

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

University Orthopaedic Services, Inc (Applicant)	AAA Case No.	17-19-1127-1547
	Applicant's File No.	19-18047
- and -	Insurer's Claim File No.	263 PP HZB1346 002
The Travelers Home And Marine Insurance Company (Respondent)	NAIC No.	27998

**ARBITRATION AWARD**

I, Marianne C. Zack, 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: EIP

1. Hearing(s) held on 05/20/2020  
Declared closed by the arbitrator on 05/20/2020

Nicole Jones from The Morris Law Firm, P.C. participated by telephone for the Applicant

Tamara LeFranc from Law Office Of Aloy O. Ibuzor participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 380.70**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to the 4/30/2019 date of commencement of this arbitration.

3. Summary of Issues in Dispute

The Assignor ("EIP"), female, was injured in a motor vehicle accident that occurred on 12/29/2015. Following the accident, EIP suffered neck pain, which resulted in her seeking medical treatment. In dispute is are invoices in the collective amount of \$876.44 for occipital nerve blocks and massage therapy rendered to EIP during the period

10/4/2018 through 12/27/2018. Respondent denied reimbursement of the invoices based on lack of medical necessity, relying on the independent medical examination ("IME") reports of Dr. Louis Nunez dated 8/7/2018 and Dr. Louis H. Medved dated 10/26/2018.

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

The hearing in this matter was conducted without any witnesses. This award is based upon hearing the oral arguments of representatives of both parties and upon a full review of the of the documents contained in the electronic case file as of the date of the Award.

Once an Applicant has established a prima facie case of entitlement to no-fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the Applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd & 11th Jud. Dist., 2003); *Tahir v. Progressive Cas. Inc. Co.*, 12 Misc. 3d 657 (NYC Civ. Ct., NY Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Company*, 5 Misc. 3d 975 (NYC Civ. Ct., NY Co., 2004).

The insurer has the burden of coming forward with proof in an admissible form to establish the fact or evidentiary foundation for its belief that the patient's condition was unrelated to the motor vehicle accident. *Mount Sinai v. Triboro Coach*, 263 A.D. 2d 11 (2<sup>nd</sup> Dept, 1999) Moreover, the insurer must show that the injury was not related to the accident at all. It must show how, when and where the injury happened and that it was not aggravated or exacerbated by the accident (emphasis added). The insurer's proof may not be vague, conclusory, inconsistent or unsupported by records. In *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, (A.D. 2d. Dep't, 2009).

#### The 8/11/2018 IME of Dr. Nunez:

On 8/7/2018, EIP attended an independent orthopedic medical examination with Dr. Louis Nunez ("IME"). This was a re-examination, with the first IME having been performed on 8/13/2016. At the IME, EIP complained of neck pain, mid-back pain and lower back pain. EIP stated that she is being treating for chronic migraines that started after the subject motor vehicle accident. She stated that she is also experiencing cognitive issues. EIP stated that she underwent a spinal fusion at the L4-L5 level and receives massage therapy for her neck on a weekly basis.

After conducting a physical examination of the EIP, Dr. Nunez concludes that EIP has exacerbation of preexisting pathology of the lumbar spine, resolved at the time of his previous examination. He further concludes that EIP is status post lumbar spinal fusion, resolved.

Dr. Nunez states that in his opinion, EIP suffered an exacerbation of underlying spinal pathology and the exacerbation is resolved. He further states EIP's current back complaints are due to the preexisting pathology of the lumbar spine that was present before the subject motor vehicle accident. Dr. Nunez attributes EIP's reduced ranges of motion to her preexisting condition and not the accident of record. Dr. Nunez concludes that EIP is no longer in need of further massage therapy or injections. He states that EIP will not require any further orthopedic follow-up.

Respondent has failed to satisfy its burden of establishing lack of medical necessity for the services at issue. Dr. Nunez fails to discuss the treatment at issue with any specificity in the IME report. Other than generally stating that EIP is no longer in need for injections, Dr. Nunez does not explain *why* EIP would no longer need occipital nerve blocks for her ongoing migraines. In fact, he does not discuss EIP's headache complaints at all. Additionally, Dr. Nunez concludes that EIP suffered an exacerbation of her preexisting condition and concludes that the exacerbation is resolved. Dr. Nunez fails to offer any medical rationale as to how he arrived at that conclusion. It does not appear that Dr. Nunez reviewed any medical records that predate the 12/29/2018 accident of record.

The 10/26/2018 IME of Dr. Medved:

On 10/26/2018, EIP attended a neurological IME with Dr. Medved. At the time of her IME, EIP complained of migraine heads which occur every two weeks. She stated that the migraines begin with nausea and her vision then becomes tainted with yellow. She described her right temporal region as severe causing photophobia, increased sonophobia, asthmaphobia, nausea, vomiting and anorexia. EIP stated that she has had sound sensitivity since the accident, requiring her to wear earplugs to the movies. She stated she undergoes occipital nerve blocks which provide relief for a month to a month and a half.

Dr. Medved states that he would not attribute EIP's migraine disorder to the accident of record. He states this based on the fact that there was no "significant closed head injury". Dr. Medved then states that "[i]t is plausible that cervical strain/whiplash can serve as a triggering factor for migraine headache resulting in an increase in frequency".

Dr. Medved concludes that EIP has reached a maximum therapeutic benefit from casually related neurological treatment for her migraine headaches and any further treatment would not be causally related to the motor vehicle accident.

The IME is insufficient to support Respondent's burden of establishing lack of medical necessity for the services at issue. Dr. Medved is asserting that the accident of record

was not the cause of EIP's migraine syndrome, but he has not ruled out exacerbation. See, *Mount Sinai v. Triboro Coach*, 263 A.D. 2d. 11 (Second Dep't, 1999). In fact, Dr. Medved does broach the possibility that EIP's migraines were "triggered" by the accident of record and thus occurring more frequently. Exacerbations of pre-existing conditions are compensable under no-fault. *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, (A.D. 2d. Dep't, 2009).

Additionally, even if Dr. Medved's IME report sufficed to meet Respondent's burden, the medical records uploaded to the electronic case file establish that EIP was receiving a palliative benefit from the injections.

Award in favor of Applicant.

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
	University Orthopaedic Services, Inc	02/07/19 - 02/07/19	\$380.70	Awarded: \$380.70
Total			\$380.70	Awarded: \$380.70

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/30/2019 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. However, the regulations toll the accrual of interest when an applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$1360." *Id.* 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, Marianne C. Zack, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

05/27/2020  
(Dated)

Marianne C. Zack

### **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:**  
264f499dd77a5685238879e23de14da1

### **Electronically Signed**

Your name: Marianne C. Zack  
Signed on: 05/27/2020