

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ariel Chiropractic, PC , Belam Acupuncture  
PC  
(Applicant)

- and -

IDS Property Casualty Insurance Co  
(Respondent)

AAA Case No.	17-18-1089-1604
Applicant's File No.	n/a
Insurer's Claim File No.	2376023
NAIC No.	29068

**ARBITRATION AWARD**

I, Aaron Maslow, 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 ["ZK"]

1. Hearing(s) held on 07/29/2019  
Declared closed by the arbitrator on 07/29/2019

Mark Fenelon, Esq., from The Geller Law Group PC participated in person for the Applicant

Dianne Galluzzo, Esq., from Bruno Gerbino & Soriano LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,151.35**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicants reduced the amounts in dispute for each of the four bills at issue: Belam Acupuncture P.C., Oct. 21-Nov. 15, 2017, from \$565.14 to \$386.67; Belam Acupuncture P.C., Nov. 18, 2017, from \$81.35 to \$55.66; Ariel Chiropractic, P.C., Oct. 27-Nov. 18, 2017, from \$420.72 to \$363.57; Ariel Chiropractic, P.C., Nov. 24, 2017, from \$84.14 to \$72.65.

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

The parties stipulated that Applicants established a prima facie case of entitlement to No-Fault compensation with respect to their four bills. They also stipulated that

Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Additionally, they stipulated that should Applicants prevail, interest would accrue as of the date that the American Arbitration Association received Applicant's arbitration request.

### 3. Summary of Issues in Dispute

- Whether Applicants Belam Acupuncture P.C., and Ariel Chiropractic, P.C., established entitlement to No-Fault insurance compensation for acupuncture and chiropractic services provided to Assignor past an IME cutoff of further benefits
- Whether Respondent made out a prima facie case of lack of medical necessity for such services past the IME cutoff and, if so, whether Applicants rebutted it

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

#### Appearances

For Applicants:

The Geller Law Group PC  
1641 East 13th Street  
Brooklyn, NY 11229  
Of counsel: Mark Fenelon, Esq.

For Respondent:

Bruno Gerbino & Soriano LLP  
445 Broad Hollow Road  
Suite 220  
Melville, NY 11747  
By : Diane Galluzzo, Esq.

Applicants Belam Acupuncture P.C., and Ariel Chiropractic, P.C., commenced this New York No-Fault insurance arbitration, seeking as compensation \$1,151.35 remaining unpaid from that which it billed for performing acupuncture and chiropractic services from Oct. 21, 2017 to Nov. 24, 2017, for Assignor, a 67-year-old female who was injured in a motor vehicle accident on June 28, 2017. Respondent imposed an IME cutoff of benefits for further treatment effective Oct. 27, 2017. As a result one bill for each of the Applicants was only partially paid and one bill for each of them was denied completely.

At the hearing, Applicants reduced the amounts in dispute for each of the four bills at issue: Belam Acupuncture P.C., Oct. 21-Nov. 15, 2017, from \$565.14 to \$386.67; Belam Acupuncture P.C., Nov. 18, 2017, from \$81.35 to \$55.66; Ariel Chiropractic, P.C., Oct. 27-Nov. 18, 2017, from \$420.72 to \$363.57; Ariel Chiropractic, P.C., Nov. 24, 2017, from \$84.14 to \$72.65. In dispute are the dates of service after the IME cutoff effective date of Oct. 27, 2017, i.e., whether the services were medically necessary.

This arbitration was organized by the American Arbitration Association, which has been designated by the New York State Department of Financial Services to administer the mandatory arbitration provisions of Insurance Law § 5106(b), which provides:

Every insurer shall provide a claimant with the option of submitting any dispute involving the insurer's liability to pay first party ["No-Fault insurance"] benefits, or additional first party benefits, the amount thereof or any other matter which may arise pursuant to subsection (a) of this section to arbitration pursuant to simplified procedures to be promulgated or approved by the superintendent.

All parties appeared at the hearing by counsel, who presented oral argument and relied upon documentary submissions. I have reviewed the submissions' documents contained in the American Arbitration Association's ADR Center as of the date of the hearing, said submissions constituting the record in this case.

The parties stipulated that Applicants established a prima facie case of entitlement to No-Fault compensation with respect to their four bills. They also stipulated that Respondent's Form NF-10 denial of claim forms were timely issued, i.e., within the 30-day deadline prescribed by Insurance Law §5106(a) and 11 NYCRR 65-3.8(a)(1). Since Applicants reduced the amounts in dispute with respect to the four bills at issue, Respondent stated that no fee issues were being raised.

Since Respondent's denial was timely (as stipulated by the parties), it was within its rights to assert lack of medical necessity for further treatment as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002); cf. Country-Wide Insurance Co. v. Zablocki, 257 A.D.2d 506 (1st Dept. 1999).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 2008 N.Y. Slip Op. 51863(U) (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see AJS Chiropractic, P.C. v. Mercury Ins. Co., 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2002), because the ultimate burden of proof on the issue of medical necessity lies with the

claimant. See Insurance Law § 5102; Wagner v. Baird, 208 A.D.2d 1087 (3d Dept. 1994); Shtarkman v. Allstate Insurance Co., 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company). The insured or the provider bears the burden of persuasion on the question of medical necessity. Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 2005 N.Y. Slip Op. 51282(U) at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). This burden of proof is properly placed on a claimant health care provider because presumably it is in possession of the injured party's medical records.

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U) at 2 (App. Term 2d & 11th Dists. Sept. 29, 2006). Assuming the insurer establishes a lack of medical necessity based upon an IME doctor's testimony, it is ultimately the claimant who must prove, by a preponderance of the evidence, that the services were medically necessary. Amato v. State Farm Ins. Co., 40 Misc.3d 129(A), 2013 N.Y. Slip Op. 51113(U) (App. Term 2d, 11th & 13th Dists. July 3, 2013), rev'g, 30 Misc.3d 238 (Dist. Ct. Nassau Co. 2010) (district court held that IME cannot form basis for denying benefits unless post-IME records are reviewed); see also Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 2015 N.Y. Slip Op. 51751(U) (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 n. (App. Term 2d, 11th & 13th Dists. 2012).

There is a single IME report relied upon by Respondent in asserting lack of medical necessity for the services performed past the IME cutoff effective date. The report was written by Dr. Ariel E. Goldin, D.C., L.Ac., who examined Assignor on Oct. 16, 2017. He started by noting that Assignor was a pedestrian struck by a vehicle on June 28, 2017. She incurred injuries to her neck, lower back, left shoulder, right elbow, right wrist, right hip, and right knee. Assignor was taken to the hospital following the accident and released the same day. Thereafter, Assignor underwent physical therapy, chiropractic, and acupuncture.

Assignor complained to Dr. Goldin of pain in the neck, lower back, left shoulder, right hip, and bilateral knees. Dr. Goldin listed the numerous medical records which he reviewed.

Examination of the cervical spine revealed no tenderness upon palpation. Palpation further revealed no vertebral misalignments, restricted vertebral motion, subluxations, muscle spasms or other soft tissue abnormalities related to trauma. Range of motion of the cervical spine revealed flexion to be 45 degrees with normal

being 45 degrees, extension to be 40 degrees with normal being 45 degrees, right and left lateral bending to be 45 degrees with normal being 45 degrees and right and left rotation to be 80 degrees with normal being 80 degrees. Cervical Compression, Cervical Distraction and Jackson's Compression tests were all negative bilaterally. Soto-Hall Test was negative. Neurological examination of the upper extremities demonstrated normal muscle testing 5+/5 bilaterally throughout the trapezius, deltoids, triceps, biceps, wrist flexors, wrist extensors and intrinsic hand muscles with no muscle atrophy. Sensory responses were intact bilaterally throughout the upper extremities including the following dermatomes: C5, C6, C7, C8 and T1. Deep tendon reflexes of the biceps, triceps, and brachioradialis were +2 and equal bilaterally.

Examination of the thoracic spine revealed no tenderness upon palpation. Palpation further revealed no vertebral misalignments, restricted vertebral motion, subluxations, paraspinal muscle spasms, or other soft tissue abnormalities related to trauma.

Examination of the lumbar spine revealed mild right-sided tenderness upon palpation. Palpation further revealed no vertebral misalignments, restricted vertebral motion, subluxations, muscle spasms or other soft tissue abnormalities related to trauma. Range of motion of the lumbar spine revealed flexion to be 90 degrees with normal being 90 degrees, extension to be 25 degrees with normal being 30 degrees, right and left lateral bending to be 30 degrees with normal being 30 degrees, and right and left rotation to be 30 degrees with normal being 30 degrees. Straight Leg Raising Test, Bechterew's Test, Braggard's Test, Kemp's Test, Patrick-Fabere Test and sacroiliac palpation were all negative bilaterally. Valsalva Test was negative. Neurological examination of the lower extremities demonstrated muscle testing to be +5/5 bilaterally throughout the hip flexors, knee flexors, knee extensors, dorsiflexors and plantar flexors with no muscle atrophy. Sensory responses were intact bilaterally throughout the lower extremities including the following dermatomes: L2, L3, L4, L5 and S1. Patellar and Achilles reflexes were +2 and equal bilaterally. Assignor was able to walk on heels and toes, and gait was normal.

Examination of the left shoulder revealed no points of tenderness upon palpation. There was no edema and no ecchymosis. Ligamentous integrity appeared to be preserved and no muscle atrophy was observed. Apley's Scratch Test was negative. Range of motion of the left shoulder revealed forward elevation to be 150 degrees with normal being 150 degrees, abduction to be 150 degrees with normal being 150 degrees, extension to be 40 degrees with normal being 40 degrees, adduction to be 30 degrees with normal being 30 degrees, external rotation to be 40 degrees with normal being 40 degrees and internal rotation to be 40 degrees with normal being 40 degrees.

Examination of the right hip revealed points of tenderness upon palpation laterally. There was no edema. Range of motion of the right hip revealed forward flexion to be 120 degrees with normal being 125 degrees, extension to be 110

degrees with normal being 115 degrees, abduction to be 45 degrees with normal being 45 degrees, adduction to be 45 degrees with normal being 45 degrees, external rotation to be 40 degrees with normal being 45 degrees and internal rotation to be 40 degrees with normal being 45 degrees.

Examination of the right knee revealed no points of tenderness upon palpation. No edema or ecchymosis was noted. There was no muscle atrophy observed. Range of motion of the right knee revealed flexion to be 110 degrees with normal being 130 degrees and extension to be 0 degrees with normal being 0 degrees. Examination of the left knee revealed points of tenderness upon palpation anteriorly. No edema or ecchymosis was noted. There was no muscle atrophy observed. Range of motion of the left knee revealed flexion to be 110 degrees with normal being 130 degrees and extension to be 0 degrees with normal being 0 degrees.

Other areas of the body (not complained of before the IME began) were essentially normal.

In terms of Traditional Chinese Medicine, there was a normal facial complexion with normal color, moisture, and no indication of fever, anemia or blood stagnation. Tongue was normal, light red, and a moist coating and normal shape with no qi or yang deficiency evident. The tongue fur was normal, thin, and with a white coat. There was normal speech and respiration. No evidence of qi and blood stagnation were noted in the acupuncture channels. Pulse was normal at radial areas with normal rate and strong quality. There was no evidence of thready pulse. Pulse was 62 BPM. Acupuncture Shu points were negative for pain.

Dr. Goldin diagnosed resolved cervical sprain/strain; a normal examination of the thoracic spine; resolved lumbar sprain/strain; and resolved Qi and blood stagnation. "The objective examination was completely within normal limits with the exception of range of motion testing, which was consistent with the claimant's advanced age and was within functional limits. No further chiropractic treatment would be reasonable or necessary for the accident of record. From an acupuncturist's point of view, I found no local blood or qi stagnation, no further acupuncture treatment is indicated."

I find that Dr. Goldin's report contained a factual basis and a medical rationale. For Respondent, the report made out a prima facie case of lack of medical necessity for the services past the IME cutoff date. Per the case law, the burden of proof shifted to Applicant to rebut the IME findings and affirmatively prove medical necessity for further treatment.

No formal rebuttal was submitted by Applicant. An acupuncture re-evaluation of Sept. 16, 2017, was from a month before the IME report and of no probative value in terms of rebutting the IME findings. Likewise treatment notes are of no probative value since they do not reflect the varied tests performed on Assignor by Dr. Goldin.

There is an Oct. 13, 2017 chiropractic re-examination report. Assignor complained of a stiff, sore, and achy neck and back pain worse upon bending and lifting. Assignor complained of bilateral knee pain upon standing and walking. Cervical and lumbar range of motion was reduced. There were positive results on Shoulder Depression Bechterew's, McMurray's, Straight Leg Raise, and Yeoman's. Further chiropractic was recommended.

I find as follows: Applicant Ariel Chiropractic, P.C., proved medical necessity for the post-IME cutoff chiropractic services. The Oct. 13, 2017 chiropractic re-examination report was found more persuasive than Dr. Goldin's IME report. I am impressed with the detailed findings in the chiropractic re-examination report. Respondent proved lack of medical necessity for the post-IME cutoff acupuncture services. The IME report's Traditional Chinese Medicine findings were not sufficiently rebutted by Applicant Belam Acupuncture, P.C., who submitted no follow-up exam report contemporaneous with the IME. It failed to meet its burden of proof. Thus, the IME cutoff is sustained in terms of post-cutoff acupuncture services but not in terms of post-cutoff chiropractic services. Applicant Ariel Chiropractic, P.C.'s prima facie case of entitlement to No-Fault stands, but that of Applicant Belam Acupuncture, P.C. has been overcome.

Accordingly, the within arbitration claim is granted to the extent of awarding \$436.22 in health service benefits to Applicant Ariel Chiropractic, P.C.

This arbitrator has not made a determination that benefits provided for under Article 51 (the No-Fault statute) of the Insurance Law are not payable based upon the assignor's lack of coverage and/or violation of a policy condition due to the actions or conduct of Assignor. As such and in accordance with the provisions of the prescribed NYS Form NF-AOB (the assignment of benefits), Applicant health providers shall not pursue payment directly from Assignor for services which were the subject of this arbitration, notwithstanding any other agreement to the contrary.

Interest: The parties stipulated that should Applicant prevail, interest would accrue as of the date that Applicant's arbitration request was received by the American Arbitration Association. Per the latter's electronic case folder, that date was May 12, 2018. The end date for the calculation of the period of interest shall be the date of payment of the claim. In calculating interest, the date of accrual shall be excluded from the calculation. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning.") Where a motor vehicle accident occurs 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); Gokey v. Blue Ridge Ins. Co., 22 Misc.3d 1129(A), 2009 N.Y. Slip Op. 50361(U) (Sup. Ct. Ulster Co., Henry F. Zwack, J., Jan. 21, 2009).

Attorney's Fee: After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an

attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of \$1,360.00.

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	Total	Status
	Belam Acupuncture PC	10/21/17 - 11/15/17	\$565.14	\$386.67	\$ 436.22	Denied
	Belam Acupuncture PC	11/18/17 - 11/18/17	\$81.35	\$55.66	\$ 436.22	Denied
	Ariel Chiropractic, PC	10/27/17 - 11/18/17	\$420.72	\$363.57	\$ 436.22	Awarded: \$363.57
	Ariel					Award



	<b>Chiop ractic, PC</b>	<b>11/24/17 - 11/24/17</b>	<b>\$84.14</b>	<b>\$72.65</b>	<b>\$ 436.22</b>	<b>ed: \$72.65</b>
<b>Total</b>			<b>\$1,151.35</b>		<b>Awarded: \$436.22</b>	

- B. The insurer shall also compute and pay the applicant interest set forth below. 05/12/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Respondent shall pay Applicant interest on the total first-party benefits awarded herein, computed from May 12, 2018 to the date of payment of the award, but excluding May 12, 2018 from being counted within the period of interest. The interest rate shall be two percent per month, simple (i.e., not compounded), on a pro rata basis using a 30-day month.

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, as provided for in 11 NYCRR 65-4.6(d) (as existing on the filing date of this arbitration), subject to a maximum fee of \$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 Kings

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

08/01/2019

(Dated)

Aaron Maslow

**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:**  
09c68edc8d0db2eb127ad62f6b22e41f

### **Electronically Signed**

Your name: Aaron Maslow  
Signed on: 08/01/2019