

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

DRD Medical P.C.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-16-1048-5811
Applicant's File No.
Insurer's Claim File No. 0352544630101054
NAIC No. 35882

ARBITRATION AWARD

I, Matthew J. Cavalier, 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: 32 year old female on the date of the accident

1. Hearing(s) held on 08/07/2017
Declared closed by the arbitrator on 08/07/2017

Michael Tomford, Esq. from Dash Law Firm, P.C. participated in person for the Applicant

Philippa Tapada, Claims from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **1,681.38**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to, timely denials, pursuant to New York Insurance Law Section 5106(a) and 11 NYCRR 65-3.8(a)(1).

The parties further stipulated that a prima facie case had been established for the claim denied by the Peer Reviews of Dr. Jason Cohen, MD, dated July 27, 2016 and August 1, 2016, and Dr. Gary Florio, dated August 23, 2016, and Dr. Cohen's Addendum dated November 21, 2016, that the fees, if Amended for the claim, are now in accordance with the fee schedule, that if the Applicant prevails then interest is awarded from the date in the AAA award template, and neither party object to the late submission of documents to the Electronic Case File (ECF), if so found.

3. Summary of Issues in Dispute

Whether the dates of service June 14, 2016, July 5, 2016, and July 19, 2016 for nerve blocks was correctly billed and timely submitted by the Applicant, and

Whether the Respondent can maintain the defense of not medically necessary medical services based upon the Peer Reviews of Dr. Jason Cohen, MD, dated July 27, 2016 and August 1, 2016, and Dr. Gary Florio, dated August 23, 2016, and Dr. Cohen's Addendum dated November 21, 2016?

4. Findings, Conclusions, and Basis Therefor

The dispute arises from the underlying motor vehicle accident of March 22, 2016, wherein the Assignor, a 32 year old female, was injured while a restrained driver and sought medical attention on the date of the accident at Stony Brook University Hospital Medical Center Emergency Room where she was evaluate treated and released on the date of the accident. Later, she began treating with Dr. John J. Leppard, III, MD of Orthopedic & Sports Associates of Long Island, PC on March 31, 2016, where Dr. Leppard ordered and conducted a X-rays of her entire spine, and also refered her for a Cervical MRI that was conducted on April 25, 2016. Dr. Michael J. Campo of South Shore Chiropractic, P.C. on conducted an intial Chiropractic exam on April 5, 2016 where a conservative treatment plan to restore her to pre-accident physical condition was begun with, chiropractic adjustments, physical therapy treatments, and anti-inflammatory drugs to treat her injured neck and back and lower extremities, these injuries where the result of the MVA.

There are three bills comprising three dates of service in dispute, June 14, 2014, July 5, 2016, and July 19, 2016 in the sum of \$1,681.38. Applicant submitted these bills to Respondent and Respondent denied payment of these bills based on the peer review report of Dr. Jason Cohen, MD, dated July 27, 2016 and August 1, 2016, and Dr. Gary Florio dated August 23, 2016, due to lack of medical necessity.

Applicant establishes a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received by Respondent 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).

Applicant's counsel argued that the initial examination of May 25, 2016, the initial examination by Applicant, Dr. David Dynof, MD on April 5, 2016, and the follow up examination of June 28, 2016 of Dr. Dynof, plus the Rebuttal by Dr. Dynof, MD dated September 28, 2016, and the other applicable contemporaneous medical records in the ECF, espiecially the postive MRI reports for the Cervical and Lumbar spine dated April 25, 2016, and Dr. Dynof's May 3, 2016 follow-up and Nerve block report, and initial

neurological examination of May 10, 2016 by Dr. Arien Smith, are more than sufficient to rebut the Respondent's peer reviews and addendum.

Respondent's representative argued that the series of nerve blocks in question, as Dr. Cohen opines in his peer reviews is not medically necessary given the limit relief the Assignor received from the May 3 and 31, 2016 nerve blocks, and therefore relies upon the totality of Dr. Cohen's peer reviews and addendum dated November 21, 2016 and Dr. Gary Florio's peer review dated August 23, 2016 who also finds the nerve where redundant, ineffective, and thus not medically necessary.

A peer reviewer must establish a factual basis and medical rationale for his asserted lack of medical necessity of the health care provider's services. See *Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co.*, 2009 N.Y. Slip Op. 51868(U) at 3, 2009 WL 2780152 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Aug. 5, 2009); *A.M. Medical Services, P.C. v. Deerbrook Ins. Co.*, 18 Misc.3d 1139(A), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008). 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 .*, 8 Misc.3d 1025(Practice P.C. v. American Transit Ins. Co A), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 at 3 (Civ. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff who 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).

Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden. I find that Dr. Cohen's peer review reports and Dr. Florio's peer review report where predicated upon a factual basis and medical rationale.

For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the subjective and objective evidence of the patient's complaints." *Nir v. Progressive Insurance Co.*, 7 Misc.3d 1006(A), 801 N.Y.S.2d 237 (Table), 2005 N.Y. Slip Op. 50466(U), 2005 WL 782806 (Civ. Ct. Kings Co., Nadelson, Apr. 7, 2005).

Based upon a review of all of the records herein and the arguments of the parties at the hearing, Applicant has rebutted the lack of medical necessity established in the peer reports by a preponderance of the credible evidence. The Rebuttal by Dr. David Dynof, MD, dated September 28, 2016, along with all of the contemporaneous medical records in the ECF, including the initial evaluation and follow up evaluation and the cervical and

lumbar MRI reports are sufficient to rebut the Respondent's peer reviews of Dr. Cohen, dated July 27, 2016, August 1, 2016, and Dr. Florio's dated August 23, 2016, and the Addendum dated November 21, 2016 by Dr. Cohen. Dr. Dynof carefully deconstructs these three peer reviews of Drs. Cohen and Florio by stating Dr. Cohen failed to fully consider the positive MRI results in his peer reviews and that both doctors admitted the Assignor received pain relief from the nerve blocks, but just not enough relief to continue the course of treatment in their opinion, in opposition to the entire weight of the medical records. Dr. Dynof does not begin this course of treatment until after the MRI reports were reviewed and conservative treatment had failed to provide pain relief and rehabilitation for the Assignor. Neither peer review doctor offers a scale as to how much pain relief is necessary to continue the regiment of nerve blocks after the first two were administered to the Assignor in their three peer reviews. Dr. Cohen in his Addendum re-reviews all the medical evidence and does not change his opinion as to the medical necessity of the services rendered to the Assignor.

Applicant has rebutted the finding of lack of medical necessity, and thus prevails.

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
	DRD Medical P.C.	06/14/16 - 07/19/16	\$1,681.38	Awarded: \$1,681.38
Total			\$1,681.38	Awarded: \$1,681.38

- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 11/10/2016, which is a relevant date only to the extent set forth below.)

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

The Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." *Id.* The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have

agreed and resolved disputes, subject to a maximum fee of \$1,360." 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, Matthew J. Cavalier, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/06/2017
(Dated)

Matthew J. Cavalier

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:
9cb7307cc38bb88901057172d4b8b7e8

Electronically Signed

Your name: Matthew J. Cavalier
Signed on: 09/06/2017