

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pain Physicians NY PLLC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No.	17-16-1045-5594
Applicant's File No.	GTLPP090816.446
Insurer's Claim File No.	663179-03
NAIC No.	16616

ARBITRATION AWARD

I, Bonnie Link, 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 EIP

1. Hearing(s) held on 08/15/2017
Declared closed by the arbitrator on 08/15/2017

George Lewis, Esq. from Law Offices of George T. Lewis, Jr., PC participated in person for the Applicant

Robert Horn, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,520.44**, 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

This arbitration arises out of treatment of a 43 year old female for injuries sustained in a motor vehicle accident occurring on October 30, 2015. Applicant seeks reimbursement in the amount of \$2,520.44 for a toxicology drug screening conducted on February 19, 2016. The Respondent timely denied the bill based upon an IME by Dr. Michael L. Russ, M.D., a physiatrist and licensed acupuncturist conducted on January 7, 2016 that found that treatment was no longer medically necessary. Based on the exam, the Respondent issued a general denial of future treatment effective February 8, 2016. In addition, Respondent timely denied the bill based upon a Peer Review by Dr. Peter Chiu, a physiatrist, dated March 15, 2016 that found that the treatment was not medically necessary. A rebuttal dated March 10, 2017 by Dr. Tamer Elbaz, M.D. is submitted and reviewed. An addendum by Dr.

Chiu dated August 11, 2017 and uploaded on August 14, 2017 is rejected as being late.

4. Findings, Conclusions, and Basis Therefor

This matter is determined after reviewing the documents contained in the electronic case folder at the closing of the file and the presentations of both sides.

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Is noted at the outset that this matter is linked to Pain Physicians NY/MG (same EIP) v. American Transit Ins. Co., AAA Case #171610496985, also her today, which was a claim for pain management injections that was also denied based on the IME of Dr. Russ. In that matter, I found in favor of the Applicant. More specifically, that while the IME by Dr. Russ was sufficient to establish the Respondent's burden of proving the lack of medical necessity, the Applicant submission was sufficient to establish the shifted burden of proof. Inasmuch as the current claim is denied based on the IME and on the peer review, our focus must now be on Dr. Chiu's opinion.

The EIP was a rear seat passenger of a taxi when it was struck on the passenger side. The EIP was transported by ambulance to a local emergency room. She had complaints of pain in her neck and back. X-rays were negative for fracture and she was otherwise treated and released on the same day. She came under the care of private medical providers and was commenced on a regimen of physical therapy, chiropractic and pain management.

The peer review by Dr. Chiu was based on a review of the EIP's medical records including the MRIs, the emergency room record, the physical therapy evaluations

and progress notes, the police report and the NF2. He based his conclusion on his opinion that the patient was not in need of the type of medication that would require a toxicology screening. Additionally, his review of the records shows that she was prescribed Tramadol on the same day that the drug screen was conducted so the prescription was not reliant on the drug screen.

It is well settled that an applicant establishes its prima facie entitlement to payment by proving it submitted a claim setting forth the facts and the amount of the loss sustained and that payment of no fault benefits were overdue (see Insurance Law § 5106[a]; Mary Immaculate Hospital v Allstate Ins. Co., 5 A.D.3d. 742 Second Dep't 2004), A.B. Medical Services PLLC v Lumbermans Mutual Cas. Co., 4 Misc. 3d. 86 (App. Term 2d. & 11th Jud. Dists. 2004).

When evaluating the medical necessity of services, particularly when the conclusion is contradictory, consideration must be given to the evidentiary burdens. Respondent must prove first that the services were not medically necessary. The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment Kingsborough Jewish Med. Ctr. v. All State Ins. Co., 61 A.D. 3d. 13 (2d. Dep't, 2009). An insurance carrier must at a minimum establish a detailed factual basis and a sufficient medical rationale for asserting lack of medical necessity. See Delta Diagnostic Radiology PC v. Progressive Casualty Ins. Co., 21 Misc. 3d. (142A) (App. Term 2d. Dep't, 2008).

A peer review report relied upon by an insurer in timely denying a claim is a proper vehicle to assert the defense of lack of medical necessity. S & M Supply, Inc. v. Allstate Ins. Co., 2003 N.Y. Slip Op. 51191(U), 2003 WL 21960336 (App. Term 2d & 11th Dists. July 9, 2003); Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

In order to support a viable denial on grounds of medical necessity, the peer review report must "set forth a sufficiently detailed factual basis and medical rationale for the claim's rejection." Amaze Medical Supply v. Eagle Ins. Co., 2 Misc.3d 128(A), 2003 N.Y. Slip Op. 51701[U], 2003 WL 23310886 (App. Term, 2d and 11th Jud. Dists. 2003); S & M Supply Inc. v. Kemper Auto & Home Ins. Co., 2 Misc.3d 134(A), 2004 N.Y. Slip Op. 50209[U], 2004 WL 758247 (App. Term, 2d and 11th Jud. Dists. 2004). A "peer review report must set forth a factual basis sufficient to establish, prima facie, the absence of medical necessity." Choicenet Chiropractic P.C. v. Allstate Ins. Co., 2003 N.Y. Slip Op. 50672[U], 2003 WL 1904296 (App. Term, 2d and 11th Jud. Dists. 2003) (emphasis supplied).

For a peer review to meet its burden, it must demonstrate that the Applicant did not need to conduct or treat a patient to prevent an injury, make a diagnosis or formulate

a treatment plan. If the results of testing do not change the conclusion drawn from a physical examination it is excessive, or not medically necessary. A.M. Med. Servs., P.C. v. Deerbrook Ins. Co., 2008NY Slip Op 50368(U)(Civil Ct., Kings Co.).

"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 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

Dr. Chiu's peer review is adequate to meet the Respondent's burden of proof. It contains a detailed and credible record review and sufficiently analyzes the information maintained in the EIP's medical records. It is based on Dr. Chiu's educated opinion of the testing conducted and explains when such testing is medically necessary. It is clear about the standard of care and cites to the medical authority upon which it is based. It amply references the patient, his history, complaints offered and clinical findings and contains a sufficient "factual basis and medical rationale" to support a medical necessity defense under apposite legal standards, as set forth above.

Further, I find that the doctor's analysis, which relies, in part, on an insufficient clinical examination and the absence of proof that the testing was necessary to the prescription of appropriate medication, is persuasive.

This is not a situation where the reviewer denies medical necessity because additional information was necessary to draw a conclusion, Nir v. Allstate Ins. Co., 7 Misc.2d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings County. 2005), but rather a situation where the records of the EIP's doctor do not support his own treatment or testing.

Based on the foregoing, I find that the Respondent has met its burden of proving the lack of medical necessity. The burden sufficiently shifts to the Applicant.

The Applicant's attorney argues that the drug screening conducted was mandatory. Nowhere in the rebuttal by Dr. Dr. Elbaz's is that stated. Dr. Elbaz seems to suggest that many patients abuse pain relievers and he states that the FDA has begun to regulate the number of refills. I find the remainder of the rebuttal to have circular medical reasoning and conclusory. He never discusses this particular patient and

why the drug screen was medically necessary for her. He never addresses her history of medication, if any, or what his treatment plan would include once the results were available.

In the absence of a sufficient rebuttal thereto or convincing medical evidence, the peer review is sustained as being supported by a preponderance of the credible evidence. The Applicant herein has failed to overcome Respondent's evidence.

Accordingly, the 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 Nassau

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

09/05/2017
(Dated)

Bonnie Link

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:
fc4b2e1ca4a6d13af28e298bde92bb0c

Electronically Signed

Your name: Bonnie Link
Signed on: 09/05/2017