

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Triumph Pharmacy, L.L.C.
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-16-1045-9539

Applicant's File No. GS-430023

Insurer's Claim File No. 0392953477

NAIC No. 19232

ARBITRATION AWARD

I, Donna Ferrara, 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: Assignor EA.

1. Hearing(s) held on 10/10/2017
Declared closed by the arbitrator on 10/10/2017

Patricia Daugherty, Esq. from Law Offices of Gabriel & Shapiro, LLC. participated in person for the **Applicant**

Eileen Byrne, Esq. from Allstate Insurance Company participated in person for the **Respondent**

2. The amount claimed in the Arbitration Request, **\$ 2,314.65**, 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

Whether Applicant established entitlement to No Fault compensation for medical goods including a cervical pillow, lumbar cushion, lumbar orthosis (LSO), thermaphore, massager, bedboard, mattress, cervical traction unit, TENS belt, cold water circulating unit, and infrared heating lamp dispensed to Assignor on dates of service January 8, 2016 and February 5, 2016.

Whether Respondent properly denied payment based on the peer reviews.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the file with regard to this matter contained in the ADR Center record of the case maintained by the American Arbitration Association. This decision is based on my review of that file, as well as the arguments of the parties at the hearing.

The dispute arises from the underlying motor vehicle accident of November 25, 2015, wherein Assignor, a 49 year old male, was injured. He was the driver and he did not seek emergency medical attention.

There are 3 bills in dispute. Applicant submitted the bills to Respondent and Respondent denied payment of the bills based on the peer review reports of Richard Coven, M.D., dated February 12, 2016, and March 10, 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 at the hearing that the peer review reports are very generic; they don't go into the patient's condition and they just describe the equipment in general.

Respondent's counsel argued that Respondent rests on the peer review; the services were not medically necessary.

In both peer review reports, Dr. Coven reviewed Assignor's medical records including treatment reports and diagnostic tests. He discusses the medical equipment. He opines that the cervical pillow is not durable and not primarily medical in nature and that the patient can use a rolled up towel which will have the same therapeutic effect. In regard to the lumbar cushion he states that it has not permanent effect on the spine and cannot accelerate or retard the natural aging process responsible for low back pain. In regard to the LSO, he opined that Assignor did not have any lumbar instability or red flags for even short term use of an LSO. He stated that in regard to the thermaphore, Assignor can use a moist hot towel which will serve the same purpose. In regard to the massager, he opined that this is a personal comfort item and that Assignor is already on a physical therapy program. He opined that the egg crate mattress is usually medically indicated for the prevention of pressure ulcers and Assignor does not meet that criteria and that receiving a bed board and egg crate mattress is contradictory since one device causes a softer mattress and the other one causes a harder mattress. In regard to the cervical traction unit he states that there is no mention of the effectiveness of traction use for Assignor during therapy in the treatment notes. In regard to the TENS belt, he states that there is no indication that Assignor had significant, long lasting benefit from electrical stimulation during physical therapy. In regard to the water circulating pad with pump, he opined that it is a duplication of services with physical therapy. In regard to the infrared heat lamp, he opined that Assignor could use a moist hot towel which would serve the same purpose. Dr. Coven states that the standard of care for soft tissue injury is a comprehensive evaluation, prescribing of anti-inflammatory medication, cold modality, rest, and conservative treatment for a period of 4 to 8 weeks, not the routine prescribing

of durable medical equipment in soft tissue injuries. He cites to medical literature which he believes supports his findings.

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 Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(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. Coven's peer review report was predicated upon a factual basis and medical rationale.

Respondent having made out a prima facie case of lack of medical necessity through the peer review, the burden shifted to Applicant to rebut and overcome it.

Applicant submits a rebuttal by Leonid Shapiro, which is not signed.

A letter of medical necessity which is not sworn or even signed is of no probative value. Innovative MR Imaging, P.C. v. Praetorian Ins. Co., 49 Misc.3d 129(A), 20 N.Y.S.3d 292 (Table), 2015 N.Y. Slip Op. 51402(U), 2015 WL 5750848 (App. Term 2d, 11th & 13th Dists. Sept. 16, 2015).

Applicant submits the initial examination report by Huseyin E. Tuncel, MD, dated December 3, 2015, wherein he noted restricted range of motion of the cervical and lumbar spine and positive administered tests. There was normal muscle and sensory noted. He recommended all of the medical goods stating in a pre-printed form, "...all of the prescribed items should have benefit for symptoms presented by the patient and I hope that it will help achieve full restoration of musculoskeletal neurological functions."

Based on a review of all the evidence, Respondent has established the lack of medical necessity for the disputed medical goods by a fair preponderance of the credible evidence, and the claim is denied. As Applicant's rebuttal was unsigned, it did not rebut the establishment of lack of medical necessity in the peer review report. Moreover the medical report by Dr. Tuncel wherein he prescribed the medical goods also did not rebut the lack of medical necessity established in the peer report.

Applicant did not sustain its burden of proof and rebut the lack of medical necessity established in the peer report.

The arbitration 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 Suffolk

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

11/09/2017
(Dated)

Donna Ferrara

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:
0f685ea9639a7f6cc92030475188bf78

Electronically Signed

Your name: Donna Ferrara
Signed on: 11/09/2017