

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Huntington Regional Chiropractic PC (Applicant)	AAA Case No.	17-18-1083-2295
- and -	Applicant's File No.	2050707
	Insurer's Claim File No.	0433126315 AJC
Allstate Property and Casualty Insurance Company (Respondent)	NAIC No.	17230

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 07/06/2018
Declared closed by the arbitrator on 07/09/2018

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

Michael Rago, Esq. from Law Offices of Karen L Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 199.81**, 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 claimant was the 47 year-old female restrained driver of a motor vehicle that was involved in an accident on 10/19/16. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment including chiropractic treatment. Thereafter, the claimant was required to appear at an Independent Medical Examination ("IME") where Michael Berke, D.C. found further chiropractic treatment was not medically necessary. At issue is whether post IME chiropractic services provided by Applicant 10/9/17-10/24/17 were medically necessary.

4. Findings, Conclusions, and Basis Therefor

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 RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the 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 Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was the 47 year-old female restrained driver of a motor vehicle that was involved in an accident on 10/19/16. The claimant reportedly injured her neck, right shoulder, upper back, lower back, and right knee. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Plainview Hospital where she was evaluated, treated, and released. On 10/21/16 the claimant presented to Patrick Hannan, D.C. of Huntington Regional Chiropractic (Applicant) and was initiated on chiropractic treatment. On 10/24/16 the claimant presented to Hector Melgar, PT and was initiated on physical therapy. On 10/28/16 the claimant presented to Alexios Apazidis, M.D. with complaints of neck, low back, and right knee pain. Examination revealed "right knee has MCL and pes bursa tenderness, pain with valgus stress, and limited ROM. Severely swollen bursa with ecchymosis. Cervical: moderate spasm and tenderness, with normal range of motion in flexion, extension, side-bending, and left and right lateral rotation, negative Spurling test. 5/5 strength testing, intact sensation and 2+ Deep Tendon Reflex testing symmetrical bilaterally." Dr. Apazidis prescribed Amrix 15mg, Nalfon 400mg, and DME (consisting of a TENS unit and a lumbar support corset). The claimant was recommended for physical therapy, computerized range of motion study, a MSKUS test for affected peripheral joints to rule out capsular, ligamentous, and tendinous tissue injury and monitor treatment. Dr. Apazidis conducted a right knee Musculoskeletal Ultra Sound (MSKUS) Test producing an impression of sonographic evidence of abnormal indicative of a localized sub-acute inflammatory process and tendinopathic process and evidence of abnormal indicative a localized sub-acute edematous process or possible fiber tear. Dr. Apazidis also conducted computerized range of motion and manual muscle testing (ROM/MMT). On 11/9/16 Dr. Apazidis conducted a follow-up examination that was substantially similar to that of 10/28/16. The 11/13/16 right knee

MRI interpreted by Mark Decker, M.D. produced an impression of horizontal tear posterior horn medial meniscus with underlying meniscal degeneration, lateral subluxation patella with thickened medial plica with cartilage fissure and softening lateral of the patellar apex, and incompletely evaluated soft tissue lesion over the anterior medial proximal tibia; MRI of the tibia and fibula suggested. The 11/20/16 cervical spine MRI interpreted by Marc Katzman, M.D. produced an impression of straightening of the normal cervical lordosis is evidence of reflex muscle spasm, C2/3 subligamentous disc bulging, C3/4 focal central subligamentous disc herniation superimposed on peripheral disc bulging with abutment of the ventral cord, C4/5 subligamentous disc bulge approaching the ventral cord, C5/6 broad central subligamentous disc herniation impressing on the ventral cord, and C6/7 subligamentous disc bulging abutting the ventral cord. The 11/20/16 lumbar spine MRI interpreted by Marc Katzman, M.D. produced an impression of levoscoliotic curvature of the lumbar spine, straightening of the normal lumbar lordosis, L3/4 broad-based central/left paracentral disc herniation superimposed on peripheral disc bulging with impression on the ventral thecal sac, L4/5 focal central disc herniation with annular tear impressing on the ventral thecal sac and with abutment of both traversing L5 nerve roots within the lateral recesses, L5/S1 focal central disc herniation with annular fissure abutting the ventral thecal sac, and left sided foraminal stenosis due to a left foraminal disc herniation impinging the undersurface of the exiting left L5 nerve root. On 11/23/16 Dr. Apazidis conducted a follow-up examination and performed cervical trigger point injections. On 11/30/16 the claimant presented to Richard M. Seldes, M.D. of Deer Park Orthopedics for an orthopedic consultation in regard to her right knee. Dr. Seldes determined "with respect to the knee, given the fact she has persistent symptoms and failed therapy next step would be injection or surgery. She states she is interested in try an injection. She will continue with therapy and try an injection. She will follow up in one month. If symptoms persist despite therapy and injection, the last step would be arthroscopy of the right knee." On 12/7/16 Dr. Apazidis conducted a follow-up examination and performed a right knee steroid injection under ultrasonic guidance. On 12/21/16 Dr. Apazidis conducted a follow-up examination and performed L4-L5 interlaminar epidural steroid injections under ultrasonic guidance. On 1/18/17 the claimant underwent lower extremities EMG/NCV testing, the resultant impression not being in evidence. On 2/7/17 the claimant was required to present to Michael N. Berke, D.C. for an independent chiropractic examination that was purportedly negative and Respondent terminated chiropractic and massage benefits as of 2/27/17. On 4/24/17 the claimant presented to Timothy Mosomillo, D.O. of Pavilion Medical, P.C. for an examination and the claimant was recommended for upper extremities and lower extremities EMG/NCV; the upper was performed the same day by Hector Melgar, PT, that suggested evidence consistent with "an abnormal study. There is electrophysiologic evidence suggestive of acute and sub-acute axonal pathology affecting C6 nerve root level on the right side. There is also electrophysiologic evidence suggestive of a mild sensory demyelinating neuropathic process affecting the bilateral median nerve at or about the wrist (Carpal Tunnel). There is no electrophysiologic evidence suggestive of any polyneuropathic or myopathic process." On 6/12/17 Dr. Mosomillo conducted a follow-up examination. On 7/10/17 Dr. Mosomillo conducted a follow-up examination and the claimant was recommended for a pain management consultation. At issue are chiropractic services provided by Applicant 10/9/17-10/24/17.

At the hearing it was noted that Respondent uploaded a 6/27/17 general denial based on the assignor's failure to appear for an Independent Medical Examination (IME) on 5/27/17 and 6/10/17. Respondent also submitted documents in support of an IME no show defense (IME scheduling letters; the sworn sworn affidavit of Jean Rony Pressoir Administrator for D&D Associates who was retained by Respondent to schedule and arrange for the IMEs at issue, and two sworn statements signed by Martin P. Locasio, L.Ac. who would have conducted the IMEs). While I am aware that in *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 AD3d 559 (App Div 1st Dept. 2011) lv denied 17 NY3d 705 (2011), the Appellate Division, First Department held that a defense predicated upon an assignor's failure to appear for EUOs was a lack of coverage defense not precluded by an untimely denial and did sustain the insurer's defense where it only issued a general denial, I find that the holding in *Unitrin* is inconsistent and contrary to the decision of the Appellate Division, Second Department in *Westchester Med Center v. Lincoln General*, 60 AD3d 1045 (App Div 2d Dept 2009). In *Westchester Med Center*, the Second Department noted the failure of a plaintiff's assignor to appear at an EUO did not serve to toll the thirty day period to pay or deny a claim citing *Mt. Sinai Hosp. v. Triboro Coach*, 263 AD 2d 11, 17 (2d. Dep't, 1999) and noting that such an alleged breach of a policy condition does not serve to vitiate the medical provider's right to recover no-fault benefits or to toll the thirty day statutory period. Further, the court noted that such a denial was subject to the preclusion remedy citing to *Central Gen. Hospital v. Chubb Group of Insurance Co.*, as well as *Zappone v. Home Insurance Co.*, 55 NY 2d 131, 136- 137 (1982). In this matter I am inclined to follow *Westchester Med Center*.

In *Matter of Pomona Pain Mgt., P.C. v. Praetorian Ins. Co.*, 2012 NY Slip Op. 30525(U) (Sup Ct Nassau Cty 2012), the insurer sought the court's review, pursuant to CPLR Article 75, of a master arbitrator's award affirming a lower arbitration award issued by Arbitrator Bianchino wherein he precluded Respondent's untimely IME no-show defense. Judge Winslow noted the First Department's decision in *Unitrin* and the Second Department's decision in *Westchester Med Center* appeared in conflict, and sustained Master Arbitrator Merani's award, noting there was sufficient conflicting authority to preclude the finding of an error of law warranting vacatur.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). 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). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

An IME report asserting that no further treatment is not medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mutual Fire Ins. Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008).

Respondent timely denied the chiropractic services at issue based on the 2/7/17 independent chiropractic examination (IME) conducted by Dr. Michael Berk. At the hearing it was noted that the IME was actually performed by Michael Berke, D.C., I am persuaded that this slight discrepancy was a de minimis error unlikely to mislead the Applicant. After reviewing the claimant's history, treatment, and medical records, Dr. Berke conducts what appears to be a thorough examination. According to Dr. Berke the claimant's then contemporaneous complaints were "neck pain, lower back pain, right knee/lower leg pain, chest pain, and right shoulder pain. She stated that her condition has not improved and has actually worsened since beginning chiropractic treatment." Physical examination revealed the claimant presented with normal ambulation, no antalgia and good muscle tone. Her gait was normal without limp or ataxia. She wore no orthopedic appliances. Postural analysis of the claimant in the upright position revealed the head centered with shoulders and hips level. The active and passive cervical ranges of motion were within normal limits in cervical flexion-50° (50° normal), extension-60° (60° normal), left rotation-80°, right rotation-80° (80° normal), left lateral flexion-45°, right lateral flexion-45° (45° normal). Corresponding muscle strength appeared to be normal. The thoraco-lumbar ranges of motion were within normal limits in flexion-60° (60° normal), extension- 25° (25° normal), right rotation-30°, left rotation-30°, (30° normal), right lateral flexion-25°, left lateral flexion-25° (25° normal) and corresponding muscle strength appeared to be normal. Spinal palpation revealed no evidence of muscle spasm or tenderness over the cervical, thoracic and lumbar spinal regions. Upon palpation of the sciatic notch, hamstrings and Achilles tendons no spasms or tenderness was noted. There was no atrophy or deformity noted. There was no leg length discrepancy. There were no objective signs of inflammation, i.e. no redness, heat or swelling. The following orthopedic tests were negative: Toe walking, heel walking, Kemp's, cervical foraminal compression, straight leg raising, Ely's, Soto-Hall, leg lowering, SI joint compression and Bechterew's. The claimant reported **chest pain** with coughing/sneezing. She was able to perform a squat with right knee pain reported. She sat up from the examination table without difficulty. Neurological evaluation of the upper and lower extremities revealed the bicep, tricep, patellar and Achilles deep tendon reflexes to be 1+ and equal. The claimant reported **reduced sensation** over the anterior aspect of her right knee during dermatomal sensory testing over the upper and lower extremities. Dr. Berke's diagnosis was cervical sprain/ strain resolved and thoraco-lumbar sprain/strain resolved. Dr. Berke concluded the "examination fails to reveal any objective findings to substantiate the necessity for further chiropractic treatment. While subjective complaints are important to ascertain what an individual is purporting to be experiencing, recommendations for treatment, need to be predicated upon the presence of relevant objective examination findings. Therefore, based upon my examination findings and the relevant history provided, the claimant's spinal condition requires no further treatment from a chiropractic point of view. There is no necessity for

household help, massage therapy, medical transportation or the use of home medical equipment such as TENS unit, orthotics, mattress, supports, etc. There is no necessity for further spinal diagnostic testing."

Where the Defendant insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Plaintiff which must then present its own evidence of medical necessity (see Prince on Evidence section 3-104, 3-202). *West Tremont Medical Diagnostic PC v. Geico*, 13 Misc.3d 131, 824 N.Y.S. 2d 759.

Applicant submitted no chiropractic re-examinations or reevaluations contemporaneous or subsequent to the subject IME. Applicant submitted treatment notes, 2/8/17 being the day after the subject IME. It documents: "Subjective Cervical: Response to previous treatment: Decreased pain for 1-2 days after last visit; level: 3/10. Pain radiates to: right shoulder. Thoracic: Response to previous treatment: Decreased pain for 1-2 days after last visit; level: 3/10, Lumbar/Sacral/Pelvis: Response to previous treatment: Decreased pain for 1-2 days after last visit; level: 3/10. Objective Cervical: Range of motion: Observable decreased ranges of motion restrictions noted to be mild. Tightness: left & right cervical area. Spinal subluxation level: C1. Non-spinal subluxation level: Occiput. Thoracic: Tightness: left & right thoracic paraspinal areas. Spinal subluxation levels: T5, T6, T7, T8, T9. Lumbar/Sacral/Pelvis: Range of motion: Observable decreased ranges of motion restrictions noted to be mild. Tightness: left & right lumbar areas. Spinal subluxation levels: T12, L1, Left S1, Right S1. Assessment Cervical assessment: Cervical spine adjustment, manual traction. Thoracic assessment: Thoracic spine adjustment, manual traction. Lumbar assessment: Lumbar spine adjustment, lumbosacral spine adjustment, pelvic adjustment, manual traction. Treatment & Plan The patient was advised of today's treatment procedures and consented. Subluxations found on assessment and adjusted: C1; T5; T6; T7; T8; T9; T12; L1; Left S1; Right S1; Occiput. Physical Modalities: cervical traction; thoracic myofascial release; lumbar traction."

It is noted that post IME records of the other medical providers in evidence (Dr. Mosomillo, Dr. Apazidis, and Mr. Melgar) do document continued complaints and treatments; but none contain a specific recommendation for continued chiropractic treatment.

I am convinced by the thorough and credible IME report of Dr. Berke that the claimant's injuries had resolved by the date of the cut-off thereby justifying the termination of her chiropractic benefits on 2/27/17. I find the most thorough evaluation provided regarding this treatment was in fact the IME by Dr. Berke which establishes no further chiropractic treatment was necessary. I find that the examination performed by Dr. Berke formed a complete and accurate picture of the condition of the eligible injured person as of 2/7/17. As a result, based upon the documentation in evidence, Respondent has sustained its burden of proof.

Accordingly, Applicant's claim is denied in its entirety.

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

08/07/2018
(Dated)

Charles Blattberg

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:
9f365a7c315c59f34773c8c06eca3521

Electronically Signed

Your name: Charles Blattberg
Signed on: 08/07/2018