

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Interventional Physical Medicine & Rehab PC (Applicant)	AAA Case No.	17-16-1047-9979
	Applicant's File No.	38086
- and -	Insurer's Claim File No.	0292930427
Allstate Insurance Company (Respondent)	NAIC No.	19232

**ARBITRATION AWARD**

I, Nicholas Tafuri, 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: EIP (EB)

1. Hearing(s) held on 08/25/2017  
Declared closed by the arbitrator on 08/25/2017

Bennett Gewurz, Esq. from Law Office of Gewurz & Zaccaria, PC participated in person for the Applicant

Brian Kratenstein, Esq. from Peter C. Merani Esq. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,653.07**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

Applicant stipulated to the timeliness of Respondent's denials.

3. Summary of Issues in Dispute

EIP, EB, is a 41-year-old female, who was the driver of a motor vehicle involved in an accident on July 13, 2013. EIP sought medical treatment for her alleged injuries.

The issues to be determined are (1) whether Applicant is entitled to reimbursement for medical services provided to EIP on dates of service 11/8/13 to 9/11/15, and (2) whether Respondent's fee schedule defense is sustainable?

#### 4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an 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. The case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

EIP, EB, is a 41-year-old female, who was the driver of a motor vehicle involved in an accident on July 13, 2013. EIP sought medical treatment for her alleged injuries. EIP was transported by ambulance to Jacobi Hospital. X-rays of the left lower extremity and knee revealed no fractures. On July 23, 2013 EIP presented to Dr. Rafael Abramov, D.O. at Interventional Physical Medicine and Rehabilitation, with the following complaints: neck pain radiating to the left upper extremity with weakness, tingling, and numbness. EIP commenced a course of conservative treatment including physical therapy.

In dispute in this arbitration is the medical necessity for physical therapy treatment and office visits on dates of service 11/8/13-9/11/15, denied by Respondent based on an IME performed by Thomas Nipper, M.D. dated October 15, 2013.

It is well settled that an applicant establishes its *prima facie* showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the 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 (2d Dept. 2004). With Applicant establishing a *prima facie* case of entitlement to No-Fault compensation for its claim, the burden then shifts to the Respondent to prove that the bills in question were properly denied.

### FEE SCHEDULE

The insurer has the burden of proving that the fees charged were in excess and not in accordance with the Worker's Compensation fee schedule. St. Vincent Medical Care PC v. Countrywide Insurance Company, 26 Misc. 3d 146 (A), 907 NYS 2d 441 (App. Term 2d, 11th and 13th Dists. 2010). If the insurer fails to demonstrate, by competent evidentiary proof, that the claims were in excess of the appropriate fee schedule, the defense of noncompliance cannot be sustained. See, Continental Medical PC v Travelers Indemnity Company, 11 Misc.3d 145(a), 819 NYS 2d 847 (App Term 1st Dept. 2006).

I am permitted to take judicial notice of the Worker's Compensation fee schedule. Kingsbrook Jewish Medical Center v. Allstate Insurance Company, 61 AD 3d 13 (2d Dept. 2009); LVOV Acupuncture PC v. Geico Insurance Company, 32 Misc. 3d 144 (A) (App. Term 2d, 11th and 13th Jud. Dists. 2011). Natural Acupuncture Health PC v. Praetorian Insurance Company, 30 Misc. 3d 132 (A), 2011 N Y slip op 50040 (U), (App. Term 1st Dept. 2011).

Respondent argues that Applicant billed in excess of the fee schedule for the physical therapy visits. However, the therapy treatments in this case were not rendered by a self-employed physical therapist. Further, Dr. Abramov testified at the arbitration hearing that the bills for the health services provided were submitted in accordance with the fee schedule.

Based on the foregoing, I find that Applicant billed appropriately in accordance with the fee schedule, and as such, Respondent's fee schedule defense is not sustainable.

### MEDICAL NECESSITY

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity for future health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), (App. Term 2d & 11th Dists. Sept. 3, 2008); Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co., 19 Misc.3d 1139(A), (Dist. Ct., Nassau Co., Andrew M. Engle, J., May 29, 2008).

Where an IME report provides a factual basis and medical rationale for an opinion that services were not medically necessary, and the claimant fails to present any evidence to refute that showing, the claim should be denied, AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), (App. Term 2d & 11th Dist. Feb. 9, 2002), as the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Wagner v. Baird, 208 A.D.2d 1087 (3d Dept. 1994).

On October 15, 2013, EIP submitted to a medical examination ("IME") with Dr. Thomas Nipper, board certified in orthopedic surgery. The examination forms the basis for Respondent's denial. The IME resulted in the termination of all further orthopedic, physical therapy, PM&R, and pain management benefits, effective 11/1/13.

Dr. Nipper states that on the examination date, EIP reported that although her physical therapy treatment is not beneficial, she continues treatment three times per week. EIP continues to have complaints of headaches and pain in the neck which radiates to her left arm and hand, with numbness and tingling. Examination of the cervical spine revealed no complaints of tenderness on palpation or spasm. Range of motion testing was normal. There was no motor or sensory deficit noted in either upper extremity. The only orthopedic test performed, the cervical compression test, was reportedly negative. The examination of the left knee revealed no evidence of tenderness. Range of motion was normal. Lachman test and McMurray

test performed were negative. Dr. Nipper reports a diagnosis of resolved sprain of the cervical spine and left knee, with no evidence of an orthopedic disability, and no treatment necessary from a physiatric viewpoint.

Although there was only one (1) orthopedic test performed on the cervical spine, and there is no indication that Dr. Nipper objectively measured EIP's range of motion (i.e. a goniometer), I do find that the results of this examination presented a medical rationale as to why further benefits were terminated. Based upon the foregoing, Respondent has set forth a medical rationale in support of its defense. Since Respondent has factually demonstrated the services rendered were not medically necessary, the burden shifts to Applicant who bears the ultimate burden of persuasion.

For Applicant to prove that the disputed treatment was medically necessary, it must demonstrate that "the treatment, procedure, or service (was) ordered by a qualified physician...based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with". Nir v. Progressive Insurance, NYLJ, April 14, 2005, p.19, col. 1 (Civ Ct Kings County, J. Nadelson). Moreover, "(s)uch 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." *Id.*

In this case, Applicant relies on contemporaneous medical records, and the testimony of Dr. Rafael Abramov at the hearing.

After the initial evaluation of EIP on July 23, 2013, follow up physiatric evaluations were performed by Dr. Abramov on August 16, 2013, September 11, 2013, September 26, 2013, and October 30, 2013. On August 16, 2013, EIP's complaints included neck pain radiating to the left upper extremity with weakness, tingling, and numbness. An MRI of the cervical spine revealed disc herniations at C5-6 and C6-7, and disc bulges at C2-3, C3-4, C4-5. Dr. Abramov states that EIP continues to have difficulty with neck motion, and radiating pain into the left upper extremity. Cervical spine examination revealed bilateral trigger points, left more than right in the trapezius. Active range of motion is painful and reveals limitation in

flexion, extension, rotation, and bending. Spurling's test is positive on the left side. Motor strength is decreased in the left deltoid, left elbow, left wrist and left grip. Sensory exam is decreased in the left upper extremity diffusely compared to the right. Dr. Abramov reports positive Tinel's at the wrist.

On August 30, 2013, Dr. Abamov noted the findings of an EMG conducted on August 27, 2013, that revealed evidence of left sided C7 radiculopathy and bilateral median sensory demyelinating entrapment neuropathy with compression at the level of the transcarpal ligaments. As a result of the EMG test results, the physical therapy program was tailored to include cervical traction. EIP was also recommended to consult a spine surgeon in light of the left C7 radiculopathy, and due to the ongoing neck pain with multiple disc herniations.

On September 11, 2013, EIP presented to Dr. Abramov with worsening neck pain radiating to the left upper extremity, and with headaches, possibly radiating from the neck. The physical examination noted tenderness in the cervical spine with trigger points and decreased range of motion. Medication was prescribed and EIP was recommended to see a spine surgeon and pain management specialist.

On September 18, 2013, EIP is examined by Dr. Yasha Magyar who recommends cervical facet joint injection and an epidural steroid injection. However, EIP apparently possesses an extreme needle anxiety and she is referred to an outside pain specialist where IV anesthesia will be available for anxiolysis.

On September 26, 2013, Dr. Abramov again notes EIP's complaints to include neck pain radiating to the left upper extremity with weakness, tingling, and numbness, and headaches. She continues to have difficulty with neck motion and work-related activities are very difficult. The Medrol Dosepak helped with the intensity of her pain and the intensity of the radiation, but she continues to have difficulty with lifting, performing household chores, neck motion, and work-related activities. Tenderness and trigger points are noted upon examination of the cervical spine. Decreased range of motion, and the Spurling's test continues to be positive on the left.

A lumbar spine examination also revealed tenderness with painful and restricted range of motion. Manual muscle strength and sensory examination is decreased. Therapy program is recommended to continue. EIP is awaiting an evaluation by a spine surgeon in light of the radiculopathy and disc herniations, as well as an evaluation by a neurologist for posttraumatic headaches. Dr. Abramov notes that EIP may follow up with an orthopedist and a pain management specialist, and she will continue with her current pain medications.

On October 17, 2013, EIP presents to Jeffrey D. Klein, M.D., Spine Surgery-NYU Hospital for Joint Diseases. Upon examining EIP, Dr. Klein reports that there is obvious weakness in the left upper extremity, and recommends an anterior cervical discectomy and fusion.

On October 30, 2015, 2 weeks post IME by Dr. Nipper, EIP presents to Dr. Abramov with the same complaints of neck pain and headaches. Dr. Abramov notes that EIP was seen by an orthopedic spine surgeon in light of the multiple disc herniations and left C7 radiculopathy. She is awaiting a surgical procedure. Cervical spine examination reveals tenderness and trigger points are noted. Range of motion is painful and limited. Spurling's test is positive on the left. Manual muscle test and sensory examination is decreased. Continued therapy program is recommended, with EIP awaiting an anterior cervical discectomy with fusion.

Dr. Rafael Abramov, D.O. testified in person at the arbitration hearing and disagrees with Dr. Nipper's opinion. Dr. Abramov reaffirmed EIP's diagnosis of radiculopathy, and testified that the multiple positive findings necessitated continued treatment of EIP. His findings are consistent with the EMG results revealing left C6 radiculopathy. Causality to the subject motor vehicle accident is established. After a careful review of the records, and based on the testimony of Dr. Abramov at this hearing, as well as the arguments of respective counsel, I find that Applicant has met its burden in rebuttal. Respondent's counsel argues that EIP's statements to the IME physician-Dr. Nipper, that her physical therapy treatment is not beneficial, establishes that any further therapy treatments are not medically necessary. However, Dr. Klein, although recommending a cervical discectomy and fusion, allows EIP to continue with her conservative treatment while considering her

options. Applicant's contemporaneous medical records indicate that there were positive findings, and EIP required the continued treatment based upon objective findings along with subjective findings of persistent pain. I defer to EIP's treating physicians, and find that sufficient credible evidence has been submitted, and testimony elicited, to establish the medical necessity for EIP's continued treatment.

Accordingly, Applicant's claim is granted.

The total amount awarded to Applicant is \$6,653.07.

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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
	<b>Interventional Physical Medicine &amp; Rehab PC</b>	<b>11/08/13 - 09/11/15</b>	<b>\$6,653.07</b>	<b>Awarded: \$6,653.07</b>



<b>Total</b>	<b>\$6,653.07</b>	<b>Awarded: \$6,653.07</b>
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- B. The insurer shall also compute and pay the applicant interest as set forth below. (The filing date for this case was 11/07/2016, which is a relevant date only to the extent set forth below.)

Respondent shall compute and pay to Applicant the amount of interest from the aforesaid filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

As this matter was filed after February 4, 2015, it is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee in accordance with newly promulgated 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 Nassau

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

09/15/2017  
(Dated)

Nicholas Tafuri

### **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:**  
9e5aae9d9202035ff213abcb774cb88

### **Electronically Signed**

Your name: Nicholas Tafuri  
Signed on: 09/15/2017