

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Finally Health Medical Services  
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company  
(Respondent)

AAA Case No. 17-17-1060-6559

Applicant's File No. 250981

Insurer's Claim File No. 03772995722

NAIC No. 19232

**ARBITRATION AWARD**

I, Frank Marotta, 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: EIP-MK

1. Hearing(s) held on 10/16/2018  
Declared closed by the arbitrator on 10/16/2018

Neil Menashe, Esq. from Neil Menashe Attorney At Law P.C. participated in person for the Applicant

David Kelly, Esq. from Law Offices of James F. Sullivan, PC participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,032.12**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$1,997.72 to conform to the maximum permissible fee allowable under the New York State Workers' Compensation Fee Schedule (WCFS) and New York Workers' Compensation Chiropractic Fee Schedule (WCCFS).

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate and agree that the Applicant established its prima facie burden as to their entitlement to reimbursement for the assigned no-fault benefits; the Respondent's denial of the subject claim was timely issued and that the amended amount in dispute does not exceed the maximum permissible fees allowable under the WCFS and WCCFS.

### 3. Summary of Issues in Dispute

The record reveals that the EIP-MK, a 33 year old male, reportedly sustained injuries in a motor vehicle accident on 7/20/15. The Applicant submitted a claim for physical therapy and chiropractic care. On 10/29/15 the Respondent issued a denial of future neurological benefits effective 11/5/15 based on a medical examination (IME) performed by Dr. Uriel Davis on 10/20/15 and thereafter subsequent claim specific denials for the services in question based on Dr. Davis' IME findings. On 11/2/15 the Respondent issued a denial of future chiropractic benefits effective 11/9/15 based on an IME performed by Dr. Brian Wolin on 10/19/15 and thereafter subsequent claim specific denials for the services in question based on Dr. Wolin's IME findings. The issue for determination is whether the Applicant's services were medically necessary.

### 4. Findings, Conclusions, and Basis Therefor

The Applicant filed this claim in the amount of \$2,032.12, amended to \$1,997.72 for disputed fees in connection with physical therapy and chiropractic care provided to the EIP between 11/3/15 and 3/23/16 following a motor vehicle accident that occurred on 7/20/15.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

The parties stipulate and agree that the Applicant established its prima facie burden as to their entitlement to reimbursement for the assigned no-fault benefits; the Respondent's denial of the subject claim was timely issued and that the amended amount in dispute does not exceed the maximum permissible fees allowable under the WCFS and WCCFS.

Once an applicant's prima facie burden is met, the medical necessity for the service provided is presumed and the burden shifts to the Respondent who may rebut the applicant's prima facie showing by establishing that the claim was both timely and properly paid, Insurance Law §5106(a); 11NYCRR 65- 3.8(a) (1); St. Vincent Medical Care PC v. Countrywide Insurance Company, 26 Misc. 3d 146 (A), 907 NYS 2d 441 (App. Term 2d, 11th and 13th Dists. 2010); Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip 26240, 13 Misc.3d 172, 822 N.Y.S.2d 378, 2006

N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006) or that the services were medically unnecessary following a timely denial, Presbyterian Hosp. v Maryland Cas. Co., 90 NY 2d 274, 660 NYS 2d 536 (2d Dept. 1997), based on a medical examination (IME) AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), 880 N.Y.S.2d 871 (Table), 2009 N.Y. Slip Op. 50208(U), 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2009) or a peer review. A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007).

In support of its denial the Respondent relies on IMEs by Dr. Wolin on 10/19/15 and Dr. Davis on 10/20/15.

Drs. Wolin and Davis provides a history of the EIP as a 33 year old male who was involved in a motor vehicle accident on 7/20/15 as a restrained driver. Drs. Wolin and Davis report that following the accident the EIP was taken via ambulance to Brooklyn Community Hospital where he was evaluated and later released. Dr. Wolin notes that the EIP was released with an arm sling and neck collar. The EIP's reported initial complaints included neck, lower back and left shoulder pain. The EIP later began a course of physical therapy and chiropractic care. Dr. Davis also reports that the EIP was receiving treatment from a neurologist. At the time of the IME the EIP reported attending therapy twice a week which included chiropractic care, neurologic, physical therapy and orthopedic. Dr. Davis reports that the EIP received injections to his lower back three weeks before the IME. Dr. Wolin reports that the EIP received a TENS unit and back brace. Dr. Wolin notes that the at the time of the IME the EIP reported lower back pain that radiates to the lower extremities associated with tightness, soreness, stiffness and aches. Dr. Davis notes that the EIP reported low back pain. The EIP further reported that he avoids heavy lifting to prevent exacerbation of neck and left shoulder pain.

After review I find that the Respondent met its prima facie burden of proof establishing that post-IME physical therapy services in question were not medically necessary with the IME of Dr. Davis who performed an examination of the EIP's cervical and lumbar spine as well as the EIP's left shoulder and concluded based on his findings that the EIP's cervical/lumbar spine sprains and strains and left shoulder radicular pain had resolved. Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 873 N.Y.S.2d 238, 2008 N.Y. Slip Op. 51863(U), (App. Term 2d & 11th Dists. Sept. 3, 2008). Dr. Davis' neurological examination revealed normal cervical, lumbar and left shoulder range of motion. Reflexes, sensory and motor testing was within normal limits. Following his examination, Dr. Davis opined that the EIP was no longer in need of neurological treatment or physical therapy. Dr. Davis reports that the EIP had reached pre-accident status.

The Respondent further met its prima facie burden establishing that post-IME chiropractic care was no longer medically necessary with the IME of Dr. Wolin who performed an examination of the EIP's cervical, thoracic and lumbar spine and concluded based on his findings that the EIP's cervical and lumbar spine sprains and strains had resolved. Ying Eastern Acupuncture, supra. Dr. Wolin's chiropractic examination documents normal cervical and lumbar spine ranges of motion. Orthopedic and neurological testing performed by Dr. Wolin was either reported as negative or

found to be within normal limits. Dr. Wolin goes on to indicate that based on his examination of the EIP there is no need for further chiropractic treatment, massage therapy, et al.

Once a respondent provides sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the applicant who must then present its own evidence of medical necessity, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006), as ultimately it is the Applicant who has the burden of proof on issues of medical necessity or causal relationship of the injuries to the accident. Orlin & Cohen Orthopedic Assoc. v Allstate Ins. Co., 2017 NY Slip Op 50937 (U) (App. Term 2d & 11th Dists. July 21, 2017); Dayan v. Allstate Ins. Co., 49 Misc.3d 151 (A), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22, 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012). The burden is on the Applicant to present evidence as to why the subject treatment was needed; whether because the EIP's condition had changed after the IME or because the IME doctor's opinion following the IME was erroneous. New Horizon Surgical Center LLC v Allstate Ins. Co., 52 Misc. 3d 139 (A); 2016 NY Slip Op 51124 (U) (App. Term 2d, 11th & 13th Jud Dist. July 13, 2016).

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties, I find that Applicant has not successfully refuted the IME findings and opinion of Dr. Wolin that the EIP was no longer in need of chiropractic care and failed to establish the medical necessity for the post-IME chiropractic treatment/follow up examination by a fair preponderance of the credible evidence. In support of its claim the Applicant provided copies of the chiropractic SOAP notes for the treatment dates between 11/11/15 and 3/23/16 by Chiropractors Leslie Klein, Nick Chiappetta and Russell Greenseid as well as the 12/8/15 evaluation report by Dr. Chiappetta. The SOAP notes fail to provide a comprehensive examination or assessment of the EIP sufficient to refute Dr. Wolin's opinion and when comparing Dr. Wolin's IME report against that of Dr. Chiappetta, I find Dr. Wolin's examination to be more comprehensive and therefore more persuasive as to the need for further chiropractic treatment. It is further notes that while the Applicant has provided examination reports by Dr. Igor Stiler and RPA-C Matthew Valvo which are more comprehensive, they only indicate that the EIP should continue with physical therapy and make no mention as to the need for further chiropractic care. Based on the proof presented, I find that the Applicant failed to establish that the post-IME chiropractic care was medically necessary and their claim for these services are denied. AJS Chiropractic, P.C., supra; Eastern Star Acupuncture, P.C. v. Mercury Ins. Co., 26 Misc.3d 142(A), 907 N.Y.S.2d 436 (Table), 2010 N.Y. Slip Op. 50380(U), 2010 WL 843677 (App. Term 2d, 11th & 13th Dists. Mar. 8, 2010).

As for the physical therapy services, I find that the Applicant has provided sufficient proof to refute the opinion of Dr. Davis and establish the medical necessity for the post-IME physical therapy services and evaluations performed by the Applicant. The contemporaneous progress notes and follow up reports of Dr. Stiler documenting

ongoing subjective complaint and objective finding resulting in the opinion that further physical therapy services were medically necessary are sufficient refute the opinion of Dr. Davis. The combined records create a question of fact as to the medical necessity for the post-IME physical therapy and follow up examinations which, upon review, I find favor of the Applicant. Applicant is therefore entitled to a reimbursement in the amount of \$1,480.11 (\$1,081.60 for 16 physical therapy sessions billed at \$67.60; \$212.55 for 5 physical therapy sessions billed at \$42.51 and \$185.96 for 2 follow up office visits).

For the reasons noted above the Applicant is awarded \$1,480.11. The remaining portion of its claim is denied.

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
	<b>Finally Health Medical Services</b>	<b>11/03/15 - 03/23/16</b>	<b>\$2,032.12</b>	<b>\$1,997.72</b>	<b>Awarded: \$1,480.11</b>
<b>Total</b>			<b>\$2,032.12</b>		<b>Awarded: \$1,480.11</b>

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/11/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30 day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of filing with the American Arbitration Association and end on the date the award is paid.

C. Attorney's Fees

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

The Respondent shall also pay the Applicant an attorney fee in accordance with 11 NYCRR §65-4.6 (e). If, however, the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation period, then the attorney fee shall be based upon the provisions of 11 NYCRR §65-4.6 (b).

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

10/21/2018

(Dated)

Frank Marotta

**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:**  
1eae593ca44ff325e850d3df40350dae

### **Electronically Signed**

Your name: Frank Marotta  
Signed on: 10/21/2018