

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

JPS Medical PC
(Applicant)

- and -

21st Century Insurance Company
(Respondent)

AAA Case No. 17-16-1033-4438

Applicant's File No. 239949

Insurer's Claim File No. 3001917011

NAIC No. 43974

ARBITRATION AWARD

I, Dimitrios Stathopoulos, 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

1. Hearing(s) held on 05/16/2017
Declared closed by the arbitrator on 05/16/2017

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

Ken Popper, Esq. from Law Offices Of Buratti, Rothenberg, & Burns participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,738.24**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduces and amends the amount in dispute to \$3,645.26.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Whether the Applicant is entitled to reimbursement for trigger point injections and EMG/NCV testing performed on the Assignor and denied by the Respondent based upon a peer review.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking to be reimbursed the amended sum of \$3645.26 for trigger point injections and EMG/NCV testing of the lower extremities on 12/30/14 and EMG/NCV testing of the upper extremities on 1/13/15. This award is rendered upon the oral arguments of the parties and the documentary evidence submitted by the parties. The documentary evidence submitted by the parties consists of the documents contained within the American Arbitration Association's ADR center for this matter as of the above declared closed date by this arbitrator.

Pursuant to 11 NYCRR 65-4.5(o) (1), the arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. Prior to the commencement of the hearing I disclosed to the parties that almost 20 years ago counsel for the Applicant worked at the same law firm I worked at for approximately a year. I further advised the parties that I could hear and determine the matter before me impartially and fairly. Neither party had any objection to me hearing the case.

A synopsis of the evidence presented indicates that the Assignor was then a 21-year-old male involved in a motor vehicle accident on 10/23/14. There was reported emergency room treatment. On 11/4/14 it was reported that the Assignor consulted Dr. Sudberg, from the Applicant's office, for neck and low back pain. The impression was cervical and lumbar posttraumatic sprain and strain syndrome, rule out cervical and lumbar disc herniation and radiculopathy, and cervical myofascial pain syndrome. The plan called for conservative treatment. On 12/30/14 Dr. Sudberg reported the Assignor's complaints of pain radiating to the leg since the date of accident. Consequently, Dr. Sudberg rendered injections to the bilateral thoracic trapezoid and left lumbar muscles, and performed EMG/NCV studies of the lower extremities. The EMG/NCV studies of the lower extremities revealed evidence of left L4/L5 radiculopathy. Thereafter, on 1/13/15, Dr. Sudberg further reported that the Assignor complained of pain radiating to the arms and Dr. Sudberg subsequently performed EMG/NCV studies of the upper extremities, which revealed evidence of right C5/6.

Upon reviewing the evidence submitted by the Applicant, I find the Applicant submitted sufficient credible evidence to establish a prima facie case with the respect to the services that are the subject of this arbitration. See, Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004); Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc 3d 128[A], 2003 NY Slip Op 51701 (U) (App Term, 2d and 11th Jud Dists 2003).

Once Applicant has made out a prima facie case, the burden shifts to Respondent to timely request additional verification, deny, or pay the claim. Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 NY3d 312 (2007). Respondent timely denied the disputed services predicated upon a peer review conducted by Dr. Frida Goldin on 2/5/15.

The Respondent must establish a detailed factual basis and a sufficient medical rationale for its position that the medical service was not medically necessary. See, Vladimir Zlatnick, M.D. P.C. v. Travelers Indem. Co., 12 Misc.3d 128(A), 2006 NY Slip Op 50963 (U) (App Term 1st Dept. 2006). A peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim. Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005). Every peer review requires individual scrutiny to determine whether the burden should be shifted back to the claimant to submit contrary expert proof. Novacare Medical P.C. v. Travelers Property Casualty Ins. Co., 31 Misc.3d 1205(A), 927 N.Y.S.2d 817 (Table), 2011 N.Y. Slip Op. 50500(U) at 3-4, 2011 WL 1226956 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., Apr. 1, 2011).

Dr. Goldin asserts that it is commonly accepted standard medical practice to perform a physical examination on the day of, or in close proximity to the date of performing EMG/NCV studies. Dr. Goldin notes that Dr. Sudberg's evaluation of the Assignor on 11/4/14 had insufficient findings to substantiate the medical necessity for the upper and lower extremity EMG/NCVs. In addition, Dr. Goldin notes there was no evidence that the Assignor's physiological and neurological status was maintaining severe deficits or deteriorating despite adherence to a conservative treatment plan. In addition, Dr. Goldin maintains there was also no clearly stated purpose for the performance of these tests or how the results would affect a treatment course for this Assignor. Dr. Goldin then refers to the American Medical Association definition of medical necessity and opines that the disputed EMG/NCV studies performed did not meet the criteria of this definition.

With respect to the trigger point injections rendered on 12/30/14, Dr. Goldin asserts there was no evidence that the Assignor was examined by the physician on that date, or that the Assignor's physiological and neurological status was maintaining severe deficits or deteriorating despite an adherence to a conservative treatment plan. He concludes that the injections did not meet the criteria of medical necessity as defined by the American Medical Association.

Determination

I find the peer review insufficient to sustain the Respondent's burden of showing that the EMG/NCV studies were not medically necessary. Dr. Goldin conclusively states that the Assignor's physical examination findings were not sufficient to substantiate the medical necessity of the EMG/NCV studies of the upper and lower extremities. However, Dr. Goldin fails to set forth the type of findings or a standard of care that would warrant EMG/NCV testing. Without a stated standard of care for when EMG/NCV studies of the upper and lower extremities may be warranted, Respondent cannot show that the Applicant deviated from the standard by performing the EMG/NCV studies in this clinical scenario. Simply stating that the findings of the physical examination were not sufficient to substantiate the medical necessity of a procedure is insufficient without setting forth the standards that would substantiate the medical necessity of a procedure. Accordingly, reimbursement of the EMG/CV studies is granted.

In addition, for the injections disputed herein, Dr. Goldin appears to suggest that the services were not medically necessary because a physical examination of the Assignor was not performed on the day the injections were rendered, and that the Assignor's neurological status maintained severe deficits or deteriorated despite adherence to a conservative treatment plan. However, Dr. Goldin fails to set forth authority, or state that the standard of care dictates that a physical examination should be rendered on the date injections are rendered, or that the Assignor should fail a course of conservative treatment prior to rendering the services. Accordingly, reimbursement of the injections is also granted.

Respondent further submits a fee schedule defense that the services should be reimbursed in the sum of \$2,440.69. In support of this reduction the Respondent submits an affidavit from Noreen McLoughlin, a certified fee coder, who details the basis for the reductions. I find the affidavit persuasive. Applicant fails to rebut the affidavit. Accordingly, Applicant is awarded the sum of \$2,440.69 for the injections and EMG/NCV testing contested herein.

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	Amount Amended	Status
	JPS Medical PC	12/30/14 - 01/13/15	\$3,738.24	\$3,645.26	Awarded: \$2,440.69
Total			\$3,738.24		Awarded: \$2,440.69

B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 04/27/2016, which is a relevant date only to the extent set forth below.)

Since, the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the Applicant, the amount of interest at the rate of 2% per month, simple, and ending with the date of payment of the award.

C. Attorney's Fees

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

The Respondent shall also pay the Applicant, an attorney's fee of 20%, in accordance with 11 NYCRR 4.6(e), but such fee shall not be less than \$60.00 or more than \$850.00. However, if this case was filed on or after February 4, 2015, Respondent shall pay an attorney's fee of 20% with no minimum fee and a maximum fee of \$1,360.

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

05/16/2017

(Dated)

Dimitrios Stathopoulos

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:
f15fe768785f8d9418a0318f8c8452dc

Electronically Signed

Your name: Dimitrios Stathopoulos
Signed on: 05/16/2017