

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Douglas Wright DC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-19-1140-5802

Applicant's File No. FDNY19-35516

Insurer's Claim File No. 0489902816
2CG

NAIC No. 29688

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 02/19/2020
Declared closed by the arbitrator on 02/25/2020

Melissa Pirillo, Esq. from Fass & D'Agostino, P.C. participated in person for the Applicant

Peter Graziosi, Esq. from Law Offices Of Karen L Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ 1,481.21, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the amount claimed to \$1,113.50 pursuant to fee schedule.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The claimant was the 66 year-old female restrained driver of a motor vehicle that was involved in an accident on 1/24/18. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. At issue are chiropractic services and testing performed by Applicant 3/12/19-4/15/19.

4. Findings, Conclusions, and Basis Therefor

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

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 66 year-old female restrained driver of a motor vehicle that was involved in an accident on 1/24/18. The claimant reportedly injured her neck, clavicle, and low back. There was no reported loss of consciousness. There were no reported lacerations, but there was a clavicle fracture. Following the accident the claimant was transported to Huntington Hospital where she was provided with a sling; and was evaluated, treated, and released. On 1/31/18 the claimant presented to Warwick Green, M.D. for an orthopedic consultation. Examination revealed "extensive ecchymosis on the superior aspect of the left shoulder extending to the root of the neck on the left side. There is a palpable step-off along the shaft of the clavicle which is tender to touch. There is no sensory deficit in the lateral aspect of the shoulder. No neurological deficits in the left upper extremity. Radial pulses are readily palpable." The treatment plan included sling immobilization and follow-up. On 3/28/18 the claimant presented to Douglas B. Wright, D.C. (Applicant) and was initiated on chiropractic treatment. On 4/11/18 Dr. Wright conducted computerized range of motion (ROM) testing. On 4/16/18 Dr. Wright conducted computerized comparative muscle strength testing (CCMT). As of the 4/16/18 Dr. Green noted that the claimant had recovered full range of left shoulder movement and was cleared for physical therapy. On 5/8/18, on referral from Dr. Wright, Paul Priolo, D.C. conducted ligament laxity analysis/CRMA studies. The 5/14/18 cervical spine MRI ordered by Dr. Wright and interpreted by Linda Harkavy, M.D. produced an impression of straightening of the usual lordosis; multilevel disc degeneration, most severe at C4-5, C5-6 and C6-7 where there are disc herniations accompanied by osteophytic ridging. There is encroachment upon the cord at C5-C6 and bony narrowing of the neural foramina at each of these levels, more severe on the right at C4-5 and bilaterally at C5-6 and C6-7; and at C2-3 and C3-4 there are shallow posterior herniations with mild encroachment upon the subarachnoid space. The 5/14/18 lumbar spine MRI ordered by Dr. Wright and interpreted by Linda Harkavy, M.D. produced an impression of: levoconvex rotatory curvature with slight retrolisthesis at L2-3 and L3-4; and stable multilevel disc degeneration, desiccated disc bulging favoring the right and facet and ligament hypertrophy. There is canal stenosis at L2-3, L3-4 and L4-5 with marked narrowing of the left subarticular recess and encroachment upon the left L5 nerve root at L4-5. At L5-S1, there is mild encroachment upon the right SI nerve root within the lateral recess. There is foraminal narrowing, more severe on the right at

T12-L1, L1-2 and L2-3, bilaterally at L3-4 and L4-5. On 5/16/18 Dr. Wright conducted ROM testing. On 5/17/18 the claimant was required to present to Robert Snitkoff, D.C. for an independent chiropractic examination (IME) that was purportedly negative and Respondent concluded "As per the findings of the physical examination conducted by ROBERT SNITKOFF DC on 5/17/18, all chiropractic, massage therapy and related claims benefits were determined to be not medically necessary and were denied effective 6/18/18." On 5/23/18 Dr. Wright conducted CCMT. On 6/14/18, on referral from Dr. Wright, the claimant presented to Scott A. Jones, D.O. of Branch Medical, P.C. for an examination preliminary to upper extremities and lower extremities EMG/NCV/F/H testing performed the same day that suggested evidence consistent with right C5 radiculopathy, bilateral axonal and demyelinating median neuropathy consistent with carpal tunnel syndrome, and bilateral S1 radiculopathy. The claimant presented with complaints of "neck pain, which radiates to the bilateral shoulders and down her right arm. She denies numbness and tingling in her upper extremities. She reports weakness in her shoulders and in the right arm. The patient also reports lower back pain, which radiates to the bilateral buttocks and down the posterior thighs to her knees, more prominent on the left. She reports a tingling sensation over the same distribution, more prominent in her lower extremities, left more than right. She denies weakness in her lower extremities." Examination of the cervical spine revealed muscle spasm along the bilateral cervical paraspinals and upper trapezium with associated tenderness to palpation, right more than left. Range of motion testing revealed flexion to 30/45°, extension to 30/55°, right rotation to 40/70°, left rotation to 60/70°, right lateral flexion to 10/40°, and left lateral flexion to 30/40°. The claimant reported pain in her neck on extension, right rotation, and bilateral side bending. Spurling's sign was positive bilaterally, more prominent on the right. Examination of the lumbar spine revealed muscle spasm along the bilateral lumbosacral paraspinals and gluteals with associated tenderness to palpation, left more than right. Range of motion testing revealed flexion to 40/90°, extension to 10/30°, right rotation to 20/30°, left rotation to 20/30°, right lateral flexion to 20/35°, and left lateral flexion to 20/35°. The claimant reported pain/discomfort on flexion (most), extension, and left side bending. Manual motor strength testing revealed 5/5 motor power throughout the bilateral upper and lower extremities; except for the bilateral deltoids and the left hip flexors, which were 4/5. Testing for deep tendon reflexes revealed 2+ responses throughout the bilateral upper and lower extremities; except at the left ankle, which was 1+. Sensation to light touch and pinprick was intact throughout the bilateral upper and lower extremities. Testing for Babinski and Hoffman's pathologic reflexes was negative. Muscle tone was within normal limits with no upper motor neuron signs noted. Proprioception and coordination were intact, Distal pulses were intact. On 6/25/18, on referral from Dr. Wright, the claimant presented to Mark J. Zuckerman, M.D. for a neurologic consultation with complaints of considerable radiating neck back pain and stiffness and radiating neck pain and stiffness with numbness and tingling in the first three fingers of right hand. Neurological examination revealed "there is no arm drift, interossei, finger flexion, extension, thumb abduction, wrist flexion, extension, elbow flexion, extension, biceps, triceps and strength are intact. Hip flexion, knee extension, dorsi and plantarflexion are normal. Reflexes are normal 1-2+ in arms, and knees. Right ankle reflex is diminished. Knees and arms are 1-2+. She has decreased vibration in her feet, but preserved pin and touch and cold in the feet and hands with negative Romberg. No ataxia. Finger tapping, finger-to-nose and rapid movements are normal." Cervical examination revealed rotation

on the neck to 55/80°, extension to 20°, flexion to 15°. Lateral flexion 30° to the left and 20° to the right. Lumbar flexion was limited to 40°, lateral flexion 10° on left and 15° to the right and 10° of extension. There was moderate spasm in the trapezii in the mid lower cervical paraspinal muscles and mid lumbar paraspinal muscles. Dr. Zuckerman's diagnostic impression was "sustained cervical sprain injury with persistent cervical pain and lumbar sprain with pain, disc herniation in the cervical spine with some superimposed on degenerative changes; and lumbar MRI report dated 05/14/2018 found ligament hypertrophy, lumbar stenosis at L4-L5 with marked foraminal stenosis and lateral recess stenosis." Dr. Zuckerman's treatment plan included "she will continue physical therapy and chiropractic. We discussed epidural injection for the low back given the degree of pain and radicular complaints in the left leg buttock. I am trying to obtain Huntington Hospital records. There is a question of a fracture of the clavicle. I would like to see the reports. She is also having shoulder issues in the right shoulder, and should be seen orthopedically." On 6/27/18 Dr. Wright conducted ROM testing. On 7/10/18 Dr. Wright conducted CCMT. On 7/11/18 the claimant presented to Felix Karafin, M.D. and trigger point injections were performed. On 7/26/18 Dr. Wright conducted ROM testing. On 9/17/18 Dr. Wright conducted CCMT. On 9/20/18 Dr. Wright conducted ROM testing. On 10/19/18 Dr. Wright conducted CCMT. On 11/14/18 the claimant presented to Brian Haftel, M.D. with complaints of neck pain and Dr. Haftel performed cervical trigger point injections. On 11/16/18 Dr. Wright conducted ROM testing. On 12/4/18 Dr. Wright conducted CCMT. On 12/18/18 Dr. Wright conducted ROM testing. On 1/9/19 Dr. Haftel performed cervical trigger point injections. On 2/6/19 Dr. Wright conducted CCMT. On 2/8/19 Dr. Wright conducted ROM testing. On 3/4/19 Dr. Wright conducted CCMT. On 3/4/19 Aman Deep, M.D. performed Lumbar Paravertebral Nerve Block three levels and right sided under ultrasound guidance. On 3/18/19 Dr. Wright conducted ROM testing. On 3/18/19 Dr. Deep performed Lumbar Paravertebral Nerve Block three levels and right sided under ultrasound guidance. On 4/1/19 Dr. Deep conducted a follow-up examination. Cervical examination revealed mild tenderness to palpation throughout the cervical spine specifically from C3 through C6. There was tenderness on palpation of paraspinal muscles on the left and right indicating myalgia. Bilaterally there were mild trigger points noted in the splenius capitus and trapezius muscles. There were mild restrictions in range of motion in all planes (quantified). There was pain noted with flexion and extension. Foraminal Compression test was negative. Shoulder Depression test was negative. Lhermitte's test for cervical myelopathy was negative. Upper extremities deep tendon reflexes and muscle strength was normal. Thoracic examination revealed mild tenderness to palpation noted at thoracic levels T1 through T7. Bilaterally there were trigger points noted to palpation to be mildly tender in the thoracic paraspinal region. Lumbosacral examination revealed moderate tenderness to palpation noted at lumbosacral levels L2 through SI. Bilateral trigger points were noted upon palpation to be moderately tender. There was tenderness noted over the right and left sacroiliac joint. There was pain reported with restricted range of motion in left rotation, right rotation, flexion and extension. Straight leg test was positive on the left, eliciting lower back pain. The sacroiliac compression test was positive bilaterally. Range of motion was moderately restricted in all planes (quantified). Lower extremities deep tendon reflexes and muscle strength was normal. Dr. Deep's treatment plan included "Continue with Chiropractic treatment as per treating Doctor" and Dr. Deep performed Lumbar Paravertebral Nerve Block three levels and left sided under ultrasound guidance. On

4/15/19 Dr. Wright conducted CCMT. On 4/29/19 Dr. Wright conducted ROM testing. At issue are chiropractic services provided by Applicant 3/12/19-4/4/19; the 3/18/19 ROM testing and the 4/15/19 CCMT conducted by Applicant.

DOS 4/15/19

Respondent denied the 4/15/19 CCMT averring "As per the findings of the physical examination conducted by DR RAGHAVA POLAVARAPU MD on 10/16/18, all Orthopaedic, Physical Therapy, Physical Medicine and Rehabilitation (PMR), Massage Therapy, Pain Management, prescription medication and related claims benefits were determined to be not medically necessary and were denied effective 11/10/18." Respondent failed to submit a copy of the referenced physical examination report by Dr. Polavarapu into evidence.

Respondent's denial also states "In addition to the foregoing reason for denial, the amount charged and sought to be reimbursed exceeds the amount permitted under the applicable Worker's Compensation fee schedule and is not reimbursable as billed." Applicant billed the 4/15/19 CCMT under CPT code 95831. It is noted that per the CPT Assistant it may have been more appropriate to bill computerized range of motion and muscle testing under CPT code 97750. Applicant billed for sixteen units under CPT code 95831 at \$39.73 per unit. CPT code 95831 has a Relative Value of 5.16 multiplied by the Chiropractic Conversion Factor in Region 4 of \$5.78 yields an allowable fee of \$29.82 for each allowable unit of this service. The official code description of CPT code 95831 in the Fee Schedule is: Muscle testing, manual (separate procedure) with report; extremity (excluding hand) or trunk. The method used by Applicant to calculate reimbursement is improper considering the code descriptor for CPT code 95831. By reporting the code sixteen times based on the plane of motion that was tested for each anatomical region, Applicant sought to be paid the functional equivalent of 82.50 Relative Value Units (RVUs). As argued by Respondent's counsel CPT code 95834 is the code which accounts for a total evaluation of the body, including the hands, and it has been assigned 14.88 RVUs. 14.88 RVUs multiplied by the Chiropractic Conversion Factor of \$5.78 yields a compensable fee of \$86.01 for CPT code 95834. Applicant's aggregate charge of \$635.68 is more than seven times this amount. The description for this code is clear and unambiguous. It directs providers to bill per extremity (excluding the hands) or trunk section. There is nothing in the phrasing that lends itself to the method that was utilized by the Applicant. Accordingly, Applicant is awarded \$86.01.

DOS 3/12/19-4/8/19

As to these bills the burden has shifted to the Respondent as they have raised a medical necessity defense. In order to sustain this burden, the Respondent must produce competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. That is, the Independent Medical Examination (IME) report they have relied upon must set forth how and why the disputed services were inconsistent with generally accepted medical and/or professional practices.

An IME report must also set forth a sufficient factual basis and medical rationale for the conclusion that further services are not medically necessary. See *Ying E. 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) (IME report, which indicates that, as of the date of the IME, there was no need for further treatment, is insufficient to demonstrate the lack of medical necessity of services rendered before the IME was conducted). An IME report asserting that no further treatment is medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mut. Fire Ins Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct., Nassau Co., May 29, 2008, Andrew M. Engle, J.).

Respondent timely denied the 6/19/18-6/28/18 chiropractic services based on the 5/17/18 independent chiropractic examination (IME) conducted by Robert Snitkoff, D.C. After reviewing the claimant's history, treatment, and medical records, Dr. Snitkoff conducts what appears to be a thorough examination. Dr. Snitkoff documents the claimant's then current complaints as pain in the neck that travels to her shoulders, lower back pain that radiates through the thigh, and pain in the left shoulder from the clavicle fracture that was still tender. Examination of the cervical spine revealed **minimal to moderate tenderness** on palpation; there was no muscle spasm on palpation. Range of motion of the cervical spine revealed flexion to **45/50°**; extension to **55/60°**; lateral bending to **40/45°** bilaterally; and rotation to **70/80°** bilaterally. Negative orthopedic tests were Soto Hall test, Foraminal Compression, Jackson's Compression, and Cervical Distraction. Examination of the thoracic spine revealed no evidence of palpable muscle spasm or tenderness. Examination of the lumbar spine revealed **minimal tenderness** on palpation; there was no muscle spasm on palpation. Range of motion of the lumbar spine revealed flexion to **50/60°**; extension to **20/25°**; lateral bending to **20/25°** bilaterally; and rotation to **30/30°** bilaterally. Minor's sign was absent. The claimant was able to walk well on both heels and toes and in tandem. Negative orthopedic tests were Ely's, Fabere-Patrick, Nachlas, Straight leg raising, and Kemp's. Deep tendon reflexes in the bilateral upper and lower extremities were 2+, equal and symmetrical. Muscle testing of the upper and lower extremities was 5/5 bilaterally. Sensation was normal. Dr. Snitkoff's diagnosis was cervical and lumbar spine sprains/strains resolved. Dr. Snitkoff concluded "decreased range of motion exhibited on exam is secondary to the claimant's age. Based on my examination, there is no need for further chiropractic treatment. There is no need for diagnostic testing. The claimant does not require household help, special transportation or durable medical equipment. There is no need for massage therapy."

Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, *Bronx Expert, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1st Dept. 2006).

Applicant did not submit any chiropractic treatment notes or reports of any chiropractic reexamination/reevaluations after the initial examination of 3/28/18; beyond the multiple testing reports referenced above.

Following a complete review of the evidence presented here, I find Dr. Snitkoff's IME report more persuasive than Applicant's evidence on the issue of medical necessity for

the chiropractic treatment at issue in this arbitration. I find that Respondent proved lack of medical necessity for the subject services by a preponderance of the credible evidence. Applicant failed to meet its evidentiary burden. The submitted reports do not sufficiently rebut Dr. Snitkoff's negative examination or demonstrate a continuing injury requiring further chiropractic treatment. I sustain the defense asserted in the denials.

Accordingly, Applicant is awarded \$86.01.

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	Status
	Douglas Wright DC	03/12/19 - 04/15/19	\$1,481.21	\$1,113.50	Awarded: \$86.01
Total			\$1,481.21		Awarded: \$86.01

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/05/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 9/5/19 (the date that arbitration was requested) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

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.

04/07/2020
(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:
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Electronically Signed

Your name: Charles Blattberg
Signed on: 04/07/2020