

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Towers NY Inc
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-18-1095-2729
Applicant's File No. N/A
Insurer's Claim File No. 0577701060101041
NAIC No.

ARBITRATION AWARD

I, Heidi Obiajulu, 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: Injured Party

1. Hearing(s) held on 08/09/2019
Declared closed by the arbitrator on 08/09/2019

Vladimir Tamayeff, Esq. from Law Office of Tamayeff, P.C. 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, **\$ 1,339.85**, 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

Were the disputed durable medical equipment (consisting of a bed board, mattress, cervical collar, thermophore, LSO, massager, and water circulating unit with pump) dispensed on 12/12/17 medically necessary based on the peer review report by Dr. Eric M. Littman, DC? The then 33-year-old male driver was involved in a motor vehicle accident occurring on October 06, 2017 and received treatment for injuries to his neck, right shoulder, back knees, and hips.

4. Findings, Conclusions, and Basis Therefor

I have reviewed all relevant documents included in the Modria ADR Center maintained by the American Arbitration Association (hereinafter referred to as AAA) consisting of the submissions made by the parties. The parties did not submit any additional documents at the time of the hearing.

In dispute in this arbitration is Applicant's claim in the amount of \$1339.85 for the disputed durable medical equipment (consisting of a bed board, mattress, cervical collar, thermophore, LSO, massager, and water circulating unit with pump) dispensed on 12/12/17.

This case arises out of a motor vehicle accident occurring on October 06, 2017, in which the Injured Party (CO), a then 33-year-old male, sustained multiple injuries including to the neck, right shoulder, back knees, and hips while driving the insured vehicle when it was rear-ended by the adverse vehicle. After the accident, he went to the emergency room of Jacobi Medical Center where he was evaluated, treated, and released.

Initially, the Injured Party received acupuncture treatment.

On October 26, 2017, Dr. Melissa DeTullio, DC initially evaluated the Injured Party and reported that he presented with intense muscle pain and stiffness in the cervical and lumbar spine with significant loss of range of motion, numbness and tingling down into his bilateral hands occasionally, difficulty standing, walking, riding, bending and rising to walk after sitting, upper back pain and stiffness, difficulty lifting heavy objects, sacrum pain upon palpation, and sacroiliac pain. She commenced him on chiropractic care.

On October 30, 2017, Dr. David N. Lifschutz, M.D. initially evaluated the Injured Party and reported that he presented with complaints of frontal region headaches, posterior neck pain (right worse than left), right-sided anterior chest discomfort, lower back pain across the paravertebral muscles, and right knee pain. Physical examination revealed normal motor tone, bulk, and strength, normal gait, normal sensation in all extremities, normal DTRs in the upper and lower extremities, tenderness and trigger points in the cervical paraspinal and right trapezius muscles and limited ranges of motion (see the report for ranges), tenderness and trigger points in the lumbar paraspinal muscles and limited ranges of motion (see the report for measurements), and tenderness in the right knee. Based on his exam findings. Dr. Lifschutz diagnosed post-traumatic headaches, cervical strain, lumbosacral strain, and right knee strain sprain. He commenced the Injured Party on physical therapy, chiropractic care, and acupuncture treatment and ordered an MRI of the right knee and an orthopedic evaluation and a neurological follow-up.

On November 15, 2017, the Injured Party was evaluated by Nicole Hidalgo, N.P of New York Pain Management Group. The provider reported that he presented with complaints of pain in his head, neck, right shoulder, the right side of his chest, upper back, mid-back, low back, and bilateral knee. The pain was described as radiating and associated with numbness and tingling of the legs. Physical examination revealed suboccipital spasms, bilateral trapezius pain, and spasm, limited cervical extension, facet

tenderness, a positive compression test, limited ranges of motion of the left shoulder with pain, diffuse muscle spasms, and tenderness in the back paraspinal muscles, facet tenderness, a positive Kemp's test, positive facet loading test, restricted ranges of motion of the cervical and lumbar spine (see the report for ranges), and bilateral sacroiliac joint tenderness. Based on his exam findings, the provider diagnosed lumbago, facet pain, cervicgia, facet pain, cervical radiculopathy, lumbar radiculopathy, bilateral knee pain, right shoulder pain, sacroiliitis, shoulder pain, and bursitis of the knee, right knee. He performed a urine toxicology report, prescribed medication, ordered MRIs of the cervical and lumbar spine, right shoulder and left knees (indicating that the right knee MRI had already been ordered).

On November 22, 2017, Dr. Frank Sauchelli, M.D. performed an initial exam of the Injured Party and reported that he presented with complaints of headaches, neck pain, upper and low back pain and pain in his shoulder and knee. Physical examination revealed tenderness, spasm, and stiffness on palpation of the cervical posterior, occipital, paraspinal, and trapezius muscles, moderately limited ranges of motion (measurements not given), trigger points in the cervical spine, at C3, C4, C5, C6, and C7 levels positive Soto Hall and cervical distraction test, motor deficits, sensory deficits, tenderness over the thoracic paraspinal, muscle spasms in the lumbar spine, diffuse tenderness over the lumbar paraspinal, erector spinae, iliocostal, lumborum, multifundi, gluteus muscles, and the latissimus dorsi muscles, pain radiating to the sciatic notches, moderately restricted lumbar spine ranges of motion (ranges not given), findings affecting the right shoulder with ranges of motion not given, and moderately restricted ranges of motion in both knees (ranges not given). Given that the report is in a preprinted checklist format, the findings are unclear and limited probative weight is given this report.

On November 29, 2017, Dr. Melissa DeTullio, DC performed a follow-up exam and reported that the Injured Party presented with persisting moderate muscle pain and stiffness in the cervical and lumbar spine with moderate loss of range of motion, difficulty standing, walking, riding, bending, and rising to walk after sitting, upper back pain and stiffness, difficulty lifting heavy objects, sacrum pain upon palpation, and sacroiliac pain. Physical examination of the cervical spine and musculature revealed deep and superficial muscle spasms, tenderness and muscle splinting of the anterior cervical musculature and posterior para-vertebral musculature, hypertonic trapezius, semispinalis, levator scapulae, rectus capitis muscles and suboccipital with edema (also in the zygapophyseal joints and their capsules), significant loss of intersegmental range of motion in the cervical spine (see the report for ranges), significant shortening and hypertonicity in the sternocleidomastoid, anterior scalenes, and middle scalenes, and visible swelling in the SCM's bilaterally, subluxations in the C1-C7 and T1-T12 levels, positive foramina compression test, Hyperflexion compression test, hyperextension compression test, Jackson's compression test, and shoulder depression test, restricted lumbar spine ranges of motion (see the report for ranges), deep and superficial muscle spasms and tenderness in the thoracic and lumbar spine and musculature, edema over the sacral iliac joints and lumbosacral juncture, weakness in the core lower spinal stabilizers (the transverse abdomens, rectus abdominus, gluteus maximus and medius),

significantly tightened hip flexors, hypertonic psoas muscles bilaterally, dysafferentation of the involved segments, subluxations in the L1-L5 and bilateral SI joint/sacrum, and a positive Kemp's test, SLR test at 45 degrees bilaterally, and Yeoman's test.

On December 5, 2017, Dr. Frank Sauchelli, MD (or Ricardo Baez, P.A.) performed an initial exam of the Injured Party and reported that he presented with pain in his right shoulder and knees. He noted that the Injured Party reported that the right shoulder pain was rated 9/10 on the pain scale; the right knee was rated 7/10 on the pain scale, and; the left knee was rated 8/10 on the pain scale. His physical examination of the right shoulder revealed painful and restricted ranges of motion (see the report for measurements), a positive Neer's sign, and the inability to reach behind to a back pocket. Physical examination of the knees revealed swelling, hematoma, and bruises over the posterior aspect of the knees, limited and painful ranges of motion (see the report for measurements), a positive Apley test bilaterally, and a positive Anterior Drawer test in the right knee. Based on his exam, Dr. Sauchelli recommended an orthopedic evaluation.

On December 11, Nicole Hidalgo, N.P. re-evaluation the Injured Party and reported that the Injured Party presented with persisting pain in his back and both knees.

On December 14, 2017, Ricard L. Baez, P.A. prescribed the disputed right KO adjustable w/joint support knee orthosis.

On December 15, 2017, Dr. Kenneth McCulloch, M.D. performed an orthopedic evaluation and reported that the Injured Party presented with pain in his knees and right shoulder. He noted that the left knee pain was worse than that of the right knee and that the pain was sharp at random times. His physical examination revealed restricted ranges of motion of the right knee (0 to 140 degrees), no instability, minimal joint line tenderness with a negative anterior drawer, Lachman's and McMurray's, the left knee range of motion was 0 to 130 degrees with no instability and a positive McMurray's and negative anterior drawer and Lachman, restricted right shoulder forward elevation to 130 degrees, external rotation to 60 degrees and internal rotation to L2, mild tenderness over the anterior humeral head, mildly positive Hawkins, and negative other provocative maneuvers. He reported that the right shoulder MRI study revealed rotator cuff tendinosis with an anterior labral tear at the 3 o'clock positive and biceps tenosynovitis; the right knee MRI study revealed a partial ACL tear; and, the left knee MRI study revealed a complex tear of the posterior horn and body of the medial meniscus with joint effusion. He recommended a left knee arthroscopic procedure.

Applicant dispensed the disputed durable medical equipment (hereafter referred to as DME) and submitted its claim form to Respondent seeking the reimbursement of no-fault benefits.

Within 30-days of its receipt of Applicant's claim form, Respondent denied reimbursement on the grounds that the disputed DME were medically unnecessary based on the peer review report by Dr. Eric M. Littman, DC.

After it received Respondent's denial, Applicant commenced this arbitration seeking reimbursement of its claim.

At the outset, I find that Applicant established its prima facie case with the submission of its claim form and the copy of Respondent's denial of claim form, which demonstrates that Respondent received Applicant's claim form, that more than 30-days elapsed since its receipt of same, and that Respondent denied reimbursement of Applicant's claim, which shows that Applicant's claim is now due and owing. See Insurance Law section 5106 [a]; Viviane Etienne Medical Care, PC v. County-Wide Ins. Co 25 N.Y.3d. 498, 35 N.E.3d 451, 14 N.Y.S. 3d. 283, 2015 N.Y. Slip Op 04787(NY, June 10, 2015), Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d. 1168, 911 N.Y.S.2d. 907, 2010 N.Y. Slip Op.08933, (N.Y.A.D. 2nd Dept., November 30, 2010).

Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense.

However, even before determining whether Respondent met its burden of proof, it must first be determined whether Respondent's lack of medical necessity defense survives preclusion.

In a no-fault action, a defense (other than one based upon a lack of coverage) survives preclusion only if raised in a denial that is (1) timely, Presbyterian Hosp. in the City of New York v. Maryland Casualty Ins. Co., 90 NY.2d 274, (N.Y. , June 10, 1997), Central Gen. Hosp. v. Chubb Group of Ins. Co., 90 N.Y.2d 195 (1997), (2) includes the information called for in the prescribed denial of claim form, 11 NYCRR § 65-3.4 (c) (11); Nyack Hosp. v. Metropolitan Prop. & Cas. Ins. Co., 16 A.D.3d 564 (2d Dept. 2005); Nyack Hosp. v. State Farm Mut. Auto. Ins. Co., 11 A.D.3d 664, (App. Div. 2nd Dept. Oct. 25, 2004), or is not fatally defective, and (3) "promptly apprise(s) the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated", General Accident Ins. Group v. Cirucci, 46 N.Y.2d 862, 864, (1979); New York University Hosp. Rusk Ins. v. Hartford Acc. & Indem. Co., 32 A.D.3d 458, (2d Dept. 2006).

Applying the above case law and criteria to Respondent's denial, I find that its lack of medical necessity defense is preserved because the denial was issued in a timely manner, included the information called for in the prescribed denial of claim form, and promptly apprised Applicant with a high degree of specificity of the basis of the denial.

Therefore, the issue is whether Respondent met its burden of proof in establishing its lack of medical necessity defense.

Regarding its lack of medical necessity defense, Respondent relies on the peer review report by Dr. Eric Littman, DC. To rebut that defense, Applicant relies on rebuttal by Melissa DeTullio, DC.

Reviewing the relevant evidence in the record and considering the oral arguments made by the parties, I find as follows:

In determining whether an insurer met its burden of proof in establishing its lack of medical necessity defense, the courts have found that an insurer must submit an IME report/peer review with a detailed basis and medical rationale for the denial of benefits in order to prevail. See Vladimir Zlatnick, M.D., P.C. v. Travelers Ins. Indemnity Co., 12 Misc. 3d 128A (App. Term 1st Dept. 2006) and Nir v. Allstate, 7 Misc.3d 544, 546-47 (Civ. Ct., Kings Cty. 2005). ("At a minimum, (Respondent) must establish a factual basis and medical rationale for the lack of medical necessity of (Applicant's) services"). Once Respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that Respondent has established its prima facie defense that the disputed medical service is medically unnecessary. A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co., 16 Misc.3d 131(A), (N.Y. Sup. App. Term Jul 03, 2007). Then, the burden of persuasion regarding the medical necessity of the medical services shift to the applicant to submit competent medical evidence to refute Respondent's prima facie defense that the disputed medical service/test was medically unnecessary. See Pan Chiropractic PC v. Mercury Ins. Co., 24 Misc.3d. 136 (A)(July 9, 2009).

Applying the above case law and criteria to the medical evidence in the record, I find in favor of Applicant regarding the disputed LSO, mattress, bed board, water circulating heat/cold pad, thermophore, and massager, for the following reasons. First, as the rebuttal witness pointed out in her report, the same peer reviewer suggested that the water circulating unit was warranted in the linked case AAA 17-18-1091-8976. Second, he didn't cite the generally accepted medical practices followed by the medical community for prescribing a water circulating unit and show it wasn't adhered to. Likewise, the peer reviewer appears to suggest the LSO prescribed in this case was warranted in the linked case AAA Case No. 17-18-1091-8978, as pointed out by the rebuttal witness. Also, I am persuaded that the positive lumbar MRI findings referenced by the rebuttal witness demonstrate that the peer reviewer's cited standard of care requiring evidence of spinal instability was satisfied; thus, I find that the disputed LSO was prescribed consistent with Dr. Littman's articulated standard of care. Regarding the mattress and bed board, I find that Dr. Littman failed to cite the generally accepted medical practices followed by the medical community in prescribing such devices; the peer reviewer cited general recommendations against the use of such by the NYS Workers' Compensation Board's New York Mid and Low Back Injury Medical Treatment Guidelines. Those recommendations are not recognizable standards of care followed by the medical community in prescribing bed boards and mattresses. So, I find that Dr. Littman failed to set forth a sufficient medical rationale regarding those items. Likewise, the Board recommends against manual massagers but I find that this is not a recognizable standard of care but a recommendation. Therefore, I find that Dr. Littman failed to set forth a sufficient medical rationale regarding the mechanical massager because he failed to show it was prescribed inconsistent with the standard of care followed by the medical community in prescribing such device. Finally, regarding the

thermophore, I find again that Dr. Littman failed to demonstrate it was prescribed inconsistent with the generally accepted medical practices followed by the medical community in prescribing such device. He cited an article that questions the efficacy of thermal modalities, which is not the same as demonstrating it was medically unnecessary. For those reasons, I find in favor of Applicant regarding the bed board, mattress, thermophore, LSO, massager, and water circulating unit.

However, I find in Respondent's favor regarding the cervical collar. The peer reviewer cited the NYS Workers' Compensation Board's New York Neck Injury Medical Treatment Guidelines that indicated that a rigid collar is useful for post-operative or in emergency situations and that a soft collar is not recommended. I find that this represents a generally accepted medical practice followed by the medical community and that the rigid collar was prescribed inconsistent with that standard of care.

Accordingly, for the above reasons, I find in favor of Applicant in the amount of \$1106.85

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	Total	Status
	Towers NY Inc	12/12/17 - 12/12/17	\$1,339.85	\$ 1,106.85	Awarded: \$1,106.85

Total	\$1,339.85	Awarded: \$1,106.85
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- B. The insurer shall also compute and pay the applicant interest set forth below. 05/18/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant's award in the amount of \$1106.85 shall bear interest at a rate of two percent per month, calculated on a pro-rata basis using a 30-day month from 05/18/18, the date Applicant initiated this arbitration, to the date of the payment of the award.

- 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). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with newly promulgated 11 NYCRR 65-4.6(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 New York

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

08/10/2019
 (Dated)

Heidi Obiajulu

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:
1d2f0b45b41614e6186b440d399146e1

Electronically Signed

Your name: Heidi Obiajulu
Signed on: 08/10/2019