

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Myrtle Avenue Trading LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No. 17-18-1115-1979

Applicant's File No. None

Insurer's Claim File No. 0631 1 71 9301
01 023

NAIC No. 14138

ARBITRATION AWARD

I, Paul Keenan, 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: AssignorJR

1. Hearing(s) held on 03/04/2020
Declared closed by the arbitrator on 03/04/2020

Fania Jean, Esq. from Law Offices of Eitan Dagan (Elmhurst) participated in person for the Applicant

Alexandra Simon, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,691.37**, 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 payment for DME despite denial based on peer review

4. Findings, Conclusions, and Basis Therefor

Submissions are available through ADR filings.

Assignor was allegedly injured as a passenger in a motor vehicle accident August 25, 2019. He presented to Yana Abayev, D.O. four days later (8/29/28) with complaints of

headache and pain in his head, neck, mid back, low back, left shoulder, both wrists and both knees. TREATMENT PLAN included physical therapy, computerized range of motion and muscle testing, physical performance test, outcome assessment test and MRIs of the brain, right shoulder both wrists and both knees. Dr. Abayev prescribed multiple pieces of durable medical equipment.

At issue herein is payment for right knee orthosis, cervical collar, cervical pillow, water circulating heat pad with pump, LSO, bed board, dry pressure mattress, massager and back cushion. Respondent denied payment based on lack of medical necessity pursuant to peer review by Jason S. Lipetz, M.D. Records reviewed by Dr. Lipetz included lidocaine prescription, spinal and knee MRIs, chiropractic and physical therapy evaluation and progress notes, trigger point impedance mapping points. Dr. Lipetz wrote, in pertinent part:

In this case, the excessive and acute use of durable medical items is depicted.

There is no necessity for providing a lumbar orthosis...patient does not present with a history of more overt lumbar spinal trauma. An occult spinal fracture is not suspected.

The appropriate role for such use is highlighted in the evidence-based literature and is reviewed in Petra, et al. Lumbar Supports for Prevention and Treatment of Low Back Pain: A systematic review Within the Framework of the Cochran Back Review Group. Spine 2001;26(4):377-386. Five randomized and two nonrandomized preventive trials and six randomized therapeutic trial were included in the review. There was moderate evidence that lumbar supports are not effective for primary prevention. No evidence was found on the effectiveness of lumbar supports for secondary prevention. The systematic review of therapeutic trials showed that there is limited evidence that lumbar supports are more effective than no treatment at all.

There is no radiographic criteria met for true spinal instability with such findings defined in Leone, A, et al. Radiology. Lumbar Intervertebral Instability: A Review. 2007; 245(1)...

There is no indication for a bed board or mattress or back cushion in this case.

The appropriate role for a lumbar mattress is reviewed in Kovacs FM. Medium-firm mattresses reduced pain-related disability more than firm mattresses in chronic, nonspecific low-back pain. Lancet, 2003;1599-604.

There is also no indication for providing a home massager in this case. The appropriate role for a possible soft tissue and modality-based rehabilitation in a more supervised setting is described.

As can be extrapolated from the lumbar literature and is highlighted in Lumbar Axial Pain-An Algorithmic Methodology, In: Interventional Spine. An Algorithmic

Approach. Slipman C, et al, (eds). Elsevier. Philadelphia, PA. 2008. Pages 975-977, an algorithmic approach to the patient with lumbar axial pain initially employs relative rest, activity modification, therapeutic exercise, and analgesic use for up to 4-6 weeks prior to introducing a more interventional approach.

There is no indication that massage therapy was helpful in this case or that a home unit should be promptly provided.

The excessive and acute introduction of multiple durable medical items is demonstrated in the current case.

There is no necessity for the more prompt introduction of a water-circulating heat pad in this case. There is no indication that benefit was realized from such use.

The literature is not supportive of the routine introduction of cervical pillows.

There is a lack of efficacy as reviewed in Shields, et al. Are cervical pillows effective in reducing neck pain? New Zealand Journal of Physiotherapy - Mar2006, Vol.34 Issue 1, p3-9. A systematic review was undertaken to determine if cervical pillows are effective in decreasing neck pain...There was not enough evidence to conclude if cervical pillows reduce chronic neck pain. Further research using high quality randomized controlled trials is required.

There is no need for a cervical collar in this case. A more overt spinal trauma is not noted. The patient is not presenting with a postoperative spinal condition. An occult fracture is not noted. The appropriate role for such use is reviewed in Muzine, et al. When should a cervical collar be used to treat neck pain? Curr Rev Musculoskelet Med. 2008 Jun' 1(2): 114-119. In whiplash patients, most studies suggest that early mobilization and activity is superior to immobilization and soft collar use.

More overt knee trauma is also not reported. Examination findings do not suggest instability. A postoperative knee condition is not evident. The appropriate role for consideration of such bracing is reviewed in CHEW, KT. et al. Current Evidence and Clinical Applications of Therapeutic Knee Braces. Am J Phys Med Rehabil 2007;86: 678-686... The routine use of such bracing for nonspecific knee pain is not supported in an evidence based fashion.

To establish entitlement to No-Fault benefits, applicant is required to submit proof that respondent timely received its properly completed claim forms and the claim was not paid. See Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742; 774 N.Y.S.2d 564; 2004 N.Y. App.Div. LEXIS 3597 (2nd Dept. 2004); Amaze Medical Supply a/a/o Bermudez v. Eagle Insurance, 2 Misc. 3d 128[A], 784 N.Y.S.2d 918 9(2003)). The burden then shifts to respondent to present admissible evidence demonstrating the existence of material issue(s) of fact in support of its basis for denying payment.

In the matter of Jacob Nir, M.D. v. Allstate, Civil Court of the State of New York, Kings County, 796 N.Y.S.2d 857, the Court held that a peer review based on a doctor citing only a review of medical provider's medical reports as the basis for his peer review report and not physically examining the patient before writing the peer review report or citing medical authority, standard or generally accepted medical practice as a rationale for his findings, is a conclusory peer review and insufficient to refute applicant's prima facie documentation.

Where respondent insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to provider to 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. 13Misc. 3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 WL2829826 (App. Term 2d & 11th Dists. Sept 29, 2006).

In the instant matter, Dr. Lipitz reviews the medical documentation and cites authority for his opinions. Applicant has submitted a rebuttal by Frank Segreto, M.D.

The overriding theme that permeates Dr. Lipetz' peer reviews is that this case depicts and demonstrates excessive and acute introduction and use of durable medical items. Nine items of DME were prescribed at initial evaluation four days post motor vehicle accident and provided the following day.

Dr. Segreto discusses the peer reviews and cites to authorities that describe uses of each DME item.

Following perusal of the peer reviews and rebuttal, and considering Dr. Lipetz' overriding opinion of excessive and acute use, applicant is entitled to payment for cervical collar.

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
	Myrtle Avenue Trading LLC	08/30/18 - 08/30/18	\$717.36	Awarded: \$233.00
	Myrtle Avenue Trading LLC	08/30/18 - 08/30/18	\$974.01	Denied
Total			\$1,691.37	Awarded: \$233.00

B. The insurer shall also compute and pay the applicant interest set forth below. 12/22/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant, 11 NYCRR 65-3-9c, LMK Psychological Services v. State Farm Mut. Auto Ins. Co., 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009); Hempstead General Hosp. v. Insurance Co. of North America, 208 A.D.2d 501, 617 N.Y.S.2d 478 (2nd Dept. 1994); Smithtown General Hospital v. State Farm Mut. Auto Ins. Co., 207 A.D. 2d 338, 615 N.Y.S.2d 426 (2nd Dept. 1994). The end date for calculation of interest shall be the date of payment of the claim. Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall pay the applicant, the amount of interest at the rate of 2% per month, simple, and ending with the date of payment of the award.

C. Attorney's Fees

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

Respondent shall pay the attorney's fee in accordance with 11 NYCRR 65-4.6 (e). However, for all arbitration requests filed on or after April 5, 2002, 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).

11 NYCRR 65-4.6(b) If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of the first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, 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 Nassau

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

03/07/2020
(Dated)

Paul Keenan

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:
20ec87b30e99e981ecb65a1e0064a708

Electronically Signed

Your name: Paul Keenan
Signed on: 03/07/2020