

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Premier Physical Medicine & Rehab, PC
(Applicant)

- and -

Hereford Insurance Company
(Respondent)

AAA Case No. 17-17-1066-4008

Applicant's File No. 43557

Insurer's Claim File No. 64524

NAIC No. 24309

ARBITRATION AWARD

I, Tracy Morgan, 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: injured person-assignor

1. Hearing(s) held on 06/20/2018
Declared closed by the arbitrator on 06/20/2018

Dayva Zaccaria, Esq. from Law Office of Gewurz & Zaccaria, PC participated in person for the Applicant

Pleshette Duncan from Hereford Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,041.02**, 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

The Applicant is the assignee of no-fault benefits from injured person-assignor (JH), a 69 year old female passenger who was involved in a motor vehicle accident on December 5, 2016. Following the accident, the injured person-assignor underwent EMG/NCV testing of the upper and lower extremities performed by Applicant on March 23, 2017. Respondent denied Applicant's claim contending a lack of medical necessity based upon the Peer review report of Mitchell Ehrlich, M.D. dated May 3, 2017 and based upon the Independent Medical Examination of Stuart Hershon, M.D. performed on February 15, 2017.

The issue presented on this arbitration is whether the services in dispute were medically necessary?

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in ADR Center. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed the relevant exhibits contained in the electronic file maintained by the American Arbitration Association and have considered all of the stipulations and arguments presented by both parties at the hearing of this matter. No witnesses appeared or testified.

A health care provider establishes its prima facie entitlement to no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms were mailed to and received by the insurer and that payment of no-fault benefits is overdue *See Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]; Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 (2015).

I find that Applicant established its prima facie entitlement to no-fault benefits as proof of claim was mailed to and received by the insurer and payment of No-Fault benefits is overdue.

11 NYCRR Section 65-3.8(a)(1) provides that no fault benefits are overdue if not paid within thirty (30) calendar days after the insurer received proof of claim, which shall include verification of all the relevant requested items pursuant to 11 NYCRR Section 65-3.5.

Here, the Respondent timely denied Applicant's claim contending a lack of medical necessity of the EMG/NCV testing based upon the Peer review report of Mitchell Ehrlich, M.D. dated May 3, 2017 and based upon the Independent Medical Examination of Stuart Hershon, M.D. performed on February 15, 2017.

Where a health care provider establishes its prima facie entitlement to no-fault benefits, the burden shifts to the insurer to prove that the medical services were not medically necessary *Nir v Allstate Ins. Co.*, 7 Misc. 3d 544 (2005); *Amaze Medical Supply Inc. v Eagle Insurance Co.*, 2 Misc3d 128(A), 2003 NY Slip Op. 51701(U)(App Term 2d, 11th & 13th Dists.). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established, shifts the burden of persuasion to applicant *See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App Term 1st Dept. 2006).

A denial of medical expenses based upon a lack of medical necessity must be supported by competent evidence such as a Peer Review report which sets forth a factual basis and medical rational for an opinion that services were not medically necessary

Delta Diagnostic Radiology, PC v Progressive Casualty Ins. Co., 21 Misc3d 142(A) 2008 NY Slip Op 52450(U)(App Term 2d & 11th Dists).

The medical rationale should be supported by evidence of the generally accepted medical professional practice *Nir v Allstate Ins. Co.*, 7 Misc. 3d 544 (2005). Generally accepted practice has been recognized to be "that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *City Wide Social Work & Psy. Serv. P.L.L.C. v Travelers Indemnity Company*, 3 Misc3d 608 (Civ. Ct. Kings Co., 2004).

The factual basis should provide specifics of the claim; otherwise it will be insufficient to sustain the burden as conclusory, or lacking a basis in the facts of the claim *Amaze Med. Supply v Allstate Ins. Co.*, [3 Misc3d 43](#) (App Term, 2d & 11th Dists, 2004).

In support of its contention that the EMG/NCV testing of the upper and lower extremities was not medically necessary, Respondent relies upon the peer review by Dr. Ehrlich dated May 3, 2017. Dr. Ehrlich reviewed Dr. Tolat's evaluation of the injured person-assignor on December 7, 2016. Therein, Dr. Tolat recorded complaints of radiating neck pain and back pain. He found tenderness and restricted ranges of motion of the cervical and lumbar spine, weakness of the left ankle and diminished sensation at C6 and S1. Dr. Tolat recommended physical therapy. Upon follow up evaluation of March 1, 2017, the injured person-assignor reported radiating neck pain with numbness and radiating back pain with tingling. Upon examination, Dr. Tolat found tenderness and diminished ranges of motion, weak left hand grip and left elbow extension and decreased sensation at C8 and S1. Dr. Tolat recommended electrodiagnostic testing to evaluate and differentiate radiculopathy from peripheral neuropathy and entrapment neuropathy. Dr. Ehrlich found that for this injured person-assignor, there were no significant neurological deficits and that the findings noted by Dr. Tolat were non-specific and did not amount to radiculopathy. Further, there was no evidence of a peripheral neuropathy since that is a disease process. Similarly, there was no evidence of entrapment neuropathy as there was no disorder of repetitive use. Dr. Ehrlich further opined that the testing could not have been recommended for legitimate treatment considerations because conservative management was already underway. Adjusting exercises and adding modalities like traction to the treatment program was not dependent on electrodiagnostic testing. Citing medical authority, Dr. Ehrlich commented that electrodiagnostic testing is appropriate to evaluate neurological conditions other than radiculopathy. In this matter, the clinical presentation was of a soft tissue trauma and there were no neurological conditions other than radiculopathy. There were no neuromuscular diseases, i.e. muscular dystrophy. There were no myopathies which are diseases of muscle. There were no neuropathies which are diseases of nerves. There were no entrapments which are due to repetitive use or anatomic variations. As for the other traumatic etiologies such as peripheral nerve injuries and plexopathies, these tend to be due to penetrating or prolonged or severe traction trauma.

Respondent also relies upon the IME report of Dr. Stuart Hershon, M.D. performed on February 15, 2017 to support its denial of claim. Dr. Hershon took a

history and noted that the injured person-assignor presented to the IME with current complaints of pain in the neck, mid back, low back, bilateral shoulders and bilateral knees. Dr. Hershon's examination of the cervical, thoracic and lumbar regions revealed no complaints of tenderness, no spasm and ranges of motion were within normal limits. Straight leg raise test was negative. There was no tenderness, effusion or crepitus of the left or right shoulders and ranges of motion were within normal limits. Impingement sign was negative. There was no tenderness, effusion or crepitus of the right or left knee. Ranges of motion were normal and testing including McMurray's and Lachman's tests were negative. Upper and lower muscle strength, reflexes and sensation were normal. Dr. Hershon diagnosed the injured person-assignor with resolved sprains/strains of the affected areas. He concluded by stating that no further orthopedic treatment was necessary.

Dr. Ehrlich's report and the IME of Dr. Hershon provide a sufficient factual basis and medical rationale for the opinion that the services billed were not medically necessary and therefore the burden shifts to Applicant to refute the opinion *See Delta Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 21 Misc. 3d 142A (App Term 2d & 11th Jud Dist 2008); *Crossbridge Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 20 Misc. 3d 143A (App Term 2d & 11th Jud Dist. 2008).

Applicant relied upon the follow up physiatric evaluation by Dr. Tolat on March 1, 2017 and a rebuttal letter from Raj Tolat, M.D. who evaluated the injured person-assignor and administered the testing herein. Dr. Tolat referred to his findings from January 11, 2017 wherein the injured person-assignor complained of radiating neck and back pain associated with tingling in the left hand and left leg and foot. His evaluation documented motor weakness of the left lower extremity and decreased sensation in the left upper extremity along C8 and the left lower extremity along S1. His follow up evaluation of March 1, 2017 documented persistent complaints of radiating neck pain with tingling of the left hand and low back pain associated with tingling of the left leg and foot. MRIs performed on January 18, 2017 revealed cervical and lumbar bulges and herniations. Tenderness in the cervical and lumbar region was noted and ranges of motion for the cervical and lumbar spine were restricted. Elbow flexion strength was 4/5 and sensation was diminished in the left upper extremity in a C8 dermatomal pattern and the left lower extremity in a S1 dermatomal pattern. Dr. Tolat disagreed with Dr. Ehrlich's findings and explained that the persistent subjective complaints are consistent with a nerve root compromise and that the motor and sensory deficits of the left upper and left lower extremities represent significant neurological deficits. Here, Dr. Tolat opined, the symptomology and signs were consistent with radiculopathy, peripheral neuropathy and/or entrapment neuropathy. The electrodiagnostic testing was necessary to differentiate between these diagnoses. Contrary to Dr. Ehrlich's assertion, Dr. Tolat stated that entrapment neuropathy could in fact be traumatic and does not necessarily have to originate from a repetitive disorder. While peripheral neuropathy may not have to do with the injuries here, Dr. Tolat averred that it is a condition that needed to be diagnosed since the injured person-assignor is a 69 year old female with a history of asthma, rheumatoid arthritis and osteoporosis. As to Dr. Ehrlich's statement that conservative management was already underway and invasive management was not a consideration, Dr. Tolat indicated that based upon the results of the testing, cervical and lumbar traction was added to the therapy and the

injured person-assignor was referred to a pain management specialist for more interventional forms of treating radiculopathy.

Based upon the foregoing, and after reviewing all of the evidence, I find that Applicant has submitted sufficient credible evidence to rebut Dr. Ehrlich's peer review and the IME findings and conclusions of Dr. Hershon. I am persuaded by the contemporaneous evaluation of March 1, 2017 and Dr. Tolat's Rebuttal as well as a review of the injured person-assignor's medical records that the EMG/NCV testing was medically necessary in this case. It was the treating physician's opinion that the findings represented significant neurological deficits that can be caused by peripheral neuropathy, entrapment neuropathy or radiculopathy. Deference is afforded to the judgment of the treating physician who determined that additional testing was needed to clarify the diagnosis and direct the treatment plan. Comparing the relevant evidence presented by both parties against each other and the above referenced medical necessity standard, I find that Applicant has rebutted the findings and conclusions of Dr. Ehrlich and Dr. Hershon and is therefore entitled to reimbursement.

Based on the foregoing, Applicant's claim is awarded in its entirety. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
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	Premier Physical Medicine & Rehab, PC	03/23/17 - 03/23/17	\$3,041.02	Awarded: \$3,041.02
Total			\$3,041.02	Awarded: \$3,041.02

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/29/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 NY3d 217 (2009).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(d) For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved dispute, subject to a maximum fee of \$1,360.00."

- 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 Nassau

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

06/30/2018
(Dated)

Tracy Morgan

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:
bcc261dc3338c049572ea2eb70c04c49

Electronically Signed

Your name: Tracy Morgan
Signed on: 06/30/2018