

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Buffalo Spine Surgery  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-19-1142-3162

Applicant's File No. 19-19334X

Insurer's Claim File No. 0324048164

NAIC No. 19232

**ARBITRATION AWARD**

I, Fred Lutzen, 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/claimant/patient

1. Hearing(s) held on 10/14/2020  
Declared closed by the arbitrator on 10/14/2020

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

Meghan McDonough, Esq., from Law Offices of John Trop participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 250.68**, 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

This male EIP (first initial "D") was 39-years-old when he was injured as a passenger in an automobile accident on 4/23/14. He subsequently came under the care of Applicant.

Applicant seeks reimbursement of \$250.68 for office visits and x-rays for the EIP between 8/24/14 and 8/13/15.

Respondent denied reimbursement for lack of medical necessity based on an examination [IME] performed by Dr. Alexios Apazidis, M.D., on 7/25/14.

**The issues are (1) whether the denied services were medically necessary and, if so, (2) whether the charges are within fee schedule allowances.**

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

This case was decided based upon the submissions of the parties as contained in the electronic file ["MODRIA"] maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. No witnesses testified at the hearing.

Respondent has the burden to first demonstrate, *prima facie*, that the services lacked medical necessity.

An insurer may rely on an IME that the injured person has reached the status quo, shifting the burden to the claimant to demonstrate by a preponderance of the credible evidence that the treatment at issue was medically necessary. Amato v. State Farm Ins. Co., 40 Misc.3d 129(A), 975 N.Y.S.2d 364 (Table), 2013 N.Y. Slip Op. 51113(U), 2013 WL 3497906 (App. Term 9th & 10th Dists. July 3, 2013), *rev'g*, 30 Misc.3d 238, 910 N.Y.S.2d 637 (Dist. Ct. Nassau Co. 2010). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. *See, A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007); *see, Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1<sup>st</sup> Dept. 2006).

On 7/25/14, the EIP appeared for an orthopedic examination (the "IME"), arranged by the Respondent with Dr. Apazidis. Dr. Apazidis reviewed numerous medical records, including a CT-Scan of the cervical spine, PT progress notes, evaluation reports, x-rays and ER records. The EIP reported complaints of pain in the neck, left shoulder, left elbow and left wrist, as well as headaches. Pain level at the time of the IME was rated by the EIP as 4 out of 10.

The EIP reported that he stopped therapy on 6/13/14, he "feels 'so-so' now compared to when he initially began receiving therapy." He was taking "Tylenol, Aleve and Excedrin at this time."

Examination by Dr. Apazidis revealed full ranges of motion in the cervical spine, lumbar spine, left shoulder, left elbow, and left wrist. There was no tenderness or spasm in any of the areas examined, and all clinical testing was normal or negative. Dr. Apazidis diagnosed the EIP with resolved sprains of the cervical spine, thoracic spine, left shoulder, left elbow, and left wrist. There was no complaint of low back pain and the lumbar spine was not examined.

Dr. Apazidis opined that there was no need for further orthopedic treatment, physical therapy or related services.

I find that the IME report prepared by Dr. Apazidis meets Respondent's burden of proof that the disputed services lacked medical necessity. The burden then shifted to Applicant to prove by a preponderance of credible evidence that the services denied were medically necessary.

In rebuttal, Applicant relies on the medical records submitted for the disputed dates of service, i.e., 8/28/14 through 8/13/15. In dispute are office visits on 8/28/14, 7/9/15, and 8/13/15. No treatment records were provided. The evaluation on 8/28/14 indicates the EIP "has been through conservative care", and continues to work as an ironworker with great difficulty. Examination by Dr. Andrew Cappuccino, M.D., on 8/28/14, revealed decreased ranges of motion in the cervical spine with radiculopathy, and decreased ranges of motion in the lumbar spine. Dr. Cappuccino recommended a cervical discectomy at C6-7 and to follow-up for a lumbar spine MRI.

After 8/28/14, the EIP returned almost one-year later, on 7/9/15. There is still no record of any treatment for the EIP since 6/13/14. He apparently underwent treatment for less than 2-months according to the evidence submitted, and then Dr. Cappuccino recommended ACDF surgery. However, on 7/9/15, the EIP returned with "ongoing symptoms but he remains very functional with work and attempted to continue on a conservative course. However, approximately a week ago, he experiences a severe exacerbation in regards to neck pain and left upper extremity radiculopathy." Dr. Cappuccino provided the EIP with a 12-day course of an oral steroid. Another cervical spine MRI was recommended.

On 8/13/15, despite the exacerbation noted above, there is still no mention of conservative treatment being performed, and Dr. Cappuccino again recommended cervical discectomy stating the EIP "would be an excellent candidate" for surgery.

I find that Applicant has submitted insufficient records to meet its shifted burden of proof. The records submitted are not sufficiently persuasive for several reasons. First, there has been no treatment provided to the EIP since 6/13/14, at least according to the EIP. Second, he returned to work full-time as an iron worker being "very functional" for over one-year after he discontinued all treatment. At his first return visit, Dr. Cappuccino recommended cervical discectomy surgery, which the EIP did not go through with. Finally, when the EIP returned to Dr. Cappuccino one-year later (7/9/15) stating "he was very functional at work" until an exacerbation in early July 2015. Dr. Cappuccino also relates the low back injury to the MVA even though there is no record of low back pain from this MVA.

In a hospital record from 4/30/14, the "Current Complaint" is listed as cervical and thoracic, and the "PMH" [or past medical history] lists "Pt wears reading glasses, pt reports fatigue in his arms when working with his arms overhead, depression, back and neck pain, pt donated kidney to daughter in 2009, removed cyst in upper neck." These items are prior conditions, not from the MVA. He had neck and back pain, and fatigue in his arms when working. On 4/23/14, it is noted that he would not return to work until okayed by his PMD. At the IME, the EIP told Dr. Apazidis that he missed one month from work. Therefore, it is logically concluded that the fatigue in his arms, and neck and

back pain listed in the PMH section, all pre-date the accident as he was not working when he provided this history.

The EIP told Dr. Apazidis and Dr. Cappuccino that he had no prior complaints of neck and back pain, which appears inaccurate.

Considering all of this evidence, I find that the rebuttal evidence is not sufficiently credible or persuasive to meet Applicant's shifted burden.

The ultimate burden of proof on issues of medical necessity lies with the plaintiff. Dayan v. Allstate Ins. Co., 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005).

### **Conclusion**

Having carefully considered the submissions of the parties, the relevant case law and the arguments of respective counsel, I conclude that the preponderance of the credible evidence supports a finding in favor of the Respondent as to the lack of medical necessity for the disputed services.

The denials are sustained.

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 Erie

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

11/13/2020

(Dated)

Fred Lutzen

### **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:**  
17494f15615fe80b495a8b4010e03dad

### **Electronically Signed**

Your name: Fred Lutzen  
Signed on: 11/13/2020