examination of the upper limbs revealed full power, normal sensation and reflexes, similarly in the lower limbs. Her shoulders moved through a full pain free range of movement. She had negative impingement signs. The rotator cuffs were intact clinically. She was tender over the hypothenar eminence of her right hand but there was no deformity.</i></p> <p><i>Reviewing the MRI scan of her cervical spine, the report was not available to me, but the scan of the neck itself appears normal. I think she has undergone a whiplash mechanism injury. It is still relatively early days and I am sure that persisting with physiotherapy with a combination of manual and rehabilitation exercises is appropriate. She needs to work on the paraspinal musculature and also on the dynamic stabilisers of her shoulders.</i></p> <p><i>Mr. Singh will review her with regard to her upper limb issues. I do not believe there is any indication for invasive treatment with regard to her spine.</i></p>
08-19-15	Referral by Dr. Haseeb Khaliq for neurological consultation due to the assignor's complaint of headaches.
08-19-15	Referral by Dr. Haseeb Khaliq for a TMJ consultation due to the assignor's complaint of pain in her jaw.
08-28-15	

Report for examination conducted by orthopaedic surgeon, Ian Holloway, MBBS, FRCS. It states:

She has post concussion syndrome, with short term memory loss, headaches and neck pain, for which she is having physiotherapy. She has seen Mr. Ravi Singh for shoulder and hand. The physiotherapists are working on her knee. An MRI scan after the accident has been performed and I have seen the report today. This shows no significant abnormality in the right knee. She has also had some pain in the left foot following injury, but this has been OK for the last two weeks. The knee pain is anterior and is worse on squatting. Stairs and walking cause throbbing. It can wake her at night. She gets no clicking in the knee and no giving way. The hip can click and feels uncomfortable. She has no difficulty reaching her toes.

She is otherwise well, takes no medications and is allergic to a flu medicine from the States. She is a non-smoker, drinks two units of alcohol a week and works in marketing.

*On examination, she walks with a **normal gait**. Trendelenburgh Test is negative. She has full range of painfree movement of the right hip and of the knee. There is no joint line tenderness of the knee. There is an anterior pre-patella scar in keeping with previous abrasion. McMurray's test is negative and collateral and cruciate ligaments are intact.*

The left foot examination is normal with no swelling, no tenderness and a full range of movement.

X-ray of the left foot, performed today, shows no abnormality. We did not x-ray the pelvis because she is trying for a baby.

I think her symptoms are related to residual bruising and will settle with time. I have given her advice regarding on-going rehabilitation. She is currently undergoing physiotherapy twice a week and massage once a week. I would recommend that she continue with this and will see her again in two months to review her progress.

The report makes no mention of the lumbar spine.

09-22-15	<p>Referral for physical therapy by orthopaedic surgeon, Ian Holloway, MBBS, FRCS.</p> <p>The report states that the assignor sustained soft tissue injuries as a result of the accident, principally to the front of the right knee, shoulder, and hand. It advises that on examination, the assignor did not have any limitation of movement in the hip or knee. It ends with the recommendation for physical therapy.</p> <p>There is nothing in the report with regard to the lumbar spine.</p>
09-24-15	Referral issued by neurologist, Dr. O. C. Cockerell, for physical therapy.
09-25-15	Referral for physical therapy by orthopaedic surgeon, Damian Fahy, MB, BS, FRCS. [Dr. Fahy is the provider who examined the assignor on 07-21-15, see above].
10-05-15	Report for initial evaluation by Ali Guy, MD (of Gramercy Park Physical Medicine & Rehabilitation, PC).
10-05-15	Prescription issued for LSO by Ali Guy, MD.
10-05-15	Report for neuropsychological evaluation by Kim Busichio, PhD.
10-06-15	Morphometry report, lists measurements of the assignor's brain.
10-06-15	Report for MRI of the right knee (ordered by Ali Guy, MD)
10-06-15	Report for MRI of the cervical spine (ordered by Ali Guy, MD)
10-06-15 and 10-07-15	SOAP notes for physical therapy treatment provided at Gramercy Park Physical Medicine & Rehabilitation, PC
10-07-15	Report for initial examination by Kenneth McCulloch, MD (of New York Sports & Joints Orthopaedic Specialists).

	<p>Dr. McCulloch provides a brief summary of the accident, and advises that the assignor sustained injuries to her neck, shoulders, right hip, right knee, right hand, left foot and left elbow.</p> <p>He notes that the assignor's complaint of neck pain is being evaluated by Dr. Guy, and he sets forth physical examination findings for the shoulders, right hip, right knee, left elbow, and right hand.</p> <p>There is nothing within this document about the lumbar spine.</p>
10-08-15	Report for neurological evaluation by Nicky Bhatia, MD which relates to the assignor's complaint of headaches and issues with memory.
10-10-15	Progress report and letter of medical necessity for EMG/NCV testing of the upper extremities, by Ali Guy, MD
10-10-15	Report for EMG/NCV testing of the upper extremities
10-10-15	Report for MRI of the lumbar spine (ordered by Ali Guy, MD). The testing revealed disc bulging at L2-3, L3-4, and L4-5.
10-10-15	Report for MRI of the right shoulder (ordered by Ali Guy, MD).
10-18-15	Report by Inna Yakubov, DDS (of TMJ & Cervical Pain Management). The report memorializes an evaluation of the assignor's temporomandibular joints and cervical muscles.

LEGAL FRAMEWORK:

Under New York's Comprehensive Motor Vehicle Insurance Reparation Act (the "No-Fault Law"), New York Ins. Law §5101 et seq., an insurance carrier is obligated to reimburse an injured party (or his or her assignee) for all "reasonable and necessary expenses" and "medical expenses" arising from the use or operation of the insured vehicle.

A presumption of medical necessity attaches to an applicant's properly-submitted claim form and upon its receipt, the burden shifts to the respondent to demonstrate lack of medical necessity. Amaze Med. Supply v.

Eagle Ins. Co., 2 Misc.3d 128(A), 2003 NY Slip Op 51701(U)(App Term, 2nd Dept, 2nd and 11th Jud Dists., 2003).

To succeed on this defense, the insurer is required to "set forth with sufficient particularity the factual basis and medical rationale underlying that determination." Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 2006 NY Slip Op 51185(U)(App Term, 2nd Dept, 9th and 10th Jud Dists., 2006).

Further, defending a denial of first-party benefits on the ground that the billed-for services were not medically necessary requires the insurer to establish that the services were "inconsistent with generally accepted medical/professional practice[s]." CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608 at 609, 777 N.Y.S.2d 241 Civ. Ct. Kings Co. 2004). "Generally accepted practice" is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling. Id. at 616. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden of proving that the services were not 'medically necessary.' Id. at 609.

If the insurer can establish that the services were not medically necessary, "the burden shifts to the plaintiff which must then present its own evidence of medical necessity." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 5187(U) (App Term, 2nd Dept, 2nd & 11th Jud Dists., 2006).

To succeed, Applicant must put forward evidence that meaningfully refers to and rebuts the conclusions set forth in the peer review report. High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A), 2010 N.Y. Slip Op.50447(U)(App. Term, 2nd Dept, 2nd, 11th & 13th Jud. Dists, 2010).

In the absence of any persuasive evidence to rebut an insurer's showing of a lack of medical necessity, the denials must be upheld. Quality Health Prods., Inc., v. Geico Ins. Co., 44 Misc 3d 139(A), 2014 NY Slip Op 51268(U)(App Term, 2nd Dept., 2nd, 11th & 13th Jud. Dists., 2014).

DECISION:

In his peer review, Dr. Weiss explains that restrictive braces are not indicated for muscular or soft tissue injuries. He advises that an LSO is generally used when there is evidence of spinal instability or compression fractures, or in the context of patients who have undergone spinal (fusion) surgery.

Based on the records furnished for his review, Dr. Weiss states that the standard of care was not met in this case, and he concludes that there was no medical need for the LSO.

I find the peer review by Dr. Weiss to be sufficient for the purpose of sustaining Respondent's evidentiary burden. It adequately sets forth the factual basis and medical rationale to support the conclusion that the LSO was not medically necessary. That being so, the burden shifts to Applicant to refute and overcome Respondent's showing.

Having carefully reviewed the entire record, including the rebuttal affirmation by Ali Guy, MD, I find that the more credible and persuasive proof on this issue rests with the Respondent. The evidence does not lend itself to the conclusion that the assignor was in need of a back brace. The arguments presented in the affirmation by Dr. Guy do not serve to change my assessment of the record.

Accordingly, **the claim is denied.**

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 claim is DENIED in its entirety

This award is in full settlement of all no-fault benefit claims submitted to this arbitrator.

State of New York
SS :
County of Nassau

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

03/24/2017
(Dated)

Meryem Toksoy

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:
9f9c16dc85c6922697160eeda9e6183b

Electronically Signed

Your name: Meryem Toksoy
Signed on: 03/24/2017