

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Washington Medical P.C.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-17-1068-3236

Applicant's File No.

Insurer's Claim File No. 784295-02

NAIC No. 16616

ARBITRATION AWARD

I, Steven Greif, 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: IP.

1. Hearing(s) held on 02/23/2018, 05/25/2018
Declared closed by the arbitrator on 08/21/2018

Colleen Terry from Law Office Of Stephen A. Strauss, PC participated in person for the Applicant

Katherine Lalor from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 6,167.12**, 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

Were respondent's second series of NF 10s issued on July 12, 2017 timely?

Did the respondent prove the lack of medical necessity of the electrodiagnostic ("EDX") testing performed on January 20, 2016?

Did the respondent prove the lack of medical necessity of physical therapy, office visits, range of motion and muscle testing performed from February 1, 2016 to August 3, 2016?

4. Findings, Conclusions, and Basis Therefor

The IP was a 47 year-old man when he was injured in a car accident on September 8, 2015. This case pertains to various treatment rendered by applicant to the IP from January 20, 2016 to August 3, 2016.

On January 20, 2016 applicant rendered the following services to the IP: an office visit billed in the sum of \$182.32; EDX in the sum of \$1561.21; and EDX for \$1801.19. Respondent initially denied those claims in NF 10s dated March 25, 2016 on the basis that the IP was allegedly eligible for Workers' Compensation because he was in the course of employment when the car accident occurred. Respondent also alleged in the NF 10 that the amount sought was in excess of the fee schedule.

On June 6, 2017 a hearing was held before the Workers' Compensation Board, which decided the IP was not in the course of his employment when the accident occurred. The decision was filed on June 9, 2017.

Respondent then issued additional NF10s dated July 12, 2017 denying payment for the services rendered based on a peer review by Dr. Peter Chiu, M.D.

Applicant contends the second NF 10 was untimely, and respondent contends it had the right to issue a second NF 10 after the Workers' Compensation Board denied the claim.

A basic provision of No Fault law is that No - Fault benefits are overdue if not paid within 30 days after the insurer receives proof of claim, which shall include verification of all of the relevant information requested pursuant to § 65-3.5 of the regulations. In the case of an examination under oath or a medical examination, the verification is deemed to have been received by the insurer on the day the examination was performed. 11 NYCRR 65-3.8 (a) (1).

There is no provision that provides for the tolling of the 30 day payment or denial rule based upon the submission of the claim to the Workers' Compensation Board. Respondent had every right to insert a lack of medical necessity defense in its initial NF 10, but it did not do so.

The applicant argues that this case is controlled by the case of State Farm Insurance Company v. Domotor, 266 AD 2d 219 (2nd Dept. 1999). The Court stated,

"An insurance carrier may not, after repudiating liability, create grounds for its refusal to pay by demanding compliance with proof of loss provisions of the policy. Rather, the insurance carrier 'must stand or fall upon the defense upon which it based its refusal to pay' ... i.e, because 'no treatment was necessary' (citations omitted)."

If Domotor controls, then the respondent's second denial of claim would be late, and not in compliance with the 30 day time period to pay or deny a claim as set forth in 11 NYCRR § 65-3.8 (a) (1). I find that the principle announced in Domotor remains the law. Once a denial was issued respondent could not simply issue a new denial well beyond the 30 day time limit. It is confined to the original grounds for its denial, that Workers' Compensation is the source of coverage for the IP.

Applicant is awarded the full amount sought for the services on January 20, 2016: \$3331.77.

The rest of applicant's bills were denied both on the grounds of Workers' Compensation and the medical examination ("IME") by Dr. Anna Krol, M.D. on January 20, 2016. Dr. Krol is board certified in physical medicine and rehabilitation. She indicates that after the car accident IP complained of headaches and dizziness with pain in the neck, lower back, and right shoulder, along with pain radiating to the shoulder. He also had a tingling sensation in his neck. When he saw Dr. Krol for the IME he complained of periodic headaches with mild pain in the neck and continuous pain in the lower back and right shoulder.

Dr. Krol examined the IP's cervical spine, upper extremities, thoracic spine, lumbar spine, and lower extremities. She measured the IP's ranges of motion with a handheld goniometer. A goniometer is believed to be an objective measuring device, and preferable to clinical observations. See, Perl v. Meher, 18 N.Y. 3d 208 (2011) [the court stated that serious injury determinations required some objective proof]; Toure v. Avis Rent A Car Systems, 98 N.Y. 2d 345 (2002) [objective evidence of serious injury required]; Jacobs v. Perciballi Container Service, Inc., 2013 N.Y. Misc. LEXIS 2669; 2013 NY Slip Op 31350 (U) (Sup. Ct. NY Cty. 2013) [goniometer is objective measuring device]; and Beck v. Coinmach Corp., 2013 N.Y. Misc. LEXIS 2009, 2013 NY Slip Op 31030 (U) [goniometer is objective measuring device].

Dr. Krol found normal ranges of motion in the cervical spine, thoracic spine, and lumbar spine. There was no vertebral tenderness or muscle spasm throughout the IP's paraspinal muscles. Aside from the IP's complaints of pain, there were no abnormalities observed on the IME. Accordingly, Dr. Krol diagnosed the IP with cervical and lumbar spine sprains - resolved; and right shoulder contusion - resolved.

A presumption of medical necessity attaches to an insurer'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 Prima Care, P.C. v. State Farm Mutual Auto Ins.](#), 17 Misc 3d 1135[A], 851 N.Y.S.2d 67 (Dist. Ct., Nassau Co. 12/3/2007); [A.B. Medical Services, PLLC v. NY 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, 777 N.Y.S.2d 241 (Civil Ct., Kings Co. 2004). The insurer thus bears "both the burden of production and the 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],

[831 N.Y.S.2d 358 \(N.Y.C. Civ. Ct. 2006\).](#)

It is difficult to determine what the respondent's exact burden of proof is to establish that the services were medically unnecessary, [Nir. v. Allstate Insurance Co., 7 Misc 3d 544, 546, 796 N.Y.S.2d 857 \(Civil Ct. Kings Co. 2005\).](#) At the minimum an insurer must "establish a factual basis and medical rationale for the lack of medical necessity of plaintiff's services." *Id.* See also, [CityWide Social Work, supra, A.B. Medical Services, supra.](#) The New York courts "explicitly or implicitly look to generally accepted practice in determining medical necessity. [Citywide Social Work, supra at 613](#); [Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co., 24 Misc. 3d 1244A; 901 N.Y.S.2d 902 \(Civ. Ct. Richmond 2009\).](#)

If the insurer has met its burden of persuasion, the burden of going forward with evidence of medical necessity shifts to the applicant to show the medical necessity for the treatments or tests at issue. [Andrew Carothers, M.D., P.C. v. Geico Indemnity Co., 20 Misc. 3d 1137A \(Civ. Ct. Kings Co. 2008\)](#); [Kings Highway Diagnostic Imaging, P.C. v. Autoone Ins. Co., 17 Misc. 3d 1134A, 851 N.Y.S. 2d 70 \(Civ. Ct. Kings Co. 2007\).](#)

I find that the report of the IME doctor was sufficient to carry the burden of persuasion on the issue of lack of medical necessity of all further medical treatments for the IP. That shifts the burden to the applicant to show that further medical treatment was medically necessary.

On the same day as the IME the IP had a follow-up examination with Dr. Sawey Harhash, M.D. of applicant. Dr. Harhash is also board certified in physical medicine and rehabilitation. On the date of the follow-up exam the IP complained of moderate neck pain and stiffness radiating to his shoulders and arms, more on the right side, with numbness in his right hand; right shoulder pain with clicking; moderate lower back pain and stiffness with muscle spasm radiating to his buttocks and legs; and difficulty performing his activities of daily living.

According to Dr. Harhash, the examination of the cervical spine revealed muscle spasm, trigger points, and a positive cervical compression test. The shoulder examination was positive for pain and tenderness over the subacromial area, trapezius, and rotator cuff muscles. The resisted shoulder abduction test caused increasing pain in both shoulders. In respect to the thoracolumbar spine, Dr. Harhash reports the exam was positive for pain and tenderness with muscle spasm over the paralumbar muscles with trigger points. The straight leg raise test was positive at 70° on both sides. He diagnosed the IP with cervical and lumbar sprain/strain and myofascial pain syndrome.

Dr. Harhash indicates that the electrodiagnostic testing ("EDX") he performed on January 20, 2016 had positive objective findings. Another follow up exam on February 17, 2016 maintained the same diagnosis - cervical and lumbar sprain/strain and myofascial pain syndrome; plus right shoulder derangement.

I find that applicant's documentation has carried the burden of going forward with evidence of the continued medical necessity of treatment for the IP subsequent to the IME of January 20, 2016.

Although some of applicant's bills exceeded the amount permitted under the New York Workers' Compensation Medical Fee Schedule ("Fee Schedule"), it appears that on applicant's AR 1 the amounts sought were reduced to comport with the Fee schedule. Applicant is awarded the full amount sought herein - \$6167.12.

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
	Washington Medical P.C.	01/20/16 - 08/03/16	\$6,167.12	Awarded: \$6,167.12
Total			\$6,167.12	Awarded: \$6,167.12

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/27/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In accordance with 11 NYCRR 65-3.9(c), since applicant did not request arbitration within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations, interest shall not accumulate on the disputed claim or element of claim until the date arbitration was demanded by applicant, which was 7/27/17. See LMK Psychological Services v. State Farm Insurance, 12 N.Y. 3d 217 (2009); East Acupuncture, P.C. v. Allstate Ins. Co., 61 A.D. 3d 202, 873 N.Y.S. 2d 335 (2d Dept. 2009).

C. Attorney's Fees

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

The applicant is entitled to recover 20% of the award as an attorney's fee, up to \$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, Steven Greif, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

09/13/2018
(Dated)

Steven Greif

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:
011944d48210e508e97b59e4be85fb88

Electronically Signed

Your name: Steven Greif
Signed on: 09/13/2018