

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Elite Medical Supply of New York, LLC
(Applicant)

- and -

Liberty Mutual Mid-Atlantic Insurance Co
(Respondent)

AAA Case No. 17-16-1035-0734

Applicant's File No.

Insurer's Claim File No. LA000-030742193-04

NAIC No. 14486

ARBITRATION AWARD

I, Marianne C. Zack, 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

1. Hearing(s) held on 03/07/2018
Declared closed by the arbitrator on 03/07/2018

Heather Shevlin from Scott M. Lupiani, Esq. participated by telephone for the Applicant

Cheryl Krzywicki from Liberty Mutual Mid-Atlantic Insurance Co participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 741.59**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated as to the timeliness of the denial.

3. Summary of Issues in Dispute

The Assignor, a 52-year-old male, was injured in a motor vehicle accident that occurred on 9/10/2014. Following the accident, EIP suffered lower back pain radiating to his left leg, which result in him seeking chiropractic treatment. On 4/10/2015, Applicant, through the EIP's treating chiropractor, Pasqua Chiropractic, dispensed an LSO brace

("LSO"). In dispute is the invoice for the foregoing DME in the amount of \$741.59, which was denied by Respondent for lack of medical necessity, based on a chiropractic peer review of Dr. Ji Hoon Kim dated 6/1/2015.

The hearing in this matter was conducted without any witnesses. This award is based upon hearing the oral arguments of representatives of both parties and upon a full review of the of the documents contained in the electronic case file as of the date of the Award.

An arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-45 (o) (1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms to the Insurance laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 NY2d 854, 768 NYS2d 423 (2003).

4. Findings, Conclusions, and Basis Therefor

Medical Necessity:

As a result of the subject motor vehicle accident, EIP began a course of chiropractic care with Pasqua Chiropractic (Dr. Pasqua) on 9/11/2014.

On 10/10/2015, the subject DME was prescribed to the EIP and appears to have been dispensed to the EIP on 4/10/2015.

On 6/1/2015, Ji Hoon Kim, D.C. performed a peer review of the EIP's treatment and records to provide his opinion as to the medical necessity of the LSO. In that report, Dr. Kim states that the principal of current practices is that the goal of rehabilitative therapy is to increase mobility and to limit mobility only in cases such as lumbar instability, fracture and post-surgical cases. He further opines that it is counterproductive to stabilize the spine and limit ranges of motion when the objective of rehabilitative therapy is just the opposite, which is to mobilize the spine. Dr. Kim states that prescription for the LSO is not indicated here because there are not documents evidencing that EIP suffered a fracture as a result of the subject motor vehicle accident.

In further support of his opinion that the LSO was not medically necessary, Dr. Kim cites to medical literature which points to a lack of evidence that lumbar supports are no more effective in preventing low back pain than no intervention at all.

When an insurer uses a peer review as a basis for the denial, the peer review report must contain (1) evidence of the applicable generally accepted medical/professional standards, and (2) a statement or statements by the peer reviewer, based upon his or her application of the facts of the case, which set forth the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto. Ins. Co.*, 17 Misc. 3d 1135(A) [Dist. Ct., 1st Dist., Nassau Co., 2007]; *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544 (NYC Civ. Ct., Kings Co., 2005).

If the insurer presents sufficient evidence establishing a lack of medical necessity, then the burden shifts back to the Applicant to present its own evidence of medical necessity. See *Tremont Med. Diagnostic, P.C. v. Geico Ins.*, 824 N.Y.S.2d 759 (App.Term 2d Sept. 29, 2006). In order for the Applicant to prove that the disputed expense was medically necessary, it must meaningfully refer to, or rebut, the Respondent's evidence. See *Yklik, Inc. v. Geico Ins. Co.*, 958 N.Y.S.2d 64 (App.Term 2d July 29, 2010).

I find that the peer review satisfies Respondent's burden, thus shifting the burden back to Applicant.

In this regard, I have reviewed the rebuttal of Dr. Pasqua dated 10/13/2015. Dr. Pasqua states that he prescribed the LSO because the use of the orthotic was necessary to stabilize the EIP's spine and allow him to engage in work while relieving his pain. Dr. Pasqua cites to an article of clinical evidence which concludes that LSOs may be effective at improving pain and functional capacity in patients with subacute and low back pain. Dr. Pasqua further states the LSO stabilized the EIP's spine, preventing exacerbation of his injuries and elevated tolerance for functional activities and kept him able to work. Finally, in referencing an article cited by Dr. Kim, Dr. Pasqua states that the peer review overlooked bracing's place in "contemporary practice". Dr. Pasqua does not discuss this contemporary practice to which he refers.

The rebuttal fails to address Dr. Kim's discussion of the long-standing principal that use of a lumbar support is contradictory to the objective of chiropractic care, which is to mobilize the spine. Dr. Kim reiterates this principal in the 6/2/2016 addendum submitted by Applicant.

In this instance, I am more persuaded by the peer review report and thus find in favor of Respondent.

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 Erie

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

03/13/2018
(Dated)

Marianne C. Zack

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

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Electronically Signed

Your name: Marianne C. Zack
Signed on: 03/13/2018