

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bi County Medical Diagnostics PC
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-16-1028-8473

Applicant's File No.

Insurer's Claim File No. 15-3033701

NAIC No. 24260

ARBITRATION AWARD

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 06/16/2017, 09/08/2017
Declared closed by the arbitrator on 09/08/2017

Andrew Bruskin, Esq. from Munawar & Andrews-Santillo LLP participated in person for the Applicant

David Koenig, Esq. from Law Offices of Rachel Perry participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 985.00**, 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

Was the disputed computerized range of motion and muscle strength testing performed on the Injured Party on October 21, 2015 medically necessary and properly billed? The 26-year-old female passenger was involved in a motor vehicle accident occurring on July 06, 2015 and received treatment for injuries to her neck and back.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all relevant documents included in the Modria ADR Center maintained by the American Arbitration Association (hereinafter referred to as AAA) consisting of the submissions made by the parties. No other documentation was submitted by either party at the time of the hearing.

In dispute in this arbitration is Applicant's claim in the amount of \$985.00 for the disputed computerized range of motion and muscle strength testing (hereafter referred to as ROM/MMT) performed on 10/21/15.

This case arises out of a motor vehicle accident occurring on July 06, 2015, in which the Injured Party (CG), a then 26-year-old female, sustained multiple injuries including to her neck and back while occupying the insured vehicle as a passenger when it was hit by the adverse vehicle. After the accident, she did not seek emergency care.

Then on July 17, 2015, Dr. Eric Lippman initially examined the Injured Party and reported that she presented with complaints of numbing and tingling pain in the low back bilaterally, radiating into both hips, legs, and feet, and shooting and burning pain in the neck bilaterally radiating into both shoulders, arms, and hands. Physical examination revealed abnormal DTRs in the upper and lower extremities, and a positive cervical distraction test bilaterally, maximum cervical compression test bilaterally, Lasegue (SLR test) test bilaterally at 30 degrees. Based on his exam findings, Dr. Lippman's diagnoses were lumbosacral sprain/strain with accompanying vertebral subluxation, traumatically induced subluxation complex of the lumbar spinal region with resultant insult to the corresponding soft tissues of the low back and lumbosacral paravertebral musculature, lumbar radiculitis, traumatic insult to the cervical spine complicated by intervertebral disc syndrome and radiculopathy, acute cervical sprain/strain with attendant subluxation complex of the cervical spine, and primary cervical subluxation accompanied by paravertebral muscle spasms. He recommended conservative care.

Initially, Respondent apparently reimbursed various medical providers for their medical services but then began to question the Injured Party's need for ongoing medical care. So, Respondent scheduled an independent medical examination (hereafter referred to as IME) with its consultants, Dr. James Whitaker, DC and Dr. Peter Chiu. Dr. Chiu evaluated the Injured Party on September 30, 2015 and discontinued medical treatment based on the negative objective IME findings. However, Dr. Whitaker, DC examined the Injured Party on September 02, 2015 and based on positive exam findings opined that she had cervical sprain/strain with myofascitis and radiculitis and required ongoing chiropractic treatment and massage therapy for once a week for 6 weeks with a re-evaluation of the cervical spine.

Dr. Whitaker re-evaluated the Injured Party on October 09, 2015 and opined that the Injured Party's cervical sprain/strain resolved; there were no positive objective findings regarding the cervical, thoracic, and lumbar spine; and no further chiropractic and massage treatment and testing were medically necessary. The effective date of that IME was listed as 10/14/15 but should be 10/18/15 if a 5-day mailing period is added to the date that the global denial was sent to Applicant.

Applicant performed the disputed computerized ROM/MMT testing on 10/21/15 and submitted its claim form to Respondent seeking the reimbursement of no-fault benefits.

Within 30-days of its receipt of Applicant's claim form, Respondent denied reimbursement on the grounds that the disputed computerized ROM/MMT testing was medically unnecessary based on the IMEs by Dr. Whitaker/Dr. Chiu.

After it received Respondent's denial, Applicant commenced this arbitration seeking reimbursement of its claim.

At the outset, I find that Applicant established its prima facie case with the submission of its claim form and the copy of Respondent's denial of claim form, which demonstrate that Respondent received Applicant's claim form, that more than 30-days elapsed since its receipt of same, and that Respondent denied reimbursement of Applicant's claim, which shows that Applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co 25 N.Y.3d. 498, 35 N.E.3d 451, 14 N.Y.S. 3d. 283, 2015 N.Y. Slip Op 04787(NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, 911 N.Y.S.2d. 907, 2010 N.Y. Slip Op.08933, (N.Y.A.D. 2nd Dept., November 30, 2010).

At issue is whether Respondent's denial was legally sufficient to preserve Respondent's lack of medical necessity defense. If so, the issue is whether Respondent met its burden of proof in establishing its lack of medical necessity defense and whether Applicant rebutted same.

Sufficiency of the Denial

Applicant's attorney argued that Respondent's lack of medical necessity defense should be precluded because the denial was legally insufficient in that it did not apprise Applicant with a high degree of specificity of the basis of the denial. He expounded that the EOB attached to the claim-specific denial did not indicate the name of the IME examiner but only indicated that the claim was denied based on the results of a medical examination. He argued that it is well-settled that a denial must apprise an applicant with a high degree of specificity of the basis of the denial. He contended that the above general language did not. Consequently, he argued that Respondent's lack of medical necessity defense should be precluded based on the legally insufficient denial.

Respondent's attorney argued that the above language sufficiently apprised Applicant of the basis of the denial and alternatively that if there was any doubt regarding whether Respondent relied on the IME by Dr. Chiu or Dr. Whitaker, DC, the global denial clarified which IME report was relied upon because the IME report was attached to the global denial. Consequently, he contended that Respondent's denial was legally sufficient and its defense should therefore be preserved.

Reviewing the relevant evidence in the record and considering the parties' oral arguments, I find that Respondent's denial was legally sufficient because Respondent

attached a copy of the IME report to the global denial and therefore apprised Applicant with a high degree of specificity of the basis of the denial. See Contempo Med. Care, P.C. v Travelers Indem. Ins. Co., 12 Misc. 3d 139 [A], 2006 NY Slip Op 51338[U] (App Term, 2d & 11th Jud Dists., May 24, 2006) and Olympic Chiropractic, PC v. American Tr. Ins. Co. 14 Misc. #d. 129(A),836 N.Y.S. 2d 487 (Table), 2007 WL 29051, 2007 N.Y. slip Op. 50011(U) (N.Y. Sup. App. Term, Jan. 2, 2007). Consequently, I find that Respondent's lack of medical necessity defense is preserved.

Lack of Medical Necessity Defense

Regarding its lack of medical necessity defense, Respondent relies on the IME report by Dr. Whitaker, DC/Dr. Chiu. To rebut that defense, Applicant relies on the legal arguments of its attorney and its medical reports for contemporaneous exams.

In his IME report, Dr. Chiu reported that the Injured Party presented with complaints of neck, mid-back, and low back pain. He expounded that the Injured Party indicated that her symptoms were somewhat better from the accident. His physical examination revealed **mild tenderness over the paracervical musculature to superficial light touch**, without muscle spasm, normal cervical spine ranges of motion (measurements given), normal motor strength in the upper extremities, a normal sensory exam, normal DTRs in the upper extremities, no atrophy, a negative compression test, **mild tenderness over the spinous process from T1 to T12 to superficial light touch** without muscle spasms, **mild tenderness over the paravertebral musculature to superficial light touch**, without muscle spasms, normal lumbar ranges of motion (measurements given), a normal motor exam of the lower extremities, a normal sensory exam of the lower extremities, normal DTRs in the lower extremities, and a negative SLR test. Based on his exam findings and review of the cited medical records, Dr. Chiu opined that the Injured Party's cervical, thoracic, and lumbar spine sprains/strains were resolved and that based on the history and lack of objective findings, no further physical therapy, massage therapy, injections, prescriptions, PMR treatment including office visits, diagnostic testing, household help, medical supplies or special transportation were medically necessary.

In his IME report for the exam on 10/09/15, Dr. Whitaker reported that the Injured Party presented with complaints of intermittent mild neck pain, upper back pain, and lower back pain. Despite those complaints, her reported the following benign exam findings: a normal lordosis of the spine, normal cervical spine ranges of motion, no tenderness, muscle hypertonicity, trigger points or spina subluxation/joint restriction, a normal neurological exam of the upper and lower extremities, negative orthopedic testing in the cervical and lumbar spine (see IME report for specific tests). Based on his negative IME findings, Dr. Whitaker's impression was that of resolved cervical, thoracic, lumbar spine sprains/strains. He opined that the mild subjective complaints did not correlate with the negative objective findings and that based on those negative IME findings, chiropractic and massage treatment were medically unnecessary for the cervical, thoracic, and lumbar spine, as well as household help, durable medical goods, special transportation, further testing or referrals to other specialist.

In his medical report dated October 21, 2015, Dr. Richard Bogdanski reported that the Injured Party continued to experience symptoms of neck and lower back pain with radiation into the arms and legs. His physical exam revealed paravertebral muscle spasms. He indicated that he wanted updated ROM studies to determine range of motion levels and to compare with subsequent range of motion measurements. He also indicated that the tests would enable an assessment of the Injured Party's progress.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

In determining whether an insurer met its burden of proof in establishing its lack of medical necessity defense, the courts have found that an insurer must submit an IME report/peer review with a detailed basis and medical rationale for the denial of benefits in order to prevail. See Vladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co., 12 Misc. 3d 128A (App. Term 1st Dept. 2006) and Nir v. Allstate, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 57, 60 (Civ. Ct., Kings Cty. 2005 ("At a minimum, (Respondent) must establish a factual basis and medical rationale for the lack of medical necessity of (Applicant's) services"). Once Respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that Respondent has established its prima facie defense that the disputed medical service is medically unnecessary. A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table, Text in WESTLAW), Unreported Disposition, 2007 WL 1989432, 2007 N.Y. Slip Op. 51342(U) (N.Y. Sup. App. Term Jul 03, 2007). See also, Dayan v. Allstate Ins. Co. 49 Misc.3d 151(A), 29 N.Y.S.3d 846, 2015 NY Slip Op 51751(U) (App. Term 2d, 11th & 13th Dists. 2015). Then, the burden of persuasion regarding the medical necessity of the medical services shift to the applicant to submit competent medical evidence to refute Respondent's prima facie defense that the disputed medical service/test was medically unnecessary. See Pan Chiropractic PC v. Mercury Ins. Co., 24 Misc.3d. 136 (A), 897 N.Y.S. 2d 671 (Table), 2009 NY Slip Op 51495 (U) (July 9, 2009).

Applying the above case law to the facts of this case, I find that Respondent established its prima facie case that the disputed ROM/MMT testing was medically unnecessary with the IME reports by Dr. Peter Chiu and Dr. James Whitaker because both IME examiners set forth a sufficient factual basis and medical rationale with their reported benign IME findings and review of the cited medical records. Although both examiners reported mild tenderness, they characterized those findings as subjective and not objective. I find that both IME reports were legally sufficient to establish Respondent's defense.

Thus, the question becomes whether Applicant rebutted that defense.

I find that Applicant failed to rebut Respondent's lack of medical necessity defense with Dr. Richard Bogdanski's report because it contains too few clinical findings to have much probative worth. Notably, the report does not even contain ROM measurements.

Accordingly, for the above reasons, I find in favor of Respondent. Applicant's claim is denied in its entirety.

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

09/09/2017
(Dated)

Heidi Obiajulu

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:
3b66e05ed6832be47c2e08e15c8c21ab

Electronically Signed

Your name: Heidi Obiajulu
Signed on: 09/09/2017