

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Spine Specialists LLP
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-16-1034-3572

Applicant's File No. 1836725

Insurer's Claim File No. 0358451292

NAIC No. 19232

ARBITRATION AWARD

I, Sandra Adelson, 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: the patient.

1. Hearing(s) held on 07/27/2017
Declared closed by the arbitrator on 07/27/2017

Gary Pustel, Esq. from Israel, Israel & Purdy, LLP participated in person for the Applicant

Marcia Brin, Esq. for the Law Office of Karen Lawrence from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 157.01**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there was no fee schedule issue to be litigated.

3. Summary of Issues in Dispute

The applicant seeks payment for one visit performed on 2/17/16. It should be noted that the ADR cover page mistakenly included a date of service performed on 3/16/16. However, the bill for the 3/16/16 was not submitted to the arbitration record. Therefore, the respondent was not afforded an opportunity to submit a denial for this date of service. Furthermore, applicant's AR-1 and NF-3 only identified the 2/17/16 date of service.

Respondent issued a denial which was based on Dr. Nipper's IME report of 10/13/15. Orthopedic and IME benefits were terminated effective 11/5/15. Respondent also submitted the addendum reports of Dr. Nipper

4. Findings, Conclusions, and Basis Therefor

The record consisted of claimant's submission, respondent's submission, as well as documents not enumerated within this decision but which are contained in the case file maintained by the American Arbitration Association. THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED. 11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: 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. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

This claim involves reimbursement for medical treatment rendered by applicant following an orthopedic IME examination performed on 10/13/15 by Dr. Nipper. Orthopedic and related benefits were terminated effective 11/5/15. It is necessary to point out, that on the date of the hearing, 7/27/17, this arbitrator held 7 hearings involving this applicant, the same patient and respondent. Each arbitration decision involving New York Spine Specialists, the same patient and respondent therefore will address those documents submitted to each arbitration whether each case contained identical documents due to the fact that each case was linked and involved the issue of reimbursement for post IME orthopedic treatment.

Based on a review of the documentary evidence submitted to the cases files involving this applicant, the patient and respondent heard on 7/27/17, the claim is decided as follows:

Applicant establishes "a prima facie showing of their entitlement to judgment as matter of law by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). Once Applicant has established a prima facie case the burden is on the insurer to prove the treatment was medically unnecessary. See, Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co., 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App. Term 1st Dept. 2005); A.B. Medical Services, PLLC v. GEICO Ins. Co., 2 Misc 3d 26, 773 N.Y.S.2d 773 (App Term 2nd & 11th Jud Dist 2003).

The courts have held that a respondent's peer review report or medical evidence such as an IME examination must set forth more than just a basic recitation of the expert's opinion. Lack of medical necessity is a valid defense to an action to recover No-Fault benefits, Countrywide Ins. Co. v. 563 Grand Med., P.C., 50 A.D.3d 313 (1st Dept.

2008); A.B. Med. Servs., PLLC v. Liberty Mut. Ins. Co., 39 A.D.3d 779 (2d Dept. 2007), if raised in a denial that is (1) timely, Presbyterian Hosp. in the City of New York v. Maryland Casualty Ins. Co., 226 A.D.2d 613 (2d Dept. 1996); Central Gen. Hosp. v. Chubb Group of Ins. Co., 90 N.Y.2d 195 (1997), (2) includes the information called for in the prescribed denial of claim form, 11 NYCRR § 65-3.4 (c) (11); Nyack Hosp. v. Metropolitan Prop. & Cas. Ins. Co., 16 A.D.3d 564 (2d Dept. 2005); Nyack Hosp. v. State Farm Mut. Auto. Ins. Co., 2004 WL 2394038, 2004 NY Slip Op 07663 (2d Dept. Oct. 25, 2004); Summit Psychological, P.C. v. General Assur. Co., 9 Misc.3d 8, 11 (App Term 9th & 10th Jud Dists., 2005); Shtarkman v. Allstate Ins. Co., 8 Misc.3d 129(A), 2005 NY Slip Op 51028(U) (App Term 2d & 11th Jud Dists.), and (3) "promptly apprise(s) the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated", General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 864, 414 N.Y.S.2d 512, 387 N.E.2d 223 (1979); New York University Hosp. Rusk Ins. v. Hartford Acc. & Indem. Co., 32 A.D.3d 458, 2006 NY Slip Op 06223 (2d Dept. 2006).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009); Channel Chiropractic, P.C. v. Country-Wide Ins. Co., 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, or conducting a peer review of the injured person's treatment.

The patient was 27-year-old male bicyclist who was involved in a motor vehicle accident which took place on 1/11/15. According to the arbitration record, he was rendered unconscious for one hour. He was transferred by ambulance to Montefiore Hospital. His initial complaints included pain in the neck, mid back, low back, left shoulder, left knee and left ankle. The report from Norther Yonkers PT dated 1/15/15 confirms 1) that he sustained injury to the neck, shoulders, knee and lower back and 2) that he began receiving treatment for the injuries sustained in the aforementioned accident at Northern Yonkers PT. The patient also underwent MRI studies.

It is noteworthy that the No Fault application documented the fact that he was a bicyclist struck by a vehicle and he sustained bodily injuries. The vehicle which struck him was a 2012 Jeep. The initial medical provider noted in the application was Premier Health located in Yonkers, New York. He was treated by Dr. Sebastian Lattuga, an orthopedist and Dr. Lattuga referred him to Pain Management Associates. The report dated 4/2/15 stated that he sustained injuries to his neck, left shoulder, low back and legs and that "prior to the accident, he never had pain like this before." The arbitration record documents numerous visits with New York Spine Specialists where he came under the care of Dr. Billy Ford and Dr. Sebastian Lattuga. On 10/13/15, respondent required the patient to undergo an orthopedic IME with Dr. Thomas Nipper.

Dr. Nipper's IME report noted that the patient had bilateral knee surgeries and that at the time of the IME examination, the patient advised Dr. Nipper of neck pain radiating to his arms, pain in his mid-back, radiating low back pain and pain in his left shoulder,

knees and ankles. The peer review report of 10/13/15 noted that the patient had undergone a prior IME with Dr. Nipper on 6/2/15. The records reviewed by Dr. Nipper included medical records from treating doctors and peer review reports, a dental IME report from Dr. Ginsberg and a chiropractic/acupuncture IME report from Dr. Sposta. With regard to the cervical spine examination, the IME found no tenderness to palpation of the cervical paraspinal or trapezii musculature, no muscle spasm was noted and ranges of motion were normal. The neurological examination documented no sensory deficits in the upper extremities, deep tendon reflexes were +2 and equal bilaterally, 5/5 motor strength in each range is 5/5, no atrophy of intrinsic muscles and cervical compression was negative. With regard to the thoracic spine examination, it showed no paraspinal tenderness, no paraspinal spasm, ranges of motion were normal, neurological examination noted reflexes to be 2+; motor strength of the lower extremities was graded at 5/5 bilaterally; the lumbar sensory examination was normal at the medial and lateral thighs, calves, and feet; and no atrophy was noted in the lower extremities; straight leg raising was normal. The left shoulder IME examination was normal on tenderness and range of motion. No crepitus was noted at the joints and the impingement sign was negative. The right knee and left knee noted healed arthroscopic scars over the left knee. He also noted that the ranges of motion were normal, and there was no effusion to the bilaterally knees. Orthopedic testing was normal, and there was no evidence of patella-femoral crepitus in the bilateral knees. The examination of the ankles was normal as to tissue swelling, tenderness, range of motion and sensory loss. Dr. Nipper was of the opinion that the cervical, thoracic, and lumbar spine sprain was resolved, that the left shoulder sprain was resolved, that the status post bilateral knee internal derangement and surgery was resolved and that the bilateral ankle sprains were resolved. He therefore opined that there was no evidence of an orthopedic disability.

Dr. Nipper issued an addendum report dated 7/26/16 which opined that the 6/23/16 cervical hemivertebrectomy at C4, C5 and discectomy and arthrodesis with intervertebral implant and instrumentation under fluoroscopy was not necessary. It was Dr. Nipper's opinion that there was no change in his recommendations following his orthopedic IME performed on 10/13/15. Dr. Nipper also issued another addendum report which stated that he relied on his IME report with regard to its negative left shoulder findings, and there was no need for the left shoulder arthroscopy.

In reviewing the reports from the treating physicians, it is necessary to note that the patient treated on numerous occasions with applicant prior to and subsequent to the IME examination of 10/13/15. In fact, the 9/1/15 report of applicant which documented the patient was status post left L4/5, L5/S1 lumbar spine facet injection under fluoroscopic guidance. At that time, the patient had complaints of pain associated with twisting bending motion and tenderness over the lower cervical facet joints bilaterally. The patient was still involved in physical therapy at that time. The patient was treated by applicant on 8/14/15 with complaints of lumbar spine pain and restriction of motion. The cervical neurological examination was altered at the bilateral C4 level and at the left L4 and left L5 levels. The patient had been diagnosed with herniated cervical intervertebral disc, lumbar radiculopathy and strain. The patient also had complaints of low back and neck pain with radiation into both right and left lower extremities with radiation and numbness, tingling and dysesthesias. On 1/25/16, it is significant that the patient was still symptomatic, that the patient had restriction of motion on flexion at 40

(normal being 70 degrees), extension is 25 degrees (normal being 45 degrees), and left and right turning is to 40 degrees (normal being 80 degrees). In addition, the lumbar spine examination documented no restriction at flexion at 45 (normal 90), extension at 10 degrees (normal being 40 degrees), and left and right turning to 40 degrees (normal 60). The records also noted that the MRI of the cervical spine performed on 2/20/15 as well as the lumbar spine MRI scan diagnosed a herniated disc at C4/5 and disc bulges at C6-T1 and disc bulge at L5/S1. The 'post' and 'pre' IME treatment records documented cervical epidural steroid injections performed at levels C7-T1 due to radiculopathy and lumbar facet injections due to the failure of conservative management and chronic pain. The patient also underwent a cervical discectomy and fusion at level C4/5 which was performed on 6/23/16. The treatment records from applicant documented that the patient reported improvement with this procedure but still had neck and back conditions which required continued physical therapy.

In comparing the records submitted by each side to the arbitration record, I am constrained to abide by the numerous sequential detailed and comprehensive treatment records of applicant and the treating physicians. From a review of the IME report of Dr. Nipper, it appears that the report reflects perhaps one day which was not representative of the patient's accident related conditions and symptoms which could be attributable to the therapy and injections received by the patient to alleviate his pain with regard to the neck and back. The alternative would suggest that Dr. Nipper's IME failed to credibly document this patient's condition. I am constrained to find that the reports of the treating physicians cogent and credibly refuted Dr. Nipper's IME and addendum reports.

With regard to the post IME treatment records, I also find that there was no issue that this patient required further treatment. Therefore, All-In-One Med. Care P.C. v. Government Employees Ins. Co., 2014 NY Slip Op 24070 is controlling. This decision held: "Under current Appellate Term precedent, such trial evidence, if credited, is sufficient to make out a lack of medical necessary defense to post-IME services, and shift the burden to plaintiff of demonstrating the medical necessity of post-IME treatments. See Amato v. State Farm Ins. Co., 40 Misc. 3d 129[A], 975 N.Y.S.2d 364, 2013 NY Slip Op 51113[U] [App Term 2d Dept]. This Court, as fact finder at trial, concludes that Dr. Emmanuel had a sound factual basis and medical rationale for his opinion that no further treatment was necessary. Accordingly, unless plaintiff satisfied its burden of proving to the contrary, defendant is entitled to judgment dismissing plaintiff's no-fault claim. In the face of such showing by defendant, plaintiff attempted to meet its burden through submission of post-IME medical records." All-In-One Med. Care P.C., supra.

Judge Ciffa held in All-in-One, supra. that post IME reports were admissible to establish that the patient's ongoing complaints set forth a facially valid factual basis and medical rationale for the continuing treatment:

"Critically, Dr. Demetrius' monthly medical reports include detailed evaluations of the patient's ongoing complaints, the treating doctor's findings, and the doctor's recommendation for continuation of physical therapy treatments. Moreover, the reports, on their face, set forth a facially valid factual basis and medical rationale for continuing the treatments before, during, and after January 2011. Based upon the treating doctor's opinion that Mr. Fernandez's condition had "moderately improved" with physical therapy, but he was still suffering from right and left shoulder joint pain,

decreased range of motion in the upper extremities, and radiating pain and parenthesis to both the upper and lower extremities, plaintiff continued to provide physical therapy treatments to Mr. Fernandez.

Unlike the circumstances presented in *Amato*, plaintiff's evidence takes the case out of the realm of "speculation" regarding the patient's post-IME condition."

Therefore, applicant's reports clearly established that there was no speculation with regard to the patient's need for post IME treatment. The reports from applicant's treating physician refuted the IME report of Dr. Nipper. Applicant's submission clearly established that there was a valid factual basis and medical rational for continuing treatment following the IME of Dr. Nipper.

In this case, the Applicant has submitted sufficient medical proof to establish that the services in issue were medically necessary. It is not the quantity of the proof but the quality of the proof that will or will not establish a prima facie case of medical necessity. Moreover, given the opinion offered by applicant whose reports provide objective medical findings and rationale for the need for the service in issue, this tribunal is not prepared to second guess a treating doctor who decides that a further care is necessary for this patient's diagnosis or treatment. 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).

After reviewing the evidence, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case of medical necessity for the unpaid portion of the claim. See, Mary Immaculate Hospital v. Allstate Insurance Co., 2004 N.Y. Slip Op. 02359 (2d 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).

The claim is granted.

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
	New York Spine Specialists LLP	02/17/16 - 03/16/16	\$157.01	Awarded: \$64.07
Total			\$157.01	Awarded: \$64.07

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 05/05/2016, which is a relevant date only to the extent set forth below.)

Interest to run from the date of filing-5/5/16.

C. Attorney's Fees

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

Applicable attorney fees on \$64.07 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 Suffolk

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

08/02/2017
(Dated)

Sandra Adelson

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:
36461155593b4d5a40a8c534f77ed7b4

Electronically Signed

Your name: Sandra Adelson
Signed on: 08/02/2017