

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Jerry J. Tracy III, Physician PLLC
(Applicant)

- and -

Unitrin Preferred Insurance Company
(Respondent)

AAA Case No. 17-19-1123-0980

Applicant's File No. 19?001680

Insurer's Claim File No. C036772NY17

NAIC No. 25909

ARBITRATION AWARD

I, Mona Bargnesi, 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 ["NT"]

1. Hearing(s) held on 12/10/2019
Declared closed by the arbitrator on 12/10/2019

Steven I. Super, Esq. from Super & Licatesi P.C. participated in person for the Applicant

Kristina O'Shea, Esq. from Gullo & Associates, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 758.05**, 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

Whether Applicant is entitled to reimbursement for manipulation under anesthesia (MUA) performed on December 14, 15 and 16, 2018.

Respondent denied reimbursement based on a peer review by John Cerf, DC, dated January 11, 2019.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in the American Arbitration Association's ADR Center as of the date of the hearing. These submissions are the record in this case.

This case arises out of a motor vehicle collision which occurred on May 26, 2017. The 54 year-old restrained driver allegedly injured his head, right shoulder and neck.

On June 14, 2017, Assignor was seen by Patricia Champlain, ANP. He complained of daily debilitating headaches, photophobia and right sided-neck pain with occasional numbness into his right hand. Ms. Champlain recommended a brain MRI, stating that "symptoms suggest proximal concussion headache persisted in 3 weeks".

A cervical spine MRI obtained on June 28, 2017 revealed a disc herniation at C5-6 and disc bulging at C6-7.

He began physical therapy on July 18, 2017.

On September 5, 2017, Assignor consulted with Lazslo Mechtler, MD (neurology).

EMG/NCV studies performed on September 21, 2017 were consistent with severe right median neuropathy in the wrist.

On October 31, 2017, February 13, 2018 and April 18, 2018, Dr. Mechtler administered trigger point injections.

Assignor sought chiropractic treatment with John Bialecki, DC, on April 18, 2018.

On December 10, 2018, Assignor was seen by Jerry Tracy, III, MD. Dr. Tracy opined that Assignor has responded "sub-optimally to the conservative chiropractic treatment and medical co-management". He noted that Assignor has tried chiropractic and physical therapy "providing some relief but temporary", and has difficulty sleeping, walking long distance and working at his job. Dr. Tracy recommended MUA.

Drs. Tracy and Bialecki performed MUA to the spine on December 14, 15 and 16, 2018.

At a minimum, an insurer's burden on the issue of lack of medical necessity includes establishing a factual basis and medical rationale for the lack of medical necessity of the health care provider's services. Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co., 24 Misc.3d 1244(A), 901 N.Y.S.2d 902 (Table), 2009 N.Y. Slip Op. 51868(U) at 3, 2009 WL 2780152 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Aug. 5, 2009).

John Cerf, DC, performed a peer review on January 11, 2019. He concluded that MUA was not medically necessary, stating:

There was no report of any obstacles to performing conscious patient manipulation.

The reporting of 0-3/10 pain intensity is inconsistent with...intractable pain.

None of the reevaluation notes identify specific obstacles to delivering conservative therapies.

There is no description of exhausting a variety of manipulation techniques including a trial of conscious patient MUA-type stretches.

The available medical records do not describe findings that are consistent with such a significant inability to participate in usual and customary activities that the potential benefits of MUA outweigh the risks of anesthesia.

...no report of fibrous tissue adhesions.

...medical records do not describe the claimant as a potential spine surgery candidate...

I find that Dr. Cerf's peer review lacks a sufficient factual basis and medical rationale to show that MUA was not medically necessary in this case. Although his report is lengthy (24 pages), and includes detailed descriptions of the MUA patient selection guidelines, he does not specifically apply these to Assignor's condition.

Dr. Cerf states that there is no indication of exhausting a variety of manipulation techniques including a trial of conscious patient MUA-type stretches, but the guideline he references says only that "the patient has undergone an adequate trial of appropriate care"; it does not state that the suggested MUA-type stretches are included in such care. Dr. Tracy did note that Assignor has had chiropractic, physical therapy, medication and injections.

Dr. Cerf also says that there is no indication of inability to participate in "usual and customary activities". Again, Dr. Tracy lists difficulty walking, sleeping, working; Dr. Cerf does not comment on this.

Dr. Cerf observes that there are no fibrous adhesions, however the guideline he cites states that there is "consideration of possible fibrous adhesions". The guideline does not state that they must be present.

Assignor's condition did not improve despite various types of treatment over a period of nineteen months.

Based on the foregoing, Applicant is entitled to reimbursement. Respondent did not present a fee schedule defense.

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
	Jerry J. Tracy III, Physician PLLC	12/14/18 - 12/14/18	\$173.08	Awarded: \$173.08
	Jerry J. Tracy III, Physician PLLC	12/16/18 - 12/16/18	\$173.08	Awarded: \$173.08
	Jerry J. Tracy III, Physician PLLC	12/15/18 - 12/15/18	\$173.08	Awarded: \$173.08
	Jerry J. Tracy III, Physician PLLC	12/14/18 - 12/16/18	\$238.81	Awarded: \$238.81
Total			\$758.05	Awarded: \$758.05

B. The insurer shall also compute and pay the applicant interest set forth below. 03/18/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month,

calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment.

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's 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 Erie

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

01/08/2020
(Dated)

Mona Bargnesi

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:
93943f52287415320a2a4c80899a74e7

Electronically Signed

Your name: Mona Bargnesi
Signed on: 01/08/2020