

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Orlin & Cohen Orthopedic Assoc.
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-16-1052-2539

Applicant's File No. RFA16-194829

Insurer's Claim File No. 0431021799
2AY

NAIC No. 19232

ARBITRATION AWARD

I, Fred Lutzen, 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/claimant/patient

1. Hearing(s) held on 09/14/2017
Declared closed by the arbitrator on 09/14/2017

Emily Bennett, Esq., from Russell Friedman & Associates LLP participated in person for the Applicant

Allison Lindsey, Esq., from Allstate Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,571.80**, 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

Applicant seeks reimbursement for cervical and lumbar spine MRIs performed by Applicant on 10/10/16. The amount claimed is \$1,571.80.

At the time of disputed services, this female EIP was 47-years-old. She was injured while driving and involved in an automobile accident on 10/4/16. On 10/5/16, she presented to Applicant with complaints of neck, back and other injuries. MRIs of the cervical and lumbar spine were performed on 10/10/16. Respondent denied reimbursement based on a peer review report prepared by Dr. Howard Levin, M.D., dated 11/9/16.

The issue is whether the cervical and/or lumbar spine MRIs were medically necessary.

4. Findings, Conclusions, and Basis Therefor

My decision is based on the arguments of representatives for both parties, and those documents submitted to the American Arbitration Association, as contained in the MODRIA electronic case folder as of the date of this hearing. There was no live witness testimony at the hearing.

It is now well-settled that a medical provider establishes a prima facie case of entitlement to payment of no-fault benefits upon the submission of a proper claim form setting forth the fact and amount of the losses sustained as well as the additional fact that the payment of no-fault benefits was then overdue. Insurance Law 5106(a); Mary Immaculate Hospital v. Allstate Ins. Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004); Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A), 784 N.Y.S.2d 918 (Table), 2003 N.Y. Slip Op. 51701(U), 2003 WL 23310886 (App. Term 2d & 11th Dists. Dec. 24, 2003). I find the evidence reflects that Applicant has established its prima facie case as Respondent acknowledged timely receipt of Applicant's claim as of 10/25/16, and then issued its timely denial on 11/17/16, asserting lack of medical necessity as a defense. The burden has shifted to the Respondent to prove its defense that the cervical and lumbar spine MRIs lacked medical necessity.

The Respondent's denial for lack of medical necessity must be supported by a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc.3d 975, 787 N.Y.S.2d 645 (Civ. Ct. New York Co. 2004); CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608, 609, 777 N.Y.S.2d 241, 242 (Civ. Ct. Kings Co. 2004). To successfully support its denial, the Respondent's peer review must address all of the pertinent objective findings contained in the applicant's medical submissions. The peer review must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices. The conclusory opinions of the peer reviewer, standing alone and without support of medical authorities, will not be considered sufficient to establish the absence of medical necessity. (See, Citywide Social Work, et. al. v. Travelers Indemnity Co., *supra*; and Amaze Medical Supply Inc. v. Allstate Ins. Co., 12 Misc.3d 142(A), 824 N.Y.S.2d 760 (Table), 2006 N.Y. Slip Op. 51412(U), 2006 WL 2035559 (App. Term 2d & 11th Dists. July 12, 2006).

Respondent's counsel argued that absent some conservative care or an MRI 'red flag' indicator, the MRIs were not necessary, and that the peer review met Respondent's burden of proof.

I have reviewed the entire peer review, and I find it is supported by medical authority, provides a satisfactory medical rationale and relies on the facts present, so that Respondent has met its burden. Dr. Levin stated that "[a]ccording to generally accepted standards of medical practice, a claimant should be rendered a course of conservative treatment for at least 4-6 weeks, after which time that claimant should be re-evaluated

and such examination should be complete and thorough. If the claimant's symptoms have deteriorated or the claimant develops any new significant neurological symptoms/conditions or signs, and the question arises about any further invasive treatment options, such as surgical intervention, then an MRI recommendation could be medically justified at that time." Dr. Levin stated that there is no evidence of these indications in the provided documentation. Dr. Levin reviewed the records, which included the 10/5/16 evaluation report with x-ray findings by Laura Michel, P.A./Brett A. Lenart, M.D., the MRI prescriptions, and other medical records created after the MRIs were performed. He states there "is no explanation as to how the results of the MRI studies would impact the treatment course for this claimant. There is no evidence that the MRI testing was performed as part of a pre-surgical testing."

I find that Dr. Levin's report provides a well-reasoned and factually based opinion that satisfies Respondent's burden of proof and demonstrates, prima facie, that the MRIs lacked medical necessity and were performed outside of the standard of care, as stated by Dr. Levin. Therefore, the burden has shifted back to the Applicant to persuade otherwise. See, A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007).

In rebuttal, Applicant relies on a report by Dr. John Feder, M.D., dated 7/17/17, which addresses Dr. Levin's peer review, and the remaining medical records submitted to MODRIA.

Applicant's counsel argued that the MRIs were necessary in light of the x-ray findings, which included cervical degenerative disc disease and lumbar spondylolisthesis, with the onset of acute trauma warranted immediate MRIs.

On 10/5/16, the EIP was examined at Applicant's Lynbrook office. The report was prepared/e-signed by Laura Mitchell, P.A. X-rays of the cervical spine were taken, and the report notes that the x-ray views "shows straightening consistent with spasm and disc space narrowing." X-ray of the lumbar spine revealed "disc space narrowing and spondylolisthesis." She was diagnosed with acute cervical sprain, lumbar sprain, cervical degenerative disc disease, and lumbar spondylolisthesis. No x-ray reports were submitted to MODRIA. The plan includes "[r]ecommend MRI of both cervical and lumbar spine; she will f/u with spine specialist after MRIs and consider pain mgt if needed." The MRI prescription for the cervical spine states "eval HNP; Dx. C spine DDD/sprain." The prescription for the lumbar spine MRI states "eval HNP; L spine prain"(sic). Both are signed by Dr. Lenart.

I have reviewed the entire rebuttal report by Dr. Feder, who reports that after his reviewing of Dr. Levin's peer review report, that he disagrees with Dr. Levin's assessment and conclusions. Dr. Feder disagrees that conservative care should precede MRIs. Dr. Feder also summarizes the EIP's initial complaints, which he states includes "pain so severe that she could not sleep" (the record indicates "pain causes sleep disturbances"). He described the bilateral spasms and tenderness, pain and nonspecific decreased ranges of motion. He states that the EIP's diagnosis of cervical degenerative disc disease "would make her more likely to have more pain and symptoms due to the

injuries sustained in the MVA. Therefore, it was necessary to obtain the MRIs prior to beginning therapy which would not only subject her to more pain but might also cause further damage. The MRIs were ordered so as to have a quick and pin pointed diagnosis and a targeted treatment plan." I must point out that this statement is contrary to the actual records. The treating physician did not mention these same concerns and, in fact, recommended a home exercise program (where she would be unsupervised) instead of a supervised physical therapy program. This does not suggest the same level of concern Dr. Feder now asserts existed when the MRIs were ordered. While it is true that this 47-year-old EIP was diagnosed with cervical DDD, there is no mention in the record of any concern with the DDD diagnosis or suggestion that MRIs were ordered because of it - until Dr. Feder's rebuttal report. The 10/5/16 evaluation also reveals full strength exam for the cervical and upper extremities, and subjective weakness in the lumbar with normal clinical testing, which is more consistent with Dr. Levin's assessment.

Dr. Feder states that "the American College of Radiology (ACR) guidelines clearly mention "acute trauma" to be one of the indicators for the MRI testing." (*citing, Low Back Pain, Bradley WG Jr, Seidenwurm, DJ, Brunberg, JA, et al. American College of Radiology (ACR); 2005; www.guideline.gov/summary/summary.aspx?doc_id=8559#s24*). My attempts to verify this source were unsuccessful as it has been "replaced by the updated version." I was unable to confirm from the updated article that "acute trauma" is an indicator for MRI testing with no other factors considered. On that point, I find Dr. Levin's opinion more convincing, e.g., that the standard of care requires failed conservative care for injuries such as those reported in this case. If "acute trauma" was an indicator for MRI with no other considerations, then an MRI could be reasonably performed after any accident without regard to other factors. This is not a persuasive argument, and I have not found any decisions by courts or arbitrators that support this assertion.

In weighing the peer reviewer's affirmed report against the rebuttal evidence, I find the peer reviewer's report more credible, convincing, and to have more probative value.

Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). When reviewing the medical records, I remain mindful that the treating physician's opinion is entitled to deference. However, it is not determinative. Oceanside Medical Healthcare, P.C. v. Progressive Ins., 2002 N.Y. Slip Op. 50188(U) at 5, 2002 WL 1013008 (Civ. Ct. Kings Co., Jack M. Battaglia, J., May 9, 2002). Moreover, the treating physician's opinion is not expressed clearly in the records. It is difficult to understand from these records why the MRIs would be necessary.

Based on a preponderance of the credible evidence, I find that Applicant has failed to rebut the peer reviewer's well-reasoned, supported, and factually based opinion that the cervical and lumbar spine MRIs were not medically necessary or indicated. Respondent's denial is sustained.

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 Suffolk

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

09/19/2017
(Dated)

Fred Lutzen

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:
e47ce164906698c9bfe1e2c86c5024f3

Electronically Signed

Your name: Fred Lutzen
Signed on: 09/19/2017