

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

OrthoPro Services, Inc.
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-17-1062-8619
Applicant's File No.	1965450
Insurer's Claim File No.	0394339860101134
NAIC No.	35882

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 03/08/2019
Declared closed by the arbitrator on 03/11/2019

Stacy Mandel Kaplan, Esq. from Israel, Israel & Purdy, LLP participated in person for the Applicant

Jerry Marino from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,309.27**, 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 claimant was the 24 year-old male restrained driver of a motor vehicle that was involved in an accident on 1/9/17. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue is the medical necessity of a cervical traction unit and lumbar sacral orthosis dispensed by Applicant on 3/1/17 that were timely denied based on a 4/27/17 peer review by Terence McAlarney, M.D.

4. Findings, Conclusions, and Basis Therefor

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 RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and 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. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The claimant was the 24 year-old male restrained driver of a motor vehicle that was involved in an accident on 1/9/17. The claimant reportedly injured his neck, upper back, and lower back. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to New York Presbyterian Hospital where he was evaluated, treated, and released. On 1/11/17 the claimant presented to Melissa DeTullio, D.C. of JTK Chiropractic Care, P.C. and was initiated on chiropractic treatment. On 1/11/17 the claimant presented to East Coast Acupuncture, P.C. was initiated on acupuncture and cupping. On 1/16/17 the claimant presented to David N. Lifschutz, M.D. of Integrated Neurological Associates, PLLC and ultrasound guided trigger point injections to the cervical musculature were performed. The claimant was also recommended for physical therapy, continue chiropractic care and acupuncture, and an antiinflammatory/musculoskeletal relaxer/anesthetic cream (Diclofenac 10%; Cyclobenzaprine 4.0%; Lidocaine 3 0%; Tetracaine 3.0%; Menthol 2.0%). On 2/3/17 the claimant presented to Igor Stiler, M.D. of Healthquest. Dr. Stiler noted "the patient has a history of multiple traumas as a result of a work-related injury, which occurred on 01/09/2017 with injuries sustained to the neck and mid-back." The claimant presented with complaints of "neck pain: The patient rates the pain in his neck as a 4-5/10 with 10 being the worst possible pain. He describes the pain as being intermittent" and "**mid-back** pain: The patient rates the pain in his **mid-back** as a 5/10. He describes the pain as being constant." Dr. Stiler documented "upon examination of the **cervicothoracic** spine, there was tenderness to palpation of the suboccipital region to T6. Cervical spine range of motion was as follows, flexion 40/50 degrees with mild pain, extension 40/50 degrees, left lateral flexion 40/45 degrees, right lateral flexion 35/45 degrees with mild pain, left rotation 65/80 degrees and right rotation 65/80 degrees. There was a positive compression test...the motor examination revealed 5/5 strength in both the upper and lower extremities with no signs of atrophy or spasticity...dermatomal examination of the skin with the modalities of light touch, pinprick, proprioception, vibration, graphesthesia and two point discrimination revealed no abnormalities...deep tendon reflexes were 2+/4 bilaterally in the upper and lower

extremities and the plantar responses were flexor bilaterally...there was no dysmetria to finger to nose and heel to shin. There was no evidence of ataxia nor dysdiadochokinesis." As part of his treatment plan, Dr. Stiler determined the claimant "will be referred for a cervical traction unit and **TENS** unit" and the claimant was initiated on physical therapy. On 3/1/17 Dr. Stiler signed a prescription for a cervical traction unit and a lumbar sacral orthosis. There are no medical reports or examinations attributable to Dr. Stiler 2/4/17-3/1/17 in evidence. At issue are the cervical traction unit and a lumbar sacral orthosis dispensed by Applicant on 3/1/17.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1st Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

Respondent timely denied the durable medical equipment (DME) at issue based on the 4/27/17 peer review by Terence McAlarney, M.D. After reviewing the claimant's history, treatment, and medical records, Dr. McAlarney opines "there is no medical necessity for the cervical traction unit or for the lumbosacral orthosis. The New York Neck Injury Medical Treatment Guidelines, Third Edition, September 15, 2014, Section D.11.m, states that mechanical traction is most commonly used for patients with radicular findings. If successful, it should be shifted to home traction. In this case, there is no documentation of success under supervised conditions for there to be medical necessity for shifting to a home traction unit." Dr. McAlarney continues "The New York Mid and Low Back Injury Medical Treatment Guidelines, Third Edition, September 15, 2014, Section D.2.c, states that lumbar supports may be useful for the specific treatment of spondylolisthesis, documented instability, or post-operative treatment. The claimant does not have spondylolisthesis, documented instability, or post-operative treatment. Lumbar supports are not recommended for the prevention or treatment of other back pain conditions. Reference: New York Neck Injury Medical Treatment Guidelines, Third Edition, September 15, 2014f Section D.11.m. Reference: New York Mid and Low Back Injury Medical Treatment Guidelines, Third Edition, September 15, 2014r Section D.2.c" Dr. McAlarney concludes "for the above stated reasons, the cervical traction and lumbosacral orthosis are not medically necessary."

Where the Defendant insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Plaintiff which must then present its own evidence of medical necessity (see Prince on Evidence section 3-104, 3-202). *West Tremont Medical Diagnostic PC v. Geico*, 13 Misc.3d 131, 824 N.Y.S. 2d 759.

Applicant submitted a 1/23/19 peer rebuttal in affidavit form by Igor Stiler, M.D. After reviewing the 1/16/17 examination by David N. Lifschutz, M.D. and his own 2/3/17 examination, Dr. Stiler opines "Dr. McAlarney did not consider that the patient's significant **radicular symptoms** indicated trauma to the cervical and lumbar spine that resulted in nerve root pathology. Cervical traction is an effective treatment for cervical radiculopathy. Use of the cervical traction equipment at home would help to alleviate the symptoms resulting from a herniated or bulging disc by relieving pressure on the spinal nerves and reducing the axial loading of the cervical spine. The LSO would help prevent the aggravation of the patient's **lumbar spine injuries**, which could result in additional neurological compromise. Bracing the injured region would help prevent further neurological deterioration and would allow for the current course of rehabilitation to continue without complications. The use of a lumbosacral orthosis would provide passive stiffness to the trunk allowing for increased spine stability with focus on immobilization and support of the lumbar spine. A cervical traction device is used to relieve pain and nerve root compression. When used properly and safely, traction can be a very effective approach for improving joint mobility, relieving nerve and disc compression, improving posture, and relieving pain. American Journal of Physical Medicine & Rehabilitation. 1999 Jan-Feb 78(1):30-2. A study testing the efficacy of cervical traction found that 90% of patients with radiculopathy reported improvement with the use of cervical traction, and "[i]n a retrospective study, a brief (3-5 min), over-the-door home cervical traction modality provided symptomatic relief in 81% of patients with mild to moderately severe (grade 3) cervical spondylosis syndromes." Am J Phys Med Rehabil. 1999 Jan-Feb; 78(1): 30-2." Dr. Stiler continues "according to Medicare's reimbursement guidelines for spinal orthoses (LSO), prefabricated, custom fitted, or custom fabricated orthoses are considered covered when one or more of the following conditions exist: to reduce pain by restricting mobility of the trunk; or to facilitate healing following an injury to the spine or related soft tissues; or to facilitate healing following a surgical procedure on the spine or related soft tissue; or to otherwise support weak spinal muscles and/or a deformed spine. The first two conditions have been met in this case. It is necessary to brace newly sustained injuries throughout the unsupervised portions of the day when the patient can possibly aggravate these injuries, which are vulnerable after an accident. Orthosis is useful in the healing of injuries such as the ones in this instance. This device would aid in the patient's recovery and contribute to the recovery goals. LSO devices are utilized to reduce pain by decreasing the mobility of the trunk. Stabilization by bracing facilitates healing by preventing excessive motion and support encourages good body mechanics that are affected by trauma. It is necessarily indicated in acute sprain cases and incorporated within a comprehensive rehabilitation program for faster recovery. I believe that based upon the patient's condition at the time of the office visit, the LSO device was medically necessary. Dr. McAlarney relies on a study that he claims notes "that lumbar supports are not any more effective than no intervention or training in preventing low-back pain." However, this is an inaccurate summary of the findings of this study. The authors' actual conclusion is that "[i]t remains unclear whether lumbar supports are more effective than no or other interventions for treating low-back pain." This does not mean that they are ineffective or not medically necessary, but as the authors of the study conclude, that "[t]here is still a need for high quality randomized trials on the effectiveness of lumbar supports." Cochrane Database Syst Rev. 2008 Apr 16;(2):CD001823. Accordingly, I do not believe that this study discredits the use of lumbar supports." Dr. Stiler concludes

"Dr. McAlarney claims that the cervical traction equipment should have been used only as part of an in-office treatment program. However, I prescribed this device for in-home use because the patient may obtain the maximum benefits of such therapy when it is consistently utilized in the home. Dr. McAlarney ignores the convenience and safety of not having to rely on multiple clinical visits in order to obtain the same benefits that could be obtained more often at home. The prescription of these devices was more than appropriate with regards to the onset of injury date, the nature of the injuries sustained, and the symptomatology resulting from those injuries. Furthermore, when there is a conflict between two medical opinions, I believe that the proper opinion to follow is that of the treating physician because the treating physician is in the best situation to make the best decision for the care of the patient. Therefore, in my professional medical opinion, based on review of the documentation provided, I believe the cervical traction equipment and lumbosacral orthosis, sagittal control with rigid were medically necessary."

Here, there were no documented lumbar complaints and there is no lumbar examination by the prescribing physician in evidence. Dr. Stiler states "Dr. McAlarney did not consider that the patient's significant radicular symptoms" but Dr. Stiler's 2/3/17 examination failed to document radiation of pain and sensation. In addition muscle strength, DTRs, and coordination were normal. I am not persuaded that the lumbar sacral orthosis was medically necessary. As to the cervical traction unit I find that Dr. Stiler sufficiently rebutted Dr. McAlarney's opinion that the cervical traction equipment should have been used only as part of an in-office treatment program by explaining the benefits of home use.

Accordingly, Applicant is awarded \$502.63.

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
	OrthoPro Services, Inc.	03/01/17 - 03/01/17	\$1,309.27	Awarded: \$502.63
Total			\$1,309.27	Awarded: \$502.63

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/03/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is timely denied, interest shall begin to accrue as of the date arbitration is requested, i.e., the date the American Arbitration Association receives Applicant's arbitration request, unless the arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the 30th day after proof of claim was received by the insurer. 11 NYCRR §65-4.5(s)(3), §65-3.9(c). Here with regards to the bill at issue, Applicant requested arbitration within 30 days after receipt of Respondent's denial. The denial is dated 5/1/17 and the arbitration was requested on 5/11/17. As Applicant acted in a timely manner and in accordance with the No-Fault Regulations, interest should accrue from 30 days after receipt of the claim by the insurer or 5/3/17 (as the bill was received on 4/3/17).

C. Attorney's Fees

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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of \$1,360."

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

04/08/2019

(Dated)

Charles Blattberg

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:

471b066a0b5b3d2cdccda120f2fa17f7

Electronically Signed

Your name: Charles Blattberg
Signed on: 04/08/2019