

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Catskill Rehabilitation & Sports Medicine
P.C. , New York Neurosurgical PLLC
(Applicant)

- and -

Liberty Mutual Insurance Company
(Respondent)

AAA Case No.	17-17-1064-9559
Applicant's File No.	None
Insurer's Claim File No.	LA000-033187741-01
NAIC No.	36447

ARBITRATION AWARD

I, Kent Benziger, 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: K.M.

1. Hearing(s) held on 03/02/2018
Declared closed by the arbitrator on 04/17/2018

Jeffrey Altbach, Esq. from Jeffrey S. Altbach, Esq. participated by telephone for the Applicant

Robert Spence, Esq. from Liberty Mutual Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, \$ **2,662.28**, 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

1) Whether the Applicant/Providers, Catskill Rehabilitation & Sports Medicine, P.C. and New York Neurosurgical PLLC have made a prima facie showing of necessity for treatment from May 23, 2016 to June 1, 2017 including EMG/NCV studies, physical therapy and evaluations; 2) Whether the Applicants have exchanged assignment of benefits to show standing; 3) Whether the Respondent has established lack of medical necessity for the numerous denials based on independent medical examination reports of Dr. Adam Soyer, D.O. and Dr. Richard Kanoff - which have not been exchanged - and for the lumbar EMG/NCV study based on Dr. Frida Goldins's peer review

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

In this proceeding, the Applicant/Providers, Catskill Rehabilitation & Sports Medicine, P.C. and New York Neurosurgical PLLC are seeking reimbursement for treatment from May 23, 2016 to June 1, 2017. The treatment included two EMG/NCV studies, physical therapy and evaluations from Catskill Rehabilitation & Sports Medicine (\$2,51.80) and two evaluations from New York Neurosurgical PLLC (\$110.48). The Respondent's defense as stated in the NF-10s for the various treatments include a peer review, independent medical examinations (hereinafter referred to as IMEs) and even failure to appear for IMEs, fee schedule and standing. However, the Respondent has exchanged only nine pages of documents and has failed to exchange the IMEs examinations, and proof of the Assignor's failure to appear for IMEs as well as additional documents. The Applicant did exchange Dr. Frida Goldin's peer review as to the first lower extremity EMG/NCV study. At the hearing, the Respondent raised the issue of standing since apparently no assignment of benefits on behalf of the Applicant/Providers had been exchanged. The hearing was continued, and, as a finding of fact, the Applicant then submitted proper assignment of benefits so standing is not an issue.

On January 8, 2016, the Assignor/Eligible Injured Party, a 31-year-old male, was, by history involved in a motor vehicle accident. Following the accident, the Assignor was evaluated at the emergency room of Catskill Regional Medical Center primarily for complaints to the cervical spine. On January 12, 2016, the Assignor again was evaluated at the emergency room for complaints to the lumbar spine. The Assignor then commenced treatment with Dr. Barry Scheinfeld of Applicant/Provider Catskill Rehabilitation & Sports Medicine, P.C. Through an evaluation on January 25, 2016, the Assignor complained of neck pain shooting down the right shoulder into the arm and lower back pain that went, at times, into the legs. On examination, there was limited range of motion in the cervical and lumbar spine with positive findings on the left and right straight leg raising test. The assessment was of sprains of the lumbar and cervical spine.

On May 5, 2016, a cervical MRI was performed with an impression of reversal of the cervical lordosis, multi-level degenerative changes and mild neural foramen at C4-5 and C7-T1. On the same day, a lumbar MRI was performed which showed straightening,

degenerative changes, a left paracentral disc protrusion with narrowing, canal narrowing at L5-S1 with narrowing and a central right paracentral disc protrusion at L5-S1.

On May 23, 2016, the Assignor was re-evaluated by Dr. Scheinfeld for lower back pain more on the right side. On examination, the left and right straight leg raise was positive. The Assignor was unable to accomplish the Patrick's test. The EMG/NCV test was interpreted as revealing "electrophysiologic evidence of radiculopathy".

Through a narrative report dated May 8, 2017, Dr. Steven Jacobs of New York Neurological PLLC noted that in his examination from October 2016, the Assignor had demonstrated weakness and sensory loss in the upper extremities consistent with cervical radiculopathy. He interpreted an EMG/NCV study of the performed on November 17, 2016 s demonstrating left C5-6 cervical radiculopathy while a an October 20156 MRI was interpreted as revealing a herniated disc spur complex. A further exam was held in March 2017 in which Dr. Jacobs found the Assignor had marked weakness in the left biceps and had lost 40 percent of his strength. Dr. Jacobs recommended decompression surgery.

On March 8, 2017, the Assignor complained of neck pain with stiffness and numbness in the left hand. Dr. Scheinfeld's examination noted reduced range of motion in the cervical spine along with tenderness. An upper extremity EMG/NCV was performed which was interpreted as normal.

Denials. The Respondent has issued denials for the aforesaid treatment. However, the necessary supporting documents have not been supplied. In fact, only the peer review of Dr. Goldin as to the lower extremity EMG/NCV study has been exchanged - which was by the Applicant. The Respondent, as noted, has failed to exchange a copy of Dr. Kanoff's and Dr. Adam Soyer's examinations nor copies of documents supporting any denials for failure to appear for IMEs.

As to the lumbar EMG/NCV study (5/23/16), the Respondent's denial was based on a peer review from Dr. Frida Goldin. The peer review also denied a range of motion study, but that is not in dispute in this case. The peer review did find medical necessity for the office consultation of May 5, 2016, and the physical therapy treatments from May 19, 2016 to May 26, 2016. From her review, Dr. Goldin found the medical records did not substantiate the necessity of the diagnosis and there were no severe deficits or deterioration that necessitated the EMG/NCV study. Further, the peer review found no specific diagnosis to be ruled out by the studies. Dr. Goldin then cited a definition of medical necessity and that the studies should only be performed if they would enhance the patient's care.

Rebuttal. Dr. Scheinfeld issued a rebuttal to Dr. Goldin's denial. Dr. Scheinfeld maintained that he conducted a thorough examination. Dr. Scheinfeld then discussed in-depth the studies in The Journal of Pain, Volume 9, January 2008 which determined that patients undergoing specific forms of treatment such as transforaminal ESI who have positive radiculopathy findings on EMG studies will have significant improvement. Therefore, Dr. Scheinfeld found the studies validated the use of EMG/NCV studies in determining the proper course of treatment. Dr. Scheinfeld opined that in due to the Assignor's continued symptoms of radiculopathy despite conservative care after months of treatment, the study was needed to evaluate the future course of care.

Analysis. Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), A prima facie case of entitlement to No-Fault compensation is made out where the evidence proves that a clamant submitted proof of claim and that the billed amount was not paid within 30 days. Westchester Medical Center v. Lincoln General Ins. Co., 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009); Westchester Medical Center v. Clarendon National Ins. Co., 57 A.D.3d 659, 868 N.Y.S.2d 759 (2d Dept. 2008).. The Respondent then bears the burden to prove that the treatment was not medically necessary Kings Med. Supply Inc. v. Country-Wide Ins., 5 Misc.3d 767 (2004); Behavioral Diagnostics v. Allstate Ins. Co., 3 Misc.3d 246 (2004); A.B. Med. Servs v. Geico Ins. 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." Williamsbridge Radiology v. Travelers, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co. 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was not medically necessary. See: CityWide Social Work & Psychological Services v. Travelers Idem. Co., 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, Dr. Goldin's peer review is not persuasive. She has only broadly cited sources that the studies must enhance the pateint's care. Dr. Goldin has failed to adequately discuss the positive neurological findings, the failure of conservative care and the positive MRI and EMG results. A peer review must incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic findings. 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). In addition, Dr. Scheinfeld's rebuttal cited authoritative sources that found the necessity of the studies in consideration of future treatment including injections. Applicant is awarded reimbursement for the lumbar EMG/NCV studies. As to the remainder of the treatment, the Respondent has failed to support its defenses in the denials. The Respondent has only submitted nine pages and has failed to exchange IME reports or any documents to support its grounds for its denials. In sum, the Respondent has failed to sustain its

burden of lack of medical necessity. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for the treatment in dispute.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the 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).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$2,662.28 (\$2551.80-CATSKILL REHABILITATION), \$110.48- NEW YORK NEUROLOGICAL), TOGETHER WITH INTEREST AND ATTORNEY'S FEES.

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
	Catskill Rehabilitation & Sports Medicine P.C.	05/23/16 - 06/01/17	\$2,551.80	Awarded: \$2,551.80
	New York Neurosurgical PLLC	02/22/17 - 03/24/17	\$110.48	Awarded: \$110.48
Total			\$2,662.28	Awarded: \$2,662.28

B. The insurer shall also compute and pay the applicant interest set forth below. 06/27/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the 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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(c)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 Orange

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

04/29/2018

(Dated)

Kent Benziger

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:
17e64e5183544a689ae1c0bb38f568c8

Electronically Signed

Your name: Kent Benziger
Signed on: 04/29/2018