

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Comprehensive Healthcare Medical PC
(Applicant)

- and -

Maidstone Insurance Company fka Auto One
(Respondent)

AAA Case No. 17-17-1072-6728

Applicant's File No. None

Insurer's Claim File No. B02NY1629794

NAIC No. Self-Insured

ARBITRATION AWARD

I, Nancy Kramer Avalone, 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 AM

1. Hearing(s) held on 09/19/2018
Declared closed by the arbitrator on 09/19/2018

Maria Hanford, Esq. from Hanford Law Group PC participated in person for the Applicant

Nancy Orłowski, Esq. from Law Office of Jason Tenenbaum, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ 2,445.14, 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 instant dispute arises out of a motor vehicle accident that occurred on Aug. 12, 2016, involving Assignor AM, a 45-year old male, as a driver. The Assignor was taken to Brookdale University Hospital Medical Center where he was evaluated, treated and discharged. Subsequently, the Assignor sought private medical care and commenced a course of conservative treatment. Applicant, Comprehensive Healthcare Medical P.C., is seeking reimbursement for upper and lower extremity EMG/NCV studies provided to the Assignor on Oct. 31, 2016. Respondent denied the claim as not medically necessary

based on the peer review of David Manevitz, D.O. Applicant submitted a rebuttal report by Timur Hanan, M.D. Respondent submitted an addendum report. The issue is whether the EMG/NCV studies were medically necessary.

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I have reviewed the documents contained in the E-file, heard the arguments of the parties, and make my decision in reliance thereon.

On Aug. 15, 2016, Assignor AM initially presented to the Applicant and was evaluated by Dr. Timur Hanan. Respondent denied the Applicant's claim for EDX studies provided to Applicant based on the peer review of David Manevitz, D.O., Board Certified in Physical Medicine and Rehabilitation, licensed in medical acupuncture.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursable for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

An Applicant establishes its prima facie entitlement to reimbursement by proof that it submitted its claim, setting forth the fact and amounts of the losses sustained, and that payment of no-fault benefits was overdue. Insurance Law § 5106(a); Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742 (2nd Dept. 2004); Viviane Etienne Med. Care v. Country-Wide Ins. Co., 25 N.Y.3d 498 (2015). After reviewing the records, including the bill and the denial of claim form, I find that Applicant established its prima facie case of entitlement to No-Fault compensation.

Once the Applicant has established its prima facie case, the carrier must prove that the treating doctor's services were not medically necessary. *See, e.g., Nir v. Allstate Insurance Co.*, 7 Misc.3d 544 (Civ. Court, Kings Co. 2005).

It is well settled law that ". . . a peer review's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards or generally accepted practice (*citations omitted*). 'Generally accepted practice is 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.'" Forest Rehab. Med. PC v. Allstate Ins. Co., 2014 NY Slip Op 24160, ¶¶ 4-5, 44 Misc. 3d 476, 481 (Civ. Ct. Richmond Co.)[citing CityWide Social Work & Psychological Servs. v Travelers Indem. Co., 3 Misc.3d 608, 616, 777 NYS2d 241, 2004 NY Slip Op. 24034 (Civ. Ct, Kings Co. 2004)].

When the insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant/provider which must then present its own evidence of medical necessity. *See generally, West Tremont Medical Diagnostic.*

P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U)(App. Term 2d & 11th Dists. 2006).

Where the denial is predicated upon a peer review report, and the peer review report establishes prima facie, that there was no medical necessity for the services performed, the provider must refute the peer review doctor's determination. See, A. Khodadadi Radiology, PC v. N.Y. Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), (App. Term 2d & 11th Dists. 2007). Similarly, where the insurer denies the claim based upon an Independent Medical Examination (IME) of the Assignor, and the IME establishes prima facie that there was no medical necessity for continued treatment, the Applicant/provider bears the burden of demonstrating that the treatment at issue was medically necessary by a preponderance of the credible evidence. See, Amato v. State Farm Ins. Co., 40 Misc.3d 129(A) (N.Y. App. Term 2013).

In support of the lack of medical necessity defense, the Respondent relied upon the peer review report of Dr. Manevitz, dated Dec. 2, 2016, in which the doctor concluded that the services were not medically necessary. He states that the studies were not needed to rule out cervical or lumbar radiculopathy as they can be made on a clinical basis. Additionally, EMG was noted to be of little help in predicting symptomatic outcome and of poor correlation with pain and disability in radiculopathy. The records do not indicate there was any diagnostic dilemma. Finally, there were no signs of rapid neurological deterioration of the claimant or evidence of spinal instability that would require immediate surgical assessment of the spine or the extremities.

In opposition, the Applicant relied on the Rebuttal report of Dr. Hanan, the treating physician, and the medical documentation. Dr. Hanan opined that the services were medically necessary. The Assignor was initially evaluated by Dr. Hanan on Aug. 15, 2016. At that time, he presented with complaints of neck pain radiating to left hand with numbness and flinging as well as lower back pain with radiating pain to the left foot with associated numbness and tingling. Neurologic exam on that date revealed motor strength decreased in bilateral shoulders and bilateral hips. Also decreased sensory exam over the left hand and foot, along with some decreased deep tendon reflexes. The plan was physical therapy three times per week for a period of four-six weeks with a follow-up exam and Diclofenac 75mg bid and Flexeril 10 mg for pain.

On Sept. 19, 2016 and then on Oct. 31, 2016, Dr. Hanan provided follow-up examinations to the Assignor. Despite the conservative treatment, the Assignor's complaints and clinical condition did not show improvement. MRI studies of the cervical spine dated Oct. 11, 2016 revealed disc herniation at levels C4/5, C5/6 and C6/7 with central and foraminal narrowing as well as impingement on the spinal cord at C4/5. MRI studies of the lumbar spine dated Oct. 11, 2016 revealed disc herniation at level L4/5 with central and foraminal narrowing, as well as disc bulges at levels L2/3 and L5/S1.

Dr. Hanan advises he performed the studies due to the patient's radicular complaints and positive neurologic findings that were persistent since the initial evaluation. He was considering the diagnostic dilemma of radiculopathy and/or neuropathy. The studies would help localize the nerve damage, help confirm whether the injury was acute or chronic, as he wanted to evaluate the "suspect" nerve roots.

In response to the peer reviewer's statement that there was no indication of deteriorating neurologic exam, Dr. Hanan cites to the AANEM Guidelines, Page 4, and states that the claimant had received conservative treatment for one month without significant improvement and the purpose of the Electrodiagnostic testing was, inter alia, 1) to distinguish between differential diagnoses; 2) to help determine the extent of an abnormal function; 3) to help determine and guide treatment options, prognosis and level of recovery. Such information assists with the formulate of the treatment plan.

Regarding the statement that the diagnosis of radiculopathy can be made clinically, he disagrees. He states that the most frequent reason for referring a patient for EMG/NCV studies is to confirm radiculopathy. He cites to several medical journal articles. Regarding the statement that EMG was noted to be of little help in predicting symptomatic outcome, Dr. Hanan replies that the statement is irrelevant and ignores the reasoning why the studies were recommended.

Respondent's addendum report by Dr. Manevitz states that the only diagnosis for this claimant was radiculopathy, which can be made on a clinical basis.

After a review of the credible and admissible evidence, I find that the Applicant has sufficiently rebutted the peer review and established the medical necessity for the service provided by a preponderance of the evidence.

The peer review does not comport with the requirements of *Nir v. Allstate Insurance Co.*, 7 Misc.3d 544 (Civ. Court, Kings Co. 2005) as there is no generally accepted standard of care referenced. Failing to mention the applicable generally accepted medical/professional standard and the plaintiff's departure from it denudes the defendant's proof of a prima facie case of lack of medical necessity. *Cambridge Medical, P.C. v. Government Employees Ins. Co.*, 18 Misc.3d 1144(A), 859 N.Y.S.2d 893 (Table), 2008 N.Y. Slip Op. 50435(U), (Civ. Ct. Richmond Co., Mar. 5, 2008). The only reference to medical authority in the peer and the addendum report is an article cited as *Muscle and Nerve*, February 2004, Volume 29, Issue 2, pages 165-190, for the proposition that EMG is of little help in predicting symptomatic outcome and poor correlation with pain and disability in radiculopathy.

Moreover, even, arguendo, if the peer review had adequately established lack of medical necessity, as his report provided a detailed factual basis and cogent medical rationale for providing the EMG/NCV studies. Dr. Hanan advised that he followed the guidelines for EMG/NCV set forth by the AANEM.

The claim is granted to Applicant. *This award is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.*

Applicant is entitled to statutory interest, attorney fees and the filing fee, as set forth in Sections 6. B, C and D, below.

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
	Comprehensive Healthcare Medical PC	10/31/16 - 10/31/16	\$2,445.14	Awarded: \$2,445.14
Total			\$2,445.14	Awarded: \$2,445.14

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/07/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from the **date noted above** until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty-day month.

C. Attorney's Fees

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

Respondent shall pay the Applicant attorney's fees in accordance with 11 NYCRR §65-4.6(d). As this matter was filed **after 02/04/2015**, this case is subject to the provisions promulgated by the Dept. of Financial Services in the Sixth Amendment to 11 NYCRR §65-4 (Ins. Reg. 68-D).

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

10/08/2018
(Dated)

Nancy Kramer Avalone

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:
82085ff245cfe6aa846fb5548f1b4a81

Electronically Signed

Your name: Nancy Kramer Avalone
Signed on: 10/08/2018