

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Five Towns Total Medical Care PC
(Applicant)

- and -

United Services Automobile Association
(Respondent)

AAA Case No. 17-16-1030-7092
Applicant's File No. 239199
Insurer's Claim File No. 003515497-010-000
NAIC No. 25968

ARBITRATION AWARD

I, Joshua Adler, 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 04/21/2017
Declared closed by the arbitrator on 04/21/2017

N. Menashe from Neil Menashe Attorney At Law P.C. participated in person for the Applicant

J. Lanza from McDonnell Adels & Klestzick, PLLC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 633.77**, 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

Applicant seeks payment for physical therapy and an office visit. The claim was denied in part based on an IME. Respondent also claims non-receipt of some of the invoices.

4. Findings, Conclusions, and Basis Therefor

Date of MVA: 2/25/2015

EIP: female, DOB 6/17/1931

I have reviewed the Electronic Case Folder ("ECF"). The findings and conclusions set forth below are based on documents in the ECF and the parties' positions as expressed at the hearing.

Applicant seeks payment for physical therapy and an office visit (DOS 10/05/15 - 11/06/15).

For dates of service 10/05/15 (\$67.60), 10/07/15-10/16/15 (\$202.80), 10/30/15 (\$67.60), and 11/05/15-11/06/15 (\$135.20) - totaling \$473.20 - respondent denied the claim based on a 9/09/15 IME by Dr. Mathew Chacko (asserted treatment cutoff 9/24/15). I find that respondent's proffering of the IME report failed to satisfy its prima facie burden of demonstrating lack of medical necessity for further treatment, as discussed below.

First, the IME report revealed limitations. Thus, for example, the IME Doctor reported decreased cervical ROM in flexion, extension, lateral rotation, and lateral flexion (IME at 1). He also reported decreased lumbar ROM in flexion, lateral flexion, and extension (IME at 2). Also, it appears that the IME Doctor found "positive" SLR on the right (IME at 2). Nevertheless, the IME Physician characterized the observed ROM restrictions as "voluntary," and opined that the cervical and lumbar "strains" had "resolved from an objective neurological standpoint" (IME at 3).

On the other hand, applicant submitted examination reports, one by a P.T., dated 10/16/15, and one by treating physician, Dr. Enrico Fazzini, dated 11/06/15, both of which revealed continued, *inter alia*, cervical and lumbar impairment. The 11/06/15 examination by Dr. Fazzini was particularly comprehensive, and thus very persuasive. I see no reason to favor the IME Doctor's "all resolved" diagnosis over Dr. Fazzini's.

Thus, I reject respondent's assertion of the IME "cutoff."

For dates of service 10/29/15 (\$67.60) and 11/06/15 (\$92.97), respondent claims non-receipt of the invoices prior to commencement of arbitration. Applicant has not come forward with proof of mailing, thereby failing to establish its prima facie entitlement to payment.

Notwithstanding the above, applicant argues that since respondent had asserted a treatment cutoff date of 9/24/15 it was, accordingly, excused from submitting the invoices. Applicant's counsel relied on State Farm Ins. v Domotor (266 AD2d 219 [2d Dept., 1999]) for the proposition that once respondent asserted the treatment "cutoff" based on the IME, applicant was no longer required to submit invoices. I disagree. The Department of Financial Services (f/k/a the Department of Insurance) has opined that, even after the insurer issues a denial based on "negative" IME results, applicants must still submit invoices to the insurer on a timely basis "in order to protect their rights to reimbursement, in the event that it is ultimately established that the services rendered

were medically necessary despite a negative IME report" (NYS Dept. of Financial Services, Opinion of the General Counsel, No. 4-09-03, issued September 2, 2004). The above Opinion of the General Counsel was rendered after the Second Department's decision in State Farm Ins. v Domotor, *supra*, and appears to continue to be the position of the Department of Financial Services, notwithstanding many a litigants' citation to Domotor and its progeny. Indeed, my colleague, Arbitrator Burt Feilich, cited to this very opinion of the General Counsel, commenting that the Department of Financial Services "has taken issue with the ruling in the Domotor case" (AAA Case No. 412012015014, decided 4/1/14).

Thus, these claims are dismissed without prejudice.

I award applicant the principal sum of \$473.20.

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
	Five Towns Total Medical Care PC	10/05/15 - 11/06/15	\$633.77	Awarded: \$473.20
Total			\$633.77	Awarded: \$473.20

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 03/23/2016, which is a relevant date only to the extent set forth below.)

Respondent shall pay the applicant interest computed from 03/23/2016, the date on which the AR-1 was received by the American Arbitration Association, at a rate of 2% per month, simple, and ending with the date of the payment of the award, subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

As noted above, this matter was filed with the AAA after February 4, 2015. Thus, the insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(d).

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

04/25/2017
(Dated)

Joshua Adler

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:
ad126ca205e73023bcc90abb06696b94

Electronically Signed

Your name: Joshua Adler
Signed on: 04/25/2017