

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Western New York MRI LLP
(Applicant)

- and -

Maidstone Insurance Company fka Auto One
(Respondent)

AAA Case No. 17-18-1083-6413

Applicant's File No. 18-12264

Insurer's Claim File No. B02NY1423060

NAIC No. Self-Insured

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: S.D.

1. Hearing(s) held on 07/27/2018
Declared closed by the arbitrator on 07/27/2018

Nicole Jones, Esq. from The Morris Law Firm, P.C. participated by telephone for the Applicant

Talia Beard, Esq. from Law Office of Jason Tenenbaum, PC participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,440.15**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has stipulated to amend the amount in dispute to \$1,263.37 pursuant to fee schedule for MRI studies performed on the same day.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

1) Whether the Applicant/Provider, Western New York MRI, has made a prima facie showing of necessity for cervical and lumbar spine MRI studies; 2) Whether the Respondent has established lack of medical necessity based on the independent medical examination of Dr. Gregory Chiaramonte.

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

On May 30, 2014, the Assignor/Eligible Injured Party, a 60-year-old male, was, by history, involved in a motor vehicle accident. One to two days following the accident, the Assignor reportedly was evaluated at the emergency room. The Assignor's prior history was significant for prior motor vehicle accidents on June 28, 2012 and January 24, 2013.

On June 13, 2014, the Assignor was examined by Dr. Calabrese for neck pain and back pain that radiated down the left arm and both legs. On examination, there was limited range of motion in the cervical and lumbar spine. The Neutral Cervical Compression test was positive as was the Straight Leg Raising test. The diagnoses included ligamentous instability, cervical, thoracic and lumbar sprain/sprains, new cervical, thoracic and lumbar disc herniations and radiculitis/radiculopathy. The treatment plan included MRI studies if symptoms persisted, NCV/EMG studies, physical therapy, and medication.

On July 19, 2014, a cervical MRI was performed which was interpreted as revealing reversal of the cervical lordosis, multi-level spondylosis and degenerative changes including right facet arthropathy encroaching the right neural foramen, degenerative changes, spurring and bulges.. On the same day, A lumbar study revealed straightening, spondylosis and herniations at T11-12, T12-L1, and more prominently at L3-4, L4-5 and L5-S1 with central and foraminal stenosis.

On August 15, 2014, the Assignor had a periodic re-evaluation with Chiropractic Care of WNY. Cervical range of motion was as follows: flexion -40/6-. Extension - 5/75, left lateral flexion -25/45, right lateral flexion -30/45, left rotation -55/80 and right rotation -60/80. In the lumbar spine, range of motion included flexion -10/90, extension -5/30, left lateral flexion -10/30, right lateral flexion -5/30 left rotation -10/30 and right rotation -5/30. Kemp's test and Straight leg raising were positive.

Through an evaluation on September 18, 2014, Dr. Huckell performed a review. Dr. Huckell stated the following:

Since his 3/26/13 MRI, the right paracentral T12-L1 disc extrusion appears new and we are wholly relating it to the most recent 5/30/14 motor vehicle accident. There is technically the potential for surgery to this new T12-L1 disc herniation, but the surgery is highly invasive and carries with it a high risk for intra-and post-operative complications. Overall his low back pathology appears rather diffuse and across multiple levels, but his worse levels are still L4-5 with central stenosis and L5-S1 for which he would remain a potential candidate for a two level posterior discectomy and fusion which would be considered pain reducing but not pain eliminating procedure as he has more levels than these that are pathologic.

On November 24, 2015, Dr. Calabrese performed a follow-up evaluation. On that day, the Assignor complained of increased pain in his neck radiating down the upper extremity with significant weakness, numbness and tingling in the right upper extremity, mid back to low back pain. The Assignor had left knee arthroscopy unrelated to this case. On examination, the Assignor had reduced range of motion in the cervical and lumbar spine. Motor strength was 4+/5 in the right upper extremity with 5/5 on the left upper extremity. The diagnosis included ligamentous instability, cervical, thoracic and lumbar sprain/strain, probable new thoracic and lumbar disc herniation.

On April 19, 2016, the Assignor was evaluated by Dr. Edward Simmons. The Assignor complained of neck pain rated 6-7/10 and low back pain rated 8/10. Dr. Simmons took the Assignor's history of this accident as well as the two prior accidents. On examination, cervical range of motion was restricted as follows: forward flexion -25 percent, extension -40 percent, lateral bending -40 percent and lateral bending to the right - 30 percent. Dr. Simmons noted a mildly positive Hoffmann sign, SLRs were positive bilaterally at about 65 degrees. Dr. Simmons took x-rays and reviewed the findings which he found had extensive degenerative changes and straightening. The assessment was of traumatic rupture of cervical and lumbar intervertebral disc (initial encounter) and disc degeneration, spondylosis. Dr. Simmons found that the Assignor's on-going symptoms are causally related to the May 30, 2014 motor vehicle accident. The treatment plan included MRI studies of the cervical and lumbar spine.

On May 3, 2016, a cervical MRI was performed which was interpreted as revealing straightening, right facet arthrosis with mild right foraminal encroachment and stenosis at the C2-3 disc level and stable spondylosis at the C3-4 and C4-5 levels, C5-6 slight further progression of disc space narrowing and spondylosis with developing Grade II modic type changes of the end plate predominantly of the inferior end plate of C5 with prominent degenerative anterior spurring with persistent diffuse spondylitic ridge and bulge extending approximately 2.5 mm into the spinal canal effacing the anterior subarachnoid space and mildly impinging on the ventral spinal cord, hypertrophy of the uncovertebral joint and bilateral foraminal stenosis. C6-7 disc space narrowing and

spondylosis with ventral osteophytes are noted with broad based posterior ridging and broad based herniation impinging on and flattening the ventral spinal cord with resulting central spinal stenosis hypertrophy of the uncovertebral joint and bilateral foraminal stenosis, mild bilateral posterolateral ridging at the C7-T1 disc level with foraminal encroachment and narrowing, incidental note of mild chronic bilateral maxillary sinusitis.

On the same day, a lumbar study was performed which was interpreted as straightening, T11-T12 sagittal midline view suggests a disc protrusion, T12-L1 3 mm slight right paramedian herniation of the nucleus pulposus with extrusion, L1-L2 right paramedian bulge, L3-L3, broad bulge of the annulus with a circumferential annular tear with facet arthropathy and moderate to severe secondary canal stenosis which has progressed since the prior study and with subtle contact of the annulus with the left L3 nerve root, L4-L5 broad bulge of the annulus with a circumferential annular tear, facet arthropathy and prominent dorsal epidural fact, narrowing of the thecal sac with moderate stenosis and effacement of the right L4 nerve root and subtle contract of the annulus with the left L4 nerve root, L5-S1 broad-based disc osteophyte complex with facet arthropathy with effacement of the S1 nerve root and bilateral foraminal stenosis with compression of the L5 nerve root.

The Respondent issued a denial to the studies based on the independent medical examination of Dr. Gregory Chiaramonte, an orthoepic. On September 17, 2014, the Assignor was examined at the Respondent's request by Dr. Gregory Chiaramonte, an orthopedic. At the time of the evaluation, the Assignor complained of neck and low back pain. On examination, the Assignor had full range of motion in the cervical and lumbar spine as well as both shoulders, wrists and hands. All orthopedic and neurological tests were normal. The diagnoses included cervical and lumbar spine sprain/strains superimposed upon prior injury - resolved, thoracic spine sprain/strains and left shoulder and right wrist/hand sprain all resolved. Dr. Chiaramonte found no necessity for further orthopedic treatment, physical therapy, diagnostic testing and related treatment. Based on the exam, the Respondent terminated the aforesaid benefits effective October 7, 2014.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches to the Respondent to demonstrate the lack of medical necessity. Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins., 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co., 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co. 2005); Citywide Social Work & Psychological Services v. Travelers Indemnity, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought". See: Bajaj v. Progressive Ins. Co. 14 Misc.3d 1202(A) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and

medical rationale for the lack of medical necessity of Applicant's services . Id. See also: A.B. Medical Services, supra. As to treatment including chiropractic care, the Respondent must document that the treatment was no longer benefiting the claimant and was not providing curative or significant and quantifiable palliative benefits. Hobby v. CNA Ins. Co., 267 A.D.2d 1084, (4 Dept., 1999).

As a finding of fact, Dr. Chiaramonte's examination is not persuasive. Dr. Chiaramonte's findings of full range of motion and no positive orthopedic findings are not credible when viewed against the findings of the treating providers and the extensive positive findings on diagnostic tests. Dr. Simmons and Dr. Calabrese found extensive positive findings. Surgery had been discussed, injections had been administered and there were extensive positive finding on extensive diagnostic studies with herniations, bulges, extrusions including impingement on the cords. These findings were not adequately discussed by Dr. Chiaramonte. The reports from an independent medical examination must contain not only the results of a physical examination, but also 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 a linked case, Arbitrator Mona Bargnesi rejected the Respondent's chiropractic IME on similar grounds. Arbitrator found that the examining chiropractor's findings that the injury had resolved was not credible in light of the Assignor's complaints, positive clinical findings, surgical recommendations and history. AAA Case No. 17-16-1026-9384 (June 30, 2017). The Respondent may have been on stronger ground in contending that the injuries were not causally related to this particular accident in light of the Assignor's rather extensive history -both prior and subsequent to this accident. However, this such contention was not adequately addressed by the Respondent. Further, the treating providers found the injuries necessitating the treatment causally related. Therefore, Respondent has not sustained its burden of proof, and Applicant is awarded reimbursement. Nir v. Allstate Insurance Company, 7 Misc.3d 544, 546, 547 (2005).

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 \$1,263.37, TOGETHER WITH INTEREST AND ATTORNEYS' 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 | Amount Amended | Status |
|---------|--------------------------|---------------------|--------------|----------------|---------------------|
| | Western New York MRI LLP | 05/03/16 - 05/03/16 | \$1,440.15 | \$1,263.37 | Awarded: \$1,263.37 |
| Total | | | \$1,440.15 | | Awarded: \$1,263.37 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/10/2018 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 Erie

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.

08/18/2018

(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:
a05283a085fbfb8de77826f414667ec

Electronically Signed

Your name: Kent Benziger
Signed on: 08/18/2018