

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Abrams Piazza & Julewicz DC, PLLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-16-1037-7340

Applicant's File No.

Insurer's Claim File No. 0440481470101023

NAIC No.

ARBITRATION AWARD

I, Preeti Priya, 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 [RV]

1. Hearing(s) held on 04/19/2017
Declared closed by the arbitrator on 04/19/2017

Anna Goldman, Esq., from Law Office of Anna Goldman P.C. participated by telephone for the Applicant

Dan Lissauer, Esq., from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,333.54**, 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

Whether Applicant established entitlement to No-Fault compensation for fees associated with electro-diagnostic tests provided to Assignor;

Whether Respondent made out a prima facie case of lack of medical necessity and, if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

Applicant was represented by Anna Goldman, Esq., presented oral arguments and relied upon documentary submission at the hearing. Dan Lissauer, Esq., appeared on behalf of Respondent and presented oral arguments and relied upon documentary submissions. I have reviewed the submission contained in the American Arbitration Association's ADR Center. These submissions are the record in this case.

Assignor, a 31 year old female driver, was involved in a motor vehicle accident that occurred on February 20, 2016. According to the records, Assignor sought medical attention and was evaluated by Denny A. Julewicz, MD, on February 22, 2016. Assignor received conservative care, including chiropractic treatment. Applicant underwent various diagnostic tests including an EMG/NCV of the upper and lower on March 25 and April 15, 2016 respectively. Applicant submitted the claims for the electro-diagnostic tests to Respondent; Respondent denied payment.

I find that Applicant established a prima facie case of entitlement to reimbursement of its claim. See (Amaze Medical Supply v. Eagle Ins. Co., 2 misc. 3d 128A, 784NYS 2d 918, 2003 NY Slip Op.517014 [App Term, 2d & 11th Jud. Dusts.]) and Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Therefore, the burden now shifts to the Respondent to demonstrate lack of medical necessity (Alvarez v. Prospect Hosp., 68 N.Y.S.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d [1986]; A.B.Medical Services v. Geico Ins. Co., 2 Misc 3d 26 [App Term 2d and 11th Jud Dists, 2003]).

Respondent denied payment on the basis of a peer review conducted by Kevin Portnoy, DC, dated May 4 and 27, 2016. Dr. Portnoy reviewed documents including evaluation reports, diagnostic test results and progress notes. He then outlined the treatment of the Assignor.

The No-Fault carrier may rebut the inference of medical necessity by providing proof that the claimed healthcare benefits were not medically necessary. A. Khodadadi Radiology, P.C. v. New York Central Mutual Fire Ins Co., 16 Misc 3d 131(A), 841 N.Y.S.2d 824, 2007 N.Y. Slip Op 51342(U) (App Term, 2nd Dept - 2007); Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc 3d 142(A), 2008 NY Slip Op 52450(U) (App Term, 2nd Dept - 2008); Delta Diagnostic Radiology, P.C. v. Integon Natl. Ins. Co., 2009 NY Slip Op 51502(U) (App Term, 2nd Dept - 2009). Where the No-Fault carrier's proof consists of a peer review report, that report must be predicated upon a sufficient factual basis and medical rationale. AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 NY Slip Op 50208(U), 22 Misc 3d 133(A) (App Term, 2nd Dept - 2009).

Regarding the EMG/NCV tests of the upper extremities, Dr. Portnoy opined, "the Tests was not medically necessary" "based upon the fact that Dr. Julewicz's records do not indicate how the performance of the Tests, will aide in devising, altering, reducing the number of visits to his office or enhancing the clinical prognosis of the claimant." He noted "that EMG/NCV studies does not provide the chiropractor with useful information regarding the detection and correction of the vertebral subluxation complex. Chiropractors are guided by active and passive ranges of motion, imaging studies, static and motion palpation findings, imaging findings, orthopedic testing, the performance of

deep tendon reflexes, sensory and motor testing when determining the regions of the spine to adjust." Further, he stated "There is no indication in the records that the claimant's condition was worsening or not responding to the recommended treatment and that the current chiropractic treatment plan was dependent on the results of the Tests." He found "The claimant's treatment at Dr. Julewicz's office consists of chiropractic care and this is not an intervention dependent on the results of the Tests. There was no description of any alternative invasive or surgical procedures under consideration by Dr. Julewicz to which the information obtained from the Tests would have been necessary to providing optimal chiropractic treatment to this claimant. Decision regarding the claimant's chiropractic care can be made in the absence of the Tests. The Tests have no role in the treatment of back pain. The modalities of therapy that may be given by the chiropractor will be based on clinical judgment of the chiropractor and will not be based on the findings of the Tests. He also stated "the standard of care for NCV/EMG testing after a motor vehicle accident would begin with a reasonable trial of conservative treatment. If the claimant did not respond to the therapy and had clinical evidence of a progressive neurological or orthopedic deficit, MRI might be indicated. In this case, the claimant sustained soft tissue injury." He cited to literature in support of his conclusions. I find the report predicated upon a sufficient factual basis and medical rationale. See AJS Chiropractic, P.C. v. Mercury Ins. Co., supra.

"[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), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

Applicant submitted a rebuttal by Dr. Julewicz, which addresses the report by Dr. Portnoy. The rebuttal lists Assignor, history, diagnosis and the reasons for the tests. He addressed "the inaccurate assertions that Dr. Portnoy had concluded about my patient's records not having an indication on how the performances of the test will in aid in his treatment such as devising, altering, reducing the number of visits to my office or enhancing the clinical prognosis of the claimant....On April 15, 2016, the same day that the EMG/NCV test was performed, there are clear records that Dr. Palumbo had prepared an electronically written detailed report/letter describing the exact opposite of what Dr. Portnoy had stated above. Dr. Palumbo stated, "patient in my office and is being treated for injuries due to trauma related injuries on the above noted date. Today the patient presented with lower back pain radiating into the right lower extremity. Patient also complains of occasional numbness and tingling in the right big toe. Upon reviewing the patients' file it was noted that a MRI of the lumbar spine was performed on April 1, 2016 revealed a disc herniation at L4/5. Today's neurological exam revealed decreased L5 dermatome on the right. Lower reflexes were 2+ bilateral (brisk). Muscles testing revealed 5/5 strength in all lower extremity muscles tested bilateral." He disagreed "with Dr. Portnoy's dispute. Once again, my patient did not only experience pain just in his back, his chief complaints regarding the lower extremities on February 22, 2016 was lower back pain which radiated into the right sacroiliac joint, right buttock. This symptoms came on gradually as well. It was progressively getting worse. The

intensity of this complaint was moderate to severe. This complaint was frequent. Patient graded the pain level at 8/10. He describes the feeling associated with this complaint as dull, aching, spasmodic, and throbbing, located on both sides. Musculoskeletal evaluation of the lumbar spine." He stated "The existing standard of care for the EMG/NCV testing's established by American Association of Neuromuscular and Electrodiagnostic Medicine in their publication "The Electrodiagnostic Medicine Consultation" as follows: indications for EMG/NCV studies are to differentiate the cause of radiating pain and/or abnormal sensations called paraesthesias into radiculopathies, single nerve entrapments, that often mimic each other in clinical practice, or simply differentiate between nerve root dysfunction (radiculopathy) and simple muscle spasm, especially when the symptoms or signs do not appear to subside, or in common instances worsen."

I am not persuaded by Dr. Julewicz. Though his rebuttal is detailed, he does not discuss how the tests altered the treatment plan or alternative invasive and surgical procedures. I find that Applicant has not rebutted Respondent's defense and has not sustained Applicant's burden of proof by a preponderance of credible evidence. Based on the foregoing, Applicant's 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 New York

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

04/28/2017
(Dated)

Preeti Priya

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:
c3363889986340c833081bb5346d1fef

Electronically Signed

Your name: Preeti Priya
Signed on: 04/28/2017