

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Westchester Radiology & Imaging, PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-20-1165-3984

Applicant's File No. 16779

Insurer's Claim File No. 1018693-04

NAIC No. 16616

ARBITRATION AWARD

I, Kent Benziger, 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: C.J.

1. Hearing(s) held on 11/06/2020, 11/09/2020
Declared closed by the arbitrator on 11/09/2020

Frank S. Patruno, Esq. from Frank S. Patruno Law Offices, P.C participated by telephone for the Applicant

Mustafa Nouri, Esq. from American Transit Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 809.22**, 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

On January 21, 2018, the Assignor/Eligible Injured Party, a 38-year-old male, was, by history involved in a motor vehicle accident. The service in dispute is a cervical MRI performed on February 27, 2018. The Respondent denied reimbursement on two grounds: 1) a peer review of Dr. Neil Ganz; and, 2) the Assignor's failure to appear at two scheduled independent medical examinations (hereinafter referred to as IMEs).

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case

folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

On January 21, 2018, the Assignor/Eligible Injured Party, a 38-year-old male, was, by history involved in a motor vehicle accident. On January 22, 2018, the Assignor was evaluated at Dr. Hastava's office with complaints of neck pain radiating to the right shoulder. An examination revealed tenderness and limited range of motion, moderate hypertonicity. The cervical compression and Kemp's tests were positive bilaterally. The prescription included cervicgia and segmental dysfunction. The treatment plan included conservative care and MRI studies of the cervical and lumbar spine. On February 27, 2018, a cervical MRI study was performed which was interpreted as revealing C3-4 disc bulge with compression of the anterior thecal sac and partial effacement of anterior subarachnoid space.

The Respondent received the claim for the study on April 5, 2018. The NF-10 lists the final verification as requested on June 6, 2018 with final verification received on July 5, 2018. A denial was issued for the claim on August 1, 2018 based on the peer review of Neil Ganz and the Assignor's failure to appear for independent medical examinations with Dr. Brian Wolin (hereinafter referred to as IMEs) on May 29, 2018 and June 12, 2018.

Peer Review Denial. This arbitrator shall first discuss the lack of medical necessity defense based on Dr. Ganz' peer review.

Verification Request. The first issue is whether the denial was timely issued. Following receipt of the claim, the Respondent submitted a verification request to this provider for the following:

...all other diagnostic tests on the accident on record,
please include reports, copies of all recorded images and
letter of necessity from the referring/treating Please submit
all other diagnostic test performed by your facility that are
related to the accident of physician to show causal
relationship to the accident of record
Submit MRI film of the cervical spine
Initial report from referring physician - DN Theresa
Hastava DC

A follow-up request was submitted on June 6, 2018, The Carrier noted that a response was received on July 5, 2018 which included a CD of the MRI study.

Peer Review. Dr. Neil Ganz found the cervical study not medically necessary. Cervical MRI studies should be utilized after a markedly abnormal physical examination, unrelenting symptoms and for patients in whom surgical intervention is contemplated. In this instance, he found no "red flags" such as a fracture, dislocation, infection, tumor or diagnostic dilemma that would necessitate the study. He cited the following sources:

It is the opinion of (Current Medical Diagnosis and Treatment, 42nd edition for 2003, page 1676) "that MRI provides exquisite anatomic detail but is reserved for patients in whom the information would change therapy which was not documented in the available patient records"

Be advised that according to the New York State Workers' Compensation Board, New York Neck Injury Medical Treatment Guidelines First Edition effective December 1, 2010 page #15 and reiterated in the New York State Workers' Compensation Board, New York Neck Injury Medical Treatment Guidelines Second Edition dated January 14, 2013 effective March 1, 2013 page #15 "in the absence of myelopathy or progressive neurological changes, imaging usually is not appropriate until conservative therapy has been tried and failed". "Six to eight weeks of treatment are usually an adequate period of time before an imaging procedure is in order".

Again, Dr. Ganz found no medical necessity for the studies which were also performed prematurely.

Rebuttal. Dr. Michael Tamburo, D.O. has issued a rebuttal to the peer review. He reviewed the positive findings on the initial examination, and that the study would show injuries to muscles, ligaments and other soft tissues that can occur in whiplash injuries. He cited Guidelines that recent significant trauma can be a basis for an MRI study and that three to four weeks of conservative care is sufficient prior to performing the study. In this instance, Dr. Tamburo noted there were five weeks of therapy.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches to the Respondent to demonstrate the lack of medical necessity. *Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins.*, 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); *A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co.*, 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co. 2005); *Citywide Social Work & Psychological Services v. Travelers Indemnity*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought". See: *Bajaj v. Progressive Ins. Co.* 14 Misc.3d 1202(A) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of Applicant's services". *Id.* See also: *A.B. Medical Services*, supra. As to treatment including chiropractic care, the Respondent must document that the treatment was no longer benefiting the claimant and was not providing curative or significant and quantifiable palliative benefits. *Hobby v. CNA Ins. Co.*, 267 A.D.2d 1084, (4 Dept., 1999).

As a finding of fact, the peer review is persuasive. The New York State Workers' Compensation Board, New York Neck Injury Medical Treatment Guidelines are persuasive and require six to eight weeks of conservative care which did not occur in this case. Further, the MRI was prescribed on the first evaluation. The Applicant has also failed to document additional requirements for the study which include the failure of conservative care, progressive neurological deficits, a differential diagnosis and consideration of surgery or, at the least, consideration as to how the study could alter the treatment program. This arbitrator concurs with Arbitrator May Anne Theiss who reached a similar determination as to the lumbar study performed the same day. *Westchester Radiology & Imaging, P.C. v. American Transit Insurance Company*, AAA Case No. 17-19-1118-0208 (July 16, 2019)

The Respondent has sustained its burden of proof as to lack of medical necessity, and the Applicant has failed to rebut the peer review or the cited authoritative sources. *Khodadadi Radiology v. Gomez*, 16 Misc.3d 131 (2007). As the Respondent's denial is upheld on the basis of Dr. Ganz' peer review, this arbitrator need not address the alleged breach of a condition precedent for failure to attend the IMEs. Applicant's claim for reimbursement is denied.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

APPLICANT'S CLAIM IS DENIED 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 Orange

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

11/29/2020
(Dated)

Kent Benziger

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:
9d594a9997945fa068f564f445f86e43

Electronically Signed

Your name: Kent Benziger
Signed on: 11/29/2020