

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Orthopedic Associates Of Dutchess County, PC (Applicant)	AAA Case No.	17-18-1085-3400
	Applicant's File No.	None
	Insurer's Claim File No.	0184496190101202
- and -	NAIC No.	22063

Geico Insurance Company  
(Respondent)

**ARBITRATION AWARD**

I, Debbie Kotin Insdorf, 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: Assignor

1. Hearing(s) held on 09/17/2018  
Declared closed by the arbitrator on 09/17/2018

Jeffrey Kimmel from Jeffrey S. Kimmel Esq. participated in person for the Applicant

Natalie Corriss from Goldstein & Flecker participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,266.02**, 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

Was the electrodiagnostic testing performed by Applicant, and denied by Respondent based on a peer review by Dr. Jason S Lipetz, medically necessary?

4. Findings, Conclusions, and Basis Therefor

The Applicant's claim is for \$1,266.02 for EMG/NCV study (lower extremities) and H-reflex test performed 7-20-17.

The Respondent issued a timely denial based on a peer review.

On 5-07-17, the forty eight year old Assignor was involved in a motor vehicle accident. She was initially examined by Dr. Vishal Rekhala on 7-06-17. Her complaints included radiating back pain. Examination of the lumbar spine revealed antalgic gait and tenderness. The deep tendon reflexes were 1+ throughout bilateral lower extremities and there was positive testing. The MRI of the lumbar spine revealed, "...discogenic changes most prominent at L3-L4. 4 mm disc herniation causing moderate spinal stenosis L3-L4. Small disc herniations at L5-S1 and L4-L5."

The doctor's impressions included lumbar radiculopathy and lumbar disc herniation.

The doctor's plan included EMG/N CV study of the lower extremities.

On 8-06-17, Dr. Jason S. Lipetz reviewed documents made available to him to determine the medical necessity of the testing. He did not find the electrodiagnostic test medically necessary.

In an action to recover assigned first-party no-fault benefits, an Applicant establishes a "prima facie showing of their entitlement to judgment as a matter of law 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." Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Once Applicant has established a prima facie case the burden is on the insurer to prove that the medical treatment was medically unnecessary. See, Citywide Social Work & Psychological Services, PLLC a/a/o Gloria Zhune v. Allstate Ins. Co., 8 Misc.3d 1025A, 806 N.Y.S.2d 444 (App Term 1st Dept 2005); A.B. Medical Services, PLLC v. Geico Ins. Co., 2 Misc 3d 26, 773 N.Y.S.2d 773 (App Term, 2nd & 11th Jud Dist 2003); Fifth Ave. Pain Control Center a/a/o Gladys Quintero v. Allstate Ins. Co., 196 Misc.2d 801, 766 N.Y.S. 2d 748 (Civ. Ct. Queens Co. 2003). "A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim." Healing Hands Chiropractic, P.C. a/a/o Cleeford Franklin v. Nationwide Assurance Company, 5 Misc.3d 975, 787 N.Y.S. 645, (Civ. Ct NY Co. 2004). Restated, the evidence must at least show that the services were inconsistent with generally accepted medical/professional practice. Once the generally accepted medical practice (the medical rationale) is articulated, the expert must apply the facts of the case and only then may she properly conclude the services in issue were not medically necessary due to the provider's violation of the generally accepted medical standards.

Dr. Lipetz did not find the testing necessary for an Assignor presenting in a neurologically intact fashion. He noted F-waves should not be performed where there is suspected prevailing radiculopathy.

In the instant case, the conclusion of the peer reviewer upon which the denial was based was supported by a sufficient factual foundation and medical rationale to warrant rejection of Applicant's claim and accordingly, was sufficient to support the defense of medical necessity.

The burden now shifts to applicant to refute Respondent's evidence. See, Bath Med. Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 2008 NY Slip Op 50347 (U) (App Term 2d Dept., Feb. 21, 2008); A. Khodadadi Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 16 Misc.3d 131,(A), 841 N.Y.S.2d 824 (Table), 2007 NY Slip Op 51342 (U), 2007 WL 1989432 (App. Term 2d & 11<sup>th</sup> Dists. July 3, 2007).

A rebuttal was written by Dr. Rekhala. The doctor wrote, "It was my opinion at that time that the patient's low back symptoms were due to multiple pain generators. The primary pain generator was due to lumbar radiculopathy with secondary myofascial pain and facet based pain/spondylosis. At that point, I recommended EMG of the bilateral lower extremities to confirm the primary pain generator. We discussed the possibility of epidural steroid injections pending the results of the EMG." Dr. Rekhala cited to the American Association of Neuromuscular and Electrodiagnostic Medicine and "Electromyography and Nerve Conduction studies (on line - Emedicine.medscape. com October 9, 2015).

Dr. Rekhala noted, "It was medically necessary to differentiate between the relative contributions of lumbar radiculopathy due the disc herniation seen on MRI versus neuropathy. The EMG findings were to be used to direct future treatment. Of note, the patient has responded well to lumbar epidural steroid injection for her lumbar radiculopathy and the use of gabapentin for her neuropathic pain... Appropriate studies were performed in order to confirm not only that patient's radiculopathy, but also her polyneuropathy."

An addendum was written by Dr. Lipetz. His determination that the testing was medically unnecessary remained unchanged. The history and clinical findings did not suggest the need to assess for neuropathy, neuromuscular disorder or plexopathy.

Dr. Lipetz indicated that the 7-06-17 exam didn't describe dermatomal pain distribution, dermatomal sensory deficit, myotomal strength deficit or reflex abnormality.

After reviewing all of the documents on file in the ADR Center maintained by the American Arbitration Association and considering the arguments set forth by both sides, I find there was sufficient evidence to refute the conclusion reached by the Respondent's peer reviewer.

Accordingly, the Respondent's denial cannot be upheld. The Applicant is awarded \$1,266.02.

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
	Orthopedic Associates of Dutchess County, PC	07/20/17 - 07/20/17	\$1,266.02	Awarded: \$1,266.02
Total			\$1,266.02	Awarded: \$1,266.02

- B. The insurer shall also compute and pay the applicant interest set forth below. 01/28/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after Apr.5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30-day month. 11 NYCRR 65-3.9(a). If an applicant does not request arbitration or institute a lawsuit within 30 days after receipt of a denial of claim form or from the payment of benefits, interest shall not accumulate on the disputed claim or element until such action is taken. 11 NYCRR 65-3.9(c). In accordance with 11 NYCRR 65-3.9 (c),

interest shall be paid on the claim (s), totaling \$1266.02 from 1-28-18, the date the arbitration was commenced.

C. Attorney's Fees

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

As this matter was filed 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). The insurer shall pay the applicant an attorney's fee, in accordance with 65-4.6(d). This amendment takes into account that there is an attorney fee of 20% of benefits plus interest with no minimum fee and a maximum attorney fee of \$1360.00.

- 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 New York

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

10/02/2018  
(Dated)

Debbie Kotin Insdorf

**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:**  
911a5852ed9da74ccc54e6437f9e38d4

### **Electronically Signed**

Your name: Debbie Kotin Insdorf  
Signed on: 10/02/2018