

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

First Class Medical P.C.  
(Applicant)

- and -

Ameriprise Insurance Company  
(Respondent)

AAA Case No. 17-16-1027-3650

Applicant's File No.

Insurer's Claim File No. 1847078G106

NAIC No. 12504

**ARBITRATION AWARD**

I, Eylan Schulman, 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 04/06/2017  
Declared closed by the arbitrator on 04/06/2017

James McNamara, Esq., from Lewin & Baglio LLP participated in person for the  
**Applicant**

Aliza Kayani, Esq., from Bruno Gerbino & Soriano LLP participated in person for the  
**Respondent**

2. The amount claimed in the Arbitration Request, **\$ 4,817.38**, 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

- A. Whether Respondent was justified in denying part of the claim based on Applicant's failure to attend an Examination Under Oath ("EUO") in response to Respondent's requests.
- B. Whether upper extremity EMG/NCV testing and chiropractic manipulations were medically necessary.

This is a claim for reimbursement for upper extremity EMG/NCV testing, physical therapy, and chiropractic manipulations provided between August 7, 2014, and February 19, 2015, following an automobile accident which occurred on August 5, 2014.

Respondent denied all claims at issue except for upper extremity EMG/NCV testing and chiropractic manipulations based on Applicant's failure to appear at EUO's on October 29, 2014, and November 18, 2014.

Respondent denied claims for upper extremity EMG/NCV testing and chiropractic manipulations based on lack of medical necessity. Specifically, Respondent denied the claims based on the IME reports of physical medicine and rehabilitation doctor Alan Wolf, M.D., and chiropractor Kevin Portnoy, each dated November 10, 2014. Based on the examination findings, additional medical treatment was disallowed effective November 17, 2014.

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

The findings herein are based on documentary evidence set forth in the ADR Center submitted by the parties prior to the date of hearing and oral argument at the hearing.

An Applicant establishes a *prima facie* showing of entitlement to No-Fault benefits under Article 51 of the Insurance Law by submitting proof that it submitted a claim setting forth the fact and the amount of the loss sustained and payment of No-Fault benefits was overdue. A.B. Med. Servs., PLLC v. Liberty Mutual Ins. Co., 39 A.D.3d 779 (2d Dep't 2007); Nyack Hosp. v. Metro. Prop. & Cas. Ins. Co., 16 A.D.3d 564 (2d Dep't 2005); Mary Immaculate Hospital v. Allstate Insurance Co., 5 AD3d 742 (2d Dep't 2004).

It is undisputed that Applicant established its *prima facie* case of entitlement to first-party no-fault benefits for the claims by demonstrating it submitted timely claims setting forth the fact and the amount of the loss sustained and payment for the claims has not been made.

The claims denied based on Applicant's failure to attend EUO's and claims denied based on lack of medical necessity will each be addressed in turn.

##### Claims Denied Based on Applicant's Failure to Attend EUO's

Respondent denied all claims at issue except for upper extremity EMG/NCV testing and chiropractic manipulations based on Applicant's failure to appear at EUO's on October 29, 2014, and November 18, 2014.

A health care provider's failure to appear for an EUO breaches a condition precedent to its right to its payment of the subject claim, and by itself provides a complete defense to

the instant action. Dynamic Medical Imaging, P.C. v. State Farm Mutual Automobile Ins. Co., 26 Misc.3d 776, 894 N.Y.S.2d 833 (Dist. Ct. Nassau Co., 2009).

Since the appearance of the health care provider at an EUO is a condition precedent to the insurer's liability on the policy, judgment should be granted to the insurer where it has proven that the EUO notices were mailed and there was a failure to appear at the EUOs. Point of Health Acupuncture, P.C. v. Lancer Ins. Co., 28 Misc.3d 137(A), 2010 NY Slip Op 51455(U), 2010 WL 3257917 (App. Term 2d, 11<sup>th</sup> & 13<sup>th</sup> Dists., Aug. 12, 2010).

To prove that a claim was pended for verification in the form of an EUO, an insurer must prove that the request for the EUO was based on the application of objective standards. Westchester Medical Center v. Government Employees Ins. Co., 2009 N.Y. Slip Op. 30914(U), 2009 WL 1136785 (Sup. Ct. Nassau Co., Daniel R. Palmieri, J., Apr. 17, 2009).

Where there is no response in any way to an insurer's request for an EUO of a health service provider's assignor, the provider will not be heard to complain that there was no reasonable basis for the EUO request. Crescent Radiology, PLLC v. American Transit Ins. Co., 31 Misc. 3d 134(A), 927 N.Y.S.2d 815 (Table), 2011 N.Y. Slip Op. 50622(U), 2011 WL 1448133 (App. Term 9<sup>th</sup> & 10<sup>th</sup> Dists., Apr. 6, 2011).

The evidence reflects Respondent issued timely and proper letters requesting Applicant's attendance at EUO's on October 29, 2014, and November 18, 2014. Specifically, the ADR Center includes initial and follow-up EUO scheduling requests related to the bills. The ADR Center further contains proof the EUO scheduling notices were mailed to Applicant and evidence Applicant failed to appear for either examination. Respondent provided an Affidavit by Michael Callinan, counsel for Respondent, indicating the scheduling letters were mailed to Applicant and that Applicant failed to appear for either examination. The ADR Center also includes "Statements on the Record," one from each scheduled examination, indicating Applicant failed to appear.

Based on Applicant's failure to appear for the scheduled EUO's, I find that Applicant breached a condition precedent to its right to payment of all claims denied based on the EUO no-shows, specifically, all claims at issue except for upper extremity EMG/NCV testing and chiropractic manipulations.

Accordingly, Respondent's denials related to Applicant's failure to appear for the EUO's on October 29, 2014, and November 18, 2014, are upheld.

#### Upper Extremity EMG/NCV Testing and Chiropractic Manipulations Denied Based on Lack of Medical Necessity

Respondent denied the claims for upper extremity EMG/NCV testing and chiropractic manipulations based on lack of medical necessity. Specifically, Respondent denied the claims based on the IME reports of physical medicine and rehabilitation doctor Alan

Wolf, M.D., and chiropractor Kevin Portnoy, each dated November 10, 2014. Based on the examination findings, additional medical treatment was disallowed effective November 17, 2014.

Respondent's denial for lack of medical necessity must be supported by competent medical evidence setting forth a clear factual basis and medical rationale for denying the claim. Citywide Social Work, & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608 (Civ. Ct. Kings Co. 2004).

To successfully support its denial, Respondent's peer review must address all pertinent objective findings contained in Applicant's medical submission and set forth how and why the disputed services were inconsistent with generally accepted medical practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. *See* Citywide Social Work, & Psy. Serv. P.L.L.C. v. Travelers Indemnity Co., supra; Amaze Medical Supply, Inc. v. Eagle Insurance Co., 2 Misc. 3d 128A, 784 NYS2d 918 (App Term 2d & 11<sup>th</sup> Jud Dists.).

Where a Respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11<sup>th</sup> Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11<sup>th</sup> Dists July 3, 2007).

"[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" Bedford Park Medical Practice, P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11<sup>th</sup> ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11<sup>th</sup> Dists. Sept. 29, 2006).

The EIP was a 33-year-old female who was the seat-belted driver of a vehicle involved in a left, front-end collision on August 5, 2014. The EIP sustained injuries to her neck, back, and left shoulder in the accident. On August 7, 2014, the EIP came under the care of Dr. Mani Ushyarov, affiliated with Applicant's practice, reporting headaches, neck pain, lower back pain, and left shoulder pain. Examination revealed tenderness, reduced ranges of motion, and positive orthopedic tests in the cervical spine, lumbar spine, and shoulders. Following evaluation, the EIP commenced a course of conservative treatment, including physical therapy, chiropractic manipulations, and electrodiagnostic testing. The ADR Center includes reevaluation reports from Applicant's office from September 30, 2014, November 13, 2014, and February 19, 2015, contemporaneous with the IME and treatment at issue in this hearing. The reports demonstrate continued

neck, lower back, and left shoulder difficulties the EIP was having, substantiated by positive, objective findings of tenderness, reduced ranges of motion, and positive orthopedic tests. The necessity of upper extremity EMG/NCV testing and chiropractic manipulations are now at issue.

Respondent attempts to meet its burden to establish lack of medical necessity through the IME reports of physical medicine and rehabilitation doctor Alan Wolf, M.D., and chiropractor Kevin Portnoy, each dated November 10, 2014.

The EIP presented to the IME with Dr. Wolf complaining about pain in her neck, lower back, and left shoulder. Cervical, lumbar spine, and bilateral shoulder examinations revealed normal ranges of motion, no tenderness, no spasm, negative orthopedic tests, and a normal neurological examination. Based on the examination findings, Dr. Wolf diagnosed the EIP with resolved cervical, thoracolumbar, and right shoulder contusions, and a left shoulder contusion (with no indication it was resolved). Dr. Wolf conceded the EIP would benefit from additional therapy to the left shoulder, with a physiatric follow-up evaluation.

The EIP presented to the IME with Dr. Portnoy complaining about neck, mid back, and lower back pain. Cervical and thoraco-lumbar spine examinations revealed normal ranges of motion, no tenderness, normal muscle strength, no spasm, and negative orthopedic tests. Based on the examination findings, Dr. Portnoy diagnosed the EIP with resolved cervical, thoracic, and lumbar strains, and opined that additional chiropractic manipulations were unnecessary.

After review of the medical records included on the ADR Center and consideration of the arguments advanced by counsel for both parties, assuming *arguendo* that Respondent met its burden to establish lack of medical necessity for the upper extremity EMG/NCV testing and chiropractic manipulations denied based on lack of medical necessity, I find that Applicant met its burden in rebuttal. I am persuaded by the reevaluation reports from Applicant's office from September 30, 2014, November 13, 2014, and February 19, 2015, demonstrating the EIP was exhibiting continued difficulties in her neck, lower back, and left shoulder throughout the course of treatment at issue, substantiated by objective positive findings of tenderness, reduced ranges of motion, and positive orthopedic tests. The EIP was only 33-years-old and had the right to receive the necessary treatment to help return her to the condition she was in prior to the accident. Based on the medical records provided, I find that Applicant rebutted Respondent's showing and provided its own evidence of necessity for the treatment at issue provided following the IME cutoff on November 17, 2014. Given the recommendation of the EIP's treating doctor for the EIP to undergo the electrodiagnostic testing and chiropractic manipulations at issue, I defer to the determination of the EIP's treating provider who decided the treatment was necessary. See James M. Liguori, Physician, vs. State Farm Mut.Auto Ins., 15 Misc.3d 1103A, 836 N.Y.S.2d 499, (District Ct. Nassau Co., 2007). Accordingly, Applicant will be awarded the claims, in the amount of \$2197.48.

### Conclusion

Based on the foregoing, Applicant is awarded \$2197.48 for the upper extremity EMG/NCV testing and chiropractic manipulations denied based on lack of medical necessity. The denials for the remaining claims, related to Applicant's failure to appear for EUO's, are 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	First Class Medical P.C.	08/07/14 - 02/19/15	\$4,817.38	Awarded: \$2,197.48
Total			\$4,817.38	Awarded: \$2,197.48

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 01/29/2016, which is a relevant date only to the extent set forth below.)

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30<sup>th</sup> day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is

commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. (11 NYCRR 65-3.9(c)). The end date for the calculation of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. Where a motor vehicle accident occurs after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. (11 NYCRR 65-3.9(a)).

#### C. Attorney's Fees

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

For cases filed prior to February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to a minimum of \$60 and a maximum of \$850. For cases filed on or after February 4, 2015, 20 percent of the amount of first party benefits awarded herein, plus interest thereon, subject to no minimum and a maximum of \$1360. (11 NYCRR 65-4).

- 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 Nassau

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

04/08/2017  
(Dated)

Eylan Schulman

#### **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:**  
ad5fd47f2c446c501e54d25befbfe515

### **Electronically Signed**

Your name: Eylan Schulman  
Signed on: 04/08/2017