

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,
PLLC DBA NYSJ Orthopaedic Specialists
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-19-1135-9749

Applicant's File No. SS-113728

Insurer's Claim File No. 0523608594
2AL

NAIC No. 29688

ARBITRATION AWARD

I, Corinne Pascariu, 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

1. Hearing(s) held on 11/05/2020
Declared closed by the arbitrator on 11/05/2020

Anthony Alton, Esq. from Samandarov & Associates, P.C. participated by telephone for the Applicant

Rosemary Krupp, Esq. from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 104.08**, 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

Background

Assignor is a female who was 45-years-old when she was injured as the driver of a motor vehicle involved in an accident on November 7, 2018. Assignor subsequently commenced conservative treatment. On January 25, 2019, Assignor was required to appear at a medical examination which was conducted by Dorothy Scarpinato, M.D. Based on the report, Respondent terminated no fault benefits for orthopedic treatment and physical therapy effective February 11, 2019. Applicant seeks reimbursement for an evaluation conducted on April 18, 2019.

Issue

Whether Respondent can establish that assignor no longer required medical treatment.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the Parties as contained in the ADR Center maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in the file for both parties and make my decision in reliance thereon.

Upon reviewing the evidence submitted by the Applicant, I find the Applicant submitted sufficient credible evidence to establish a prima facie case with the respect to the services that are the subject of this arbitration. See, Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004); Amaze Medical Supply Inc. v. Eagle Ins. Co., 2 Misc 3d 128[A], 2003 NY Slip Op 51701 (U) (App Term, 2d and 11th Jud Dists 2003).

Once Applicant has made out a prima facie case, the burden shifts to Respondent to timely request additional verification, deny, or pay the claim. Hospital for Joint Diseases v. Travelers Prop. Cas. Ins. Co., 9 NY3d 312 (2007).

Respondent timely denied the claim.

Medical Necessity

To meet its burden, at a minimum, the No-Fault insurer must establish a factual basis and medical rationale for its asserted lack of medical necessity of the health care provider's services. A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 859 N.Y.S.2d 892 (Table), 2008 N.Y. Slip Op. 50368(U), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally* Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *see also* All Boro Psychological Servs. P.C. v. GEICO, 34 Misc.3d 1219(A), 950 N.Y.S.2d 490 (Table),

2012 NY Slip Op 50137(U), 2012 WL 309328 (Civ. Ct. Kings Co., Reginald A. Boddie, J., Jan. 31, 2012).

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then 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., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Assuming the insurer establishes a lack of medical necessity, it is ultimately the claimant who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary. Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A), 29 N.Y.S.3d 846 (Table), 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015); Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co., 37 Misc.3d 19, 22 n., 952 N.Y.S.2d 372, 374 n. (App. Term 2d, 11th & 13th Dists. 2012).

Medical Examination

Orthopedic treatment, including physical therapy and diagnostic testing, was denied based on a medical examination conducted by Dr. Scarpinato. Dr. Scarpinato's report was based upon her examination of assignor and a review of the available medical documents.

Assignor presented to the examination with complaints of pain to her neck and back. Dr. Scarpinato examined Assignor's shoulders, wrists/hands and cervical and thoracolumbar spine. She found that there was no weakness and sensation was intact. Orthopedic testing, including the impingement sign and straight leg test yielded negative findings and range of motion was normal. Dr. Scarpinato noted that Assignor complained of diffuse tenderness upon palpation of her cervical and lumbar spine, but there was no spasm or trigger points.

Dr. Scarpinato diagnosed assignor with a resolved cervical, thoracolumbar, shoulder and left hand/wrist strain and sprain. Based upon her findings, Dr. Scarpinato determined that assignor no longer required orthopedic treatment or diagnostic testing.

Medical Records

In support of its assertion that assignor continued to require medical treatment, Applicant relied upon assignor's medical records which included the evaluation at issue which was conducted by David Lutz, PA on April 18, 2019. The evaluation noted assignor's complaints of right shoulder pain and tenderness and revealed decreased range of motion. Mr. Lutz also noted pin with provocative testing of the supraspinatus with an equivocal Neer Test. The O'Brien's test was negative. He also noted cervical radiculopathy with pain radiating down her arm.

Findings

I find that Applicant's records fail to meet the burden of persuasion in rebuttal. Applicant did not prove medical necessity by a preponderance of the credible evidence. Rather, Respondent proved lack of medical necessity. Moreover, three months passed between the termination of benefits and the imaging at issue. There is nothing in the applicant's records to explain this gap in treatment. The Applicant is required to provide an adequate explanation for gap in treatment. Delorbe v. Perez, 59 A.D. 3d 491, 873 NYS 2d 198 (2d Dept. 2009). The exam conducted by Applicant is not contemporaneous with the date of the IME and does not explain in detail that the tenured treatment was

medically necessary beyond the date of the IME cutoff. As such its claim must fail. Delta Diagnostic Radiology, PC v. American Transit Ins Co, 18 Misc. 3d 128(A) (App Term 2d and 11th Jud Dist. 2007).

As such, I deny Applicant's claim in its entirety.

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 claim is DENIED in its entirety

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

11/08/2020
(Dated)

Corinne Pascariu

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:
cc06f055764779a91bb3bc478d4d9806

Electronically Signed

Your name: Corinne Pascariu
Signed on: 11/08/2020