

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hector Melgar PT PC
(Applicant)

- and -

Mercury Casualty Company
(Respondent)

AAA Case No.	17-17-1056-7873
Applicant's File No.	1952723
Insurer's Claim File No.	2015004500535320
NAIC No.	11908

ARBITRATION AWARD

I, Evelina Miller, 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: FLM

1. Hearing(s) held on 02/21/2018
Declared closed by the arbitrator on 02/21/2018

Justin Skaterowsky Esq from Israel, Israel & Purdy, LLP participated in person for the Applicant

Sabiha Farkas Esq from Law Office of Patrick Neglia participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 184.80**, 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

Whether Applicant established entitlement to No-Fault compensation for physical therapy treatment performed on Assignor

Whether Respondent made out a prima facie case of lack of medical necessity, and if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

Applicant was represented by Justin Skaterowsky Esq., who presented oral arguments and relied upon documentary submissions. Sabiha Farkas Esq., appeared on behalf of Respondent and presented oral arguments and relied upon documentary submissions. I have reviewed the submissions contained in MODRIA. These submissions are the record in this case.

The disputes arise from the underlying automobile accident of October 14, 2015, in which the Assignor (FLM), a 50-year-old-female, was a seat-belted driver. After the accident patient sought care at an urgent care facility. Thereafter, Assignor sought private medical attention and was eventually evaluation by Hempstead Medical with complaints of neck pain, bilateral shoulder pain, lower back pain, and right knee pain. Patient was recommended to undergo conservative care including physical therapy treatment. The bills in dispute are for physical therapy treatment performed on Assignor by Hector Melgar PT on 11/28/16 through 12/12/16.

I find that Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms, setting forth the fact and amount of the loss sustained, had been mailed and received and that payment of no-fault benefits were overdue. See *Mary Immaculate Hospital v. Allstate Insurance Co.*, 5 A.D.3d 742, (2d Dept., 2004).

Applicant's proof is also in Respondent's denials, which acknowledged receipt of the bill. Since Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits, the burden then shifts to the Respondent to demonstrate a lack of medical necessity for the items at issue. See, *Citywide Social Work & Psychological Services, PLLC v. Allstate Ins. Co.*, 8 Misc 3d 1025 A (2005).

Medical Necessity:

Respondent issued timely denials for dates of service of 11/28/16 through 12/12/16 for physical therapy treatment based on an IME by Dr. Francisco Santiago M.D. performed on 1/20/16. All PM&R treatment and related claims were determined to be not medically necessary, and were denied effective 2/22/16.

A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. *Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co.*, 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ.Ct., New York County, 2004); *King's Med. Supply Inc. v. Country Wide Ins. Co.*, 5Misc. 3d 767, 783 N.Y.S. 2d 448.

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, Amaze Medical Supply Inc. v. Eagle Insurance Company, 2003NY Slip Op 51701 (U), 2 Misc.3d. 128 (App. Term 2d & 11 Dist.-2003).

IME by Dr. Francisco Santiago M.D.

On January 20, 2016, Assignor was examined by Dr. Francisco Santiago M.D., in a PM &R evaluation. Dr. Santiago reviewed the patient's medical history as well as performed an evaluation of the Assignor. Based on the medical records presented and the results of the evaluation, Dr. Santiago concluded that claimant has reached maximum improvement and medical treatment was no longer necessary.

At the time of the examination patient presented with complaints of occasional lower back discomfort.

Examination of the Cervical spine revealed normal ranges of motion. There was no tenderness or muscle spasms noted. There was no scoliosis. Ranges of motion of the lumbar spine were normal.

Both upper and lower extremities strength was in the normal muscle grade. Ranges of motion were within normal limits. There was no swelling, tenderness or instability noted in the upper and lower extremities.

Sensation was intact to touch. Reflexes were equal and symmetrical. Orthopedic tests were negative. Straight leg raising test was at 90 degrees.

In order for an applicant to prove that the disputed expenses were medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the IME reports.

Ortho-Med Surgical Supply, Inc. v. Progressive Cas. Ins. Co., 2012 NY Slip Op 50149(U) (App Term 2d, 11th & 13th Jud Dists Jan. 24, 2012); Yklik, Inc. v. Geico Ins. Co., 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 2010); High Quality Medical, P.C. v. Mercury Ins. Co., 2010 N.Y. Slip Op. 50447(U) (App Term 2d, 11th & 13th Dists. Mar. 10, 2010); Pan Chiropractic, P.C. v. Mercury Ins. Co., 24 Misc.3d 136(A), 2009 N.Y. Slip Op. 51495(U) (App Term 2d, 11th & 13th Dists. July 9, 2009).

A letter of medical necessity sworn to by a provider who had examined assignor, along with other medical documentation, may be sufficient to rebut the IME and establish the medical necessity of the services rendered. See *Quality Psychological Servs., P.C. v. Mercury Ins. Group, 2010 NY Slip Op 50601(U) (App Term 2d Dept., April 2, 2010)*. See also *Neomy Med., P.C. v. Geico Ins. Co., 2012 NY Slip Op 50145(U) (App Term 2d, 11th & 13th Jud Dists Jan. 24, 2012)*; *Vinings Spinal Diagnostic, P.C. v. Geico Gen. Ins. Co., 2010 NY Slip Op 51897(U) (App Term 2d Dept., Nov. 8, 2010)* (an affidavit from a chiropractor "meaningfully referred to" the peer and "sufficiently rebutted the conclusions set forth therein"); *Park Slope Med. & Surgical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 22 Misc.3d 141(A), 2009 NY Slip Op 50441(U) (App Term 2d, 11th & 13th Jud Dists 2009)*.

Likewise, an affirmation from the provider's assignor's treating doctor who stated that he had examined assignor around the time of the IME and whose findings contradicted the findings of the IME doctors is sufficient to raise an issue of fact as to the medical necessity of the disputed services. *Triumph Assocs. Physical v. New York Cent. Mut. Fire Ins. Co.*, 43 Misc. 3d 143(A), 2014 NY Slip Op 50875(U) (App Term 2d Dept. 2014)

Rebuttal by Applicant

Applicant submits an evaluation of the patient performed on 12/2/15. At the time of the evaluation patient presented with complaints of pain in the neck, lower back and the right knee. Examination of the Cervical spine revealed muscle spasms. There was pain in the joint lines of the right knee. Orthopedic tests were positive in the right knee. MRI of the cervical spine revealed disc bulges. MRI of the right knee revealed joint effusion.

Applicant submits an evaluation of the patient performed on 12/16/15. At the time of the evaluation patient presented with complaints of pain in the neck, lower back, right shoulder and intermittent pain in the right knee. Ranges of motion of the cervical spine were decreased. Shoulder depression test was positive on the right and left for nerve root lesion. Ranges of motion of the lumbar spine were decreased. Ranges of motion of the right shoulder were decreased. Appley's Scratch test for limitation of motion was positive. Varus Stress test was negative indicating injury to the MCL/LCL ligaments. Muscle testing of the upper and lower extremities was normal.

Applicant also submits evaluations of the patient performed on 1/14/16 and 2/23/16. Patient presented both times with complaints of pain in the neck radiating to the right shoulder, intermittent lower back pain, right shoulder pain when pressure is applied, and right knee pain when going up the stairs. The remainder of the examination revealed the same results as the examination on 12/16/15.

Applicant submits an evaluation performed on 4/12/16. Patient presented with complaints of pain in the lower back, neck pain, pain in the right shoulder and intermittent pain in the right knee. Examination of the Cervical spine revealed mildly decreased ranges of motion. There were mild spasms noted. Ranges of motion were moderately decreased in the lumbar spine. Straight leg raising was negative bilaterally. Spasms were mild. Ranges of motion were moderately decreased in the right shoulder. There were mild spasms noted.

Applicant submits an evaluation of the patient performed on 5/31/16. At the time of the evaluation patient presented with complaints of neck pain, intermittent lower back pain, right shoulder pain, and intermittent right knee pain. Ranges of motion of the Cervical and Lumbar spine were decreased. Ranges of motion of the right shoulder and the right knee were decreased as well. There were mild muscle spasms noted. Patient was diagnosed with rotator cuff tear of the right shoulder.

Applicant submits an evaluation of the patient performed on 7/5/16 and 8/3/16. At the time of the evaluations patient presented with complaints of pain in the neck, lower back, right shoulder and the right knee. Ranges of motion of the Cervical spine were

decreased. Ranges of motion of the Lumbar spine were mildly decreased and showed improvement. Ranges of motion of the right shoulder were mildly decreased, and showed improvement from previous examination. Range of motion of the right knee was decreased. Muscle testing was normal.

Applicant submits an evaluation of the patient performed on 9/14/16. Patient presented with complaints of pain in the neck, lower back, right shoulder and the right knee. Pain levels have improved from previous evaluations. Examination of the patient revealed decreased ranges of motion of the cervical and lumbar spine which have improved but remained the same from the previous evaluation. Ranges of motion of the right shoulder and the right knee improved but remained the same from the previous evaluation. Muscle strength was normal.

Applicant also submits treatment notes for the dates of service at issue noting that the patient reports improvement. Patient was able to perform activities with less pain.

Conclusion:

After reviewing all the evidence submitted, as well as considering the arguments presented in this case I find the following. The IME by Dr. Santiago noted that the patient presented with subjective complaints of pain. There were no positive objective findings noted. Applicant submits numerous evaluations of the Assignor noting that the patient was experiencing pain at levels which have improved to an 8/10. Ranges of motion were still slightly decreased, however have greatly improved. Patient's clinical improvement has plateaued according to the evaluations from 7/5/16 through 12/12/16. As such, I find that Assignor was no longer in need of further treatment. Furthermore, I find that Applicant failed to adequately rebut the conclusion of the IME doctor for dates of service of 11/28/16 through 12/12/16.

Accordingly, Applicant's claim for reimbursement 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 Nassau

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

03/18/2018

(Dated)

Evelina Miller

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:
defc5c8b0ed1f34c2c7be857a9487820

Electronically Signed

Your name: Evelina Miller
Signed on: 03/18/2018