

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

| | | |
|---|--------------------------|-------------------|
| Island Community Acupuncture, PC (Applicant) | AAA Case No. | 17-18-1106-8515 |
| - and - | Applicant's File No. | 3082983 |
| | Insurer's Claim File No. | 0439892844 2PU |
| Allstate Property and Casualty Insurance Company (Respondent) | NAIC No. | 17230 |

ARBITRATION AWARD

I, James Hogan, 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 12/03/2020
Declared closed by the arbitrator on 12/03/2020

Melissa Scotti from Costella & Gordon LLP participated for the Applicant

Dana Mangiacapra from Allstate Property and Casualty Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,499.53**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing, the amount in controversy was amended to \$3,631.01 to be in accordance with the fee schedule.

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

3. Summary of Issues in Dispute

The EIP, a 51 year old man, was injured in a collision on 12/12/16. This claim is for acupuncture services administered to the EIP from 6/26 through 12/2/17 and billed at a total of \$4,499.53. The Respondent denied the Applicant's claims based upon an IME administered by Janice Salayka, DC, L.Ac., which resulted in the denial of all

chiropractic, acupuncture and massage therapy benefits effective 5/18/17. The Applicant has filed a rebuttal to the IME.

4. Findings, Conclusions, and Basis Therefor

This decision is based upon my review of the electronic file maintained by the American Arbitration Association, and the arguments of the parties set forth in the hearing.

Applicant's submission:

Applicant is billing for services provided to the EIP as follows:

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at a total of \$51.38; infrared treatment billed under CPT code 97026 at \$21.46 for billing totaling \$102.84 for DOS 6/26, 6/28, 6/30, 7/3, 7/5, 7/7, 7/10, 7/12, 7/14, 7/24, 7/27, 7/29, 8/7, 8/12, 8/14, 8/16, 8/19, 8/21, 8/24, 8/28, 8/29, and 8/30/17.

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at a total of \$51.38 for billing totaling \$81.38 for DOS 9/6, 9/7, 9/9, 9/11, 9/13, and 9/16/17.

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at \$17.52 per session, for billing totaling \$55.56 for DOS 9/12, 9/23, 9/25, 9/26, 9/30, 10/2, 10/4, 10/9, 10/10, 10/14, 10/16, 10/19, 10/21, 10/23, 10/25, 10/28, 10/30, 11/1, 11/4, 11/6, 11/9, 11/11, 11/14, 11/16, 11/18, 11/21, 11/25, 11/27, 11/28, and 12/2/17.

A follow-up office visit billed under CPT code 99212 at \$26.41; an initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at \$17.52 per session, for billing totaling \$81.97 for DOS 9/22/17.

As per the AR-1, the Applicant billed a total of \$4,499.53; Respondent paid \$0.00, leaving an amount in dispute of \$4,499.53. At the hearing, this amount was amended.

The Applicant has also provided copies of reports from other healthcare providers. These include a report from Cohen & Kramer, MD, PC, orthopedic surgeons. The report indicates that the EIP had arthroscopic surgery on 5/22/17 to the left shoulder. Also provided is a copy of the operative report for the left shoulder surgery.

On 5/4/17, the EIP had an initial evaluation at Cohen & Kramer, MD, PC. She presented for evaluation of her left shoulder complaining of pain rated at 8/10. The physical examination of the left shoulder did not find any swelling or color changes. There was tenderness to the anterolateral aspect of the shoulder. Abduction and forward flexion were 0-140°. Positive Impingement Sign, Neer sign, Hawkins sign. Strength was 4/5. Speed test was positive.

There is a copy of an Operative Report showing that the EIP had left shoulder surgery on 5/22/17 by Dr. Kramer.

The Applicant has provided copies of follow-up reports from Dr. Kramer's office after the EIP's surgery.

There is a report from Cohen & Kramer, MD, PC, dated 8/10/17 showing that the EIP was still recovering from her left shoulder surgery. Her pain was rated at 5/10. The range of motion was 0-160° in abduction and forward flexion. External rotation and internal rotation were from 0-90°. Strength was 4/5.

There is also a report from Comprehensive Spine & Pain Center of New York dated 4/21/17. This was one week before the IME. The report indicates that the EIP presented with complaints of pain in the lower back. The pain was exacerbated by sitting, bending, lifting, walking and worsening with routine ADLs. It radiated of the bilateral hip, right buttock and thigh stopping below the right knee. It was more severe the morning. It was rated at 7/10.

She also complained of neck pain with extension to the bilateral shoulder girdle with radicular symptoms to the upper extremities. There was numbness and tingling in the digits of both hands.

The physical examination indicates that lumbar flexion was measured at 40/60; extension, left rotation and right rotation were each measured at 10/25. SLR was negative on the left and positive on the right at 60°. There was normal sensation in all dermatomes of the bilateral lower extremities. Muscle strength was 5/5 for the lower extremity muscles with the exception of the right knee and the left knee which were 4+/5.

DTRs were 2+ in the bilateral patella and 1+ in the bilateral Achilles.

As to the cervical spine, there was bilateral tenderness in muscle spasm palpable. Flexion was measured at 40/50; extension was 40/60; right and left rotation were each 60/80. Spurling's test was positive, bilaterally. Sensation to light touch was decreased in the bilateral hands. Strength was 5/5 in the bilateral upper extremities. DTRs in the upper extremities was normal and symmetrical.

The Diagnosis was cervical radiculitis; displacement of cervical intervertebral disc; acute lumbar radiculopathy; displacement of lumbar intervertebral disc without myelopathy.

The EIP had a follow-up visit at Comprehensive Spine & Pain Center of New York on 5/12/17.

The physical examination had multiple positive findings including decreased ranges of motion in the cervical spine the lumbar spine.

The Plan called for a cervical thoracic ESI under fluoroscopic guidance with epidurography.

The Applicant's submission contains a copy of the Operative Note for the 5/12/17 cervical ESI to C7/T1.

The Applicant's submission contains copies of other medical reports for treatment rendered to the EIP both before and after the IME.

The Applicant has provided a copy of the MRI reports of the EIP's lumbar spine and the cervical spine.

Also provided are copies of EMG/NCV testing done on 3/8/17.

There is a copy of the report for the EIP's left shoulder MRI.

The Applicant has also provided copies of examination of the EIP by Dr. Freddie Marton, MD, a neurologist. These are all prior to the IME.

Also provided are copies of range of motion and manual muscle testing but these are dated prior to the IME.

There also notes for trigger point injections administered to the EIP but these were prior to the IME.

On 1/20/17, the EIP had an initial evaluation at Total Wellness & Medical Health, PC with David Khanan, MD. He reported being involved in a MVA on 12/12/16. He went to the hospital where he was examined and released the same day. He claims to have injured his neck, head, low back, left shoulder, left trapezius muscle and left knee.

This examination indicates the EIP's current complaints and the pain level of being between 5 and 7/10. The physical examination indicates reduce ranges of motion in the cervical spine, lumbar spine, shoulders and knees. Motor was 4/5 in the upper extremities and lower extremities secondary to neck and low back pain, respectively. DTRs were 2+, in the bilateral upper and lower extremities.

After the examination, the patient was recommended for physical therapy at the rate of 5 days per week. In addition, range of motion studies and comparative muscle studies of the upper and lower extremities were recommended.

The EIP had re-evaluations done at this entity on 2/20, 4/10, 5/11, 6/21, 8/9, 9/29 and 12/4/17.

I note that on the 4/26/17 evaluation, the EIP's neck pain, low back pain and bilateral shoulder pain was 5/10. The range of motion for the cervical spine was measured 45/60 in flexion; 30/50 in extension; 15/40 in right and left lateral flexion.

The range of motion for the lumbar spine was measured at 60/90 in flexion; 30/30 in extension; 15/20 in both right and left lateral flexion.

SLR was positive, bilaterally, at 45° for low back pain.

The examination of the bilateral shoulders showed that forward flexion was measured at 170/180 in each; backward extension was measured 30/60 in each; as to abduction, the right shoulder was 170/180; the left shoulder was 150/180.

Motor was 4/5 in the left shoulder in flexion and extension and in the lower extremities, secondary to low back pain.

The evaluation on 5/11/17 showed that the pain level was 4-5/10 in the neck and low back; 5/10 in the left shoulder and 4/10 in the right shoulder.

The range of motion the cervical spine was measured at 60/60 in flexion; 30/50 in extension; 15/40 in right and left lateral flexion.

The lumbar spine examination showed moderate tenderness and moderate paraspinal muscle spasm.

Lumbar flexion was measured at 60/90; extension was 30/30; right and left lateral flexion were each 15/20.

SLR was positive at 45°, bilaterally, for low back pain.

The range of motion for the right shoulder and forward flexion was 170/180; the left shoulder measured 150/180; backward extension in her right shoulder and left shoulder were each 30/60; abduction for both shoulders was measured at 150/180.

Motor was 4/5 in bilateral shoulder flexion and extension and in the lower extremities, secondary to low back pain.

On 12/4/17, the EIP had an evaluation at Total Wellness & Medical Health, PC with David Khanan, MD. The EIP advised that he was diagnosed with cervico-brachial syndrome with disc bulge, disc herniation, cervical radiculopathy, status post left shoulder surgery, low back syndrome with disc bulge and disc herniation. He was receiving physical therapy at the rate of 2-3 times per week for the left shoulder. He was also receiving chiropractic treatment for the neck, mid back and low back.

As to the Current History and Complaints, the patient denied neck, low back and left shoulder pain. He was currently working. He was not in any acute distress. Ambulation was not antalgic.

The examination of the cervical spine did not find tenderness and the range of motion was quantified as normal in flexion but extension was 30/50.

As to the lumbar spine, no tenderness was noted. Flexion was measured at 60/90; extension was 30/30. SLR revealed low back pain, bilaterally, at 60°. Gaenslen's test was positive, bilaterally.

As to the shoulder joint, there was no tenderness in the left shoulder. Internal rotation was at the level of T10 in the left upper extremity.

Motor was 5/5 in the upper and lower extremities. DTRs were 2+ in the bilateral upper and lower extremities.

The sensory examination was normal.

The Impression was: 1) status post motor vehicle accident; 2) cervico-brachial syndrome with disc bulge, disc herniation and cervical radiculopathy; 3) left shoulder surgery; 4) low back syndrome with disc bulging and disc herniation.

The Recommendations included a home exercise program.

The Applicant's submission contains a copy of an initial examination of the EIP at Mendoza Chiropractic Office, PC.

The Applicant has also provided copies of acupuncture progress notes from 1/23/17 through 12/12/17.

Also provided is a copy of report of an initial acupuncture evaluation dated 1/23/17.

There also copies of acupuncture re-evaluations dated 3/24/17, 5/20/17, 7/20/17, 9/22/17 and 11/27/17.

In each of these evaluations, the EIP's range of motion was quantified for the cervical spine, the thoracic spine, lumbar spine and the shoulder. Generally, there were deficiencies and reductions in the quantified ranges of motion.

In addition, muscle strength was routinely indicated as less than normal in the muscles of the neck, shoulders and the back.

Respondent's submission:

The position of the Respondent is that the Applicant's claim was properly denied based upon an IME done on 4/26/17 by Janice Salayka, DC, L.Ac. As result of that examination, all chiropractic, acupuncture and massage therapy benefits were denied effective 5/18/17.

IME:

Janice Salayka, DC, L.Ac., administered a chiropractic and acupuncture IME to the EIP on 4/26/17.

She provides the history of the accident as provided by the claimant. After the accident he went to the hospital where he was treated and released the following day.

Initially, his injuries were to his neck, back, left shoulder and left knee.

There is a list of medical records that were reviewed. These include MRIs of the left shoulder, an MRI of the cervical spine and an MRI the lumbar spine.

The EIP's past medical history was positive for left knee surgery 2013 and right knee surgery in 2006. He was also involved in a motor vehicle accident 2013 which caused him to have the left knee surgery.

As to his employment situation, the EIP works in construction and lost 3 months from work as result of injuries that he sustained in this accident.

Present Complaints indicate that the EIP's feels improvement but the treatment only provides temporary relief. He was currently receiving chiropractic, physical therapy, acupuncture and massage therapy at the rate of 3 times per week.

The physical examination indicates that the ranges of motion were checked using a goniometer. The EIP was well-nourished and well developed.

Observation of the spirit shows that the EIP appeared alert, eyes appeared bright, facial expression was normal and speech was clear.

Observation of body shows that the complexion and skin color appeared normal.

Upon 3 finger palpation of the right and left pulse ridge, pulse was regular and not wiry.

The EIP's tongue appeared to be moist and pink and was normal in shape and size.

The EIP reported no change in appetite, thirst, taste, hearing, stool or urine.

The PX of the cervical spine and upper extremities did not find any vertebral tenderness or paravertebral spasm upon palpation. The range of motion was quantified as normal in all planes.

Foraminal Compression and Distraction tests did not elicit any tenderness.

Adson's and Allen's tests were negative.

DTRs were equal and bilateral at +2. Cervical flexion and extensors did not reveal any weakness. Finger, hand, forearm and upper arm movements were all normal, bilaterally, with equal strength.

Muscle strength, symmetry and tone were equal and normal bilaterally, with measurements of the right and left biceps at 11 inches and the right and left forearms at 10.5 inches. Dermatome testing of the upper extremities did not show any alteration from normal sensation.

The examination of the thoracic/lumbar spine and lower extremities did not find any vertebral tenderness or paraspinal spasm upon palpation.

The range of motion was quantified as normal in all planes.

SLR was negative, bilaterally. Valsalva maneuver did not cause any increased pain in the low back. Ely's test, Nachlas test and Minor's tests were negative bilaterally.

The EIP did report some slight groin pain in the left after the Faber Patrick test, but the test was negative on the right.

The EIP was able to get on and off the examination table without difficulty. He sat easily on the examination table and laid in the supine position and rose to the seated position with no apparent discomfort.

Muscle testing was 5/5, bilaterally, equal to both thigh extensors and flexors with measurements of the right and left thigh at 15 inches and right and left calf at 15 inches.

DTRs at the patella and Achilles were +2, bilaterally which was equal and within normal limits. The dermatome evaluation of the lower extremities showed no alteration of the normal sensation, bilaterally.

The examination of the left shoulder did not find any gross abnormalities upon visual inspection. There was no muscle atrophy of the shoulder girdle musculature. There was no tenderness to palpation. The range of motion was quantified as normal in all planes and did not elicit any pain. Apley's scratch, Codman's and Yergason's tests were negative.

The examination of the left knee found full flexion which was quantified at 150/150. There was no instability. McMurray's, drawer sign, abduction stress and adduction stress were negative. There was no redness or swelling noted. There was no tenderness to palpation.

The Diagnoses were: resolved cervical and lumbar strain. From an acupuncturist point of view, Dr. Salayka found resolved blood and qi stagnation of the neck, left shoulder, left knee and back.

She also says that she found no objective findings on today's examination. The chiropractic and acupuncture treatment appears appropriate and within a reasonable timeframe of care for the injuries sustained.

She also said there is no need for any further acupuncture, chiropractic and massage therapy. There was no need for any related services such as household help or related services.

Dr. Salayka related the EIP's injuries to the accident of 12/12/16.

Based upon this evaluation, on 5/11/17 the Respondent issued a global NF-10 denying all future acupuncture and chiropractic benefits as well as massage therapy benefits effective 5/18/17.

The Respondent has provided a copy of the medical reports referenced in the IME report.

Applicant's Rebuttal to IME:

The Applicant has filed a rebuttal to the IME. This was drafted by Josh Lee, PhD., L.Ac.

Dr. Lee discusses the findings of the evaluations of the EIP on 3/24, 5/20, 7/20, 9/22 and 11/27/17 which document positive findings.

He also refers to the reports by David Khanan, MD, which also had positive findings.

He notes that the acupuncture records indicate that the EIP needed treatment after the IME.

At the hearing:

Applicant relied upon the medical records.

The Respondent relied upon the IME.

FINDINGS:

The Applicant has established its prima facie case.

Applicant is billing for services provided to the EIP as follows:

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at a total of \$51.38; infrared treatment billed under CPT code 97026 at \$21.46 for billing totaling \$102.84 for DOS 6/26, 6/28, 6/30, 7/3, 7/5, 7/7, 7/10, 7/12, 7/14, 7/24, 7/27, 7/29, 8/7, 8/12, 8/14, 8/16, 8/19, 8/21, 8/24, 8/28, 8/29, and 8/30/17.

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at a total of \$51.38 for billing totaling \$81.38 for DOS 9/6, 9/7, 9/9, 9/11, 9/13, and 9/16/17.

An initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at \$17.52 per session, for billing totaling \$55.56 for DOS 9/12, 9/23, 9/25, 9/26, 9/30, 10/2, 10/4, 10/9, 10/10, 10/14, 10/16, 10/19, 10/21, 10/23, 10/25, 10/28, 10/30, 11/1, 11/4, 11/6, 11/9, 11/11, 11/14, 11/16, 11/18, 11/21, 11/25, 11/27, 11/28, and 12/2/17.

A follow-up office visit billed under CPT code 99212 at \$26.41; an initial acupuncture session billed under CPT code 97810 at \$30.00; 2 additional acupuncture sessions each billed under CPT code 97811 at \$17.52 per session, for billing totaling \$81.97 for DOS 9/22/17.

As per the AR-1, the Applicant billed a total of \$4,499.53; Respondent paid \$0.00, leaving an amount in dispute of \$4,499.53. This amount was amended to \$3,631.01 at the hearing.

The position of the Respondent is that the Applicant's claim was properly denied based upon an IME done on 4/26/17 by Janice Salayka, DC, L.Ac.

The purpose of No-fault is to return the EIP to his/her pre-action condition or as close thereto as possible. From an acupuncturist perspective, the EIP was at that point on 4/26/17 the date of the IME.

The Applicant's submission contains multiple reports both in the fields of acupuncture but also in the fields of orthopedics and physical medicine to show that the EIP required additional treatment after the IME.

The claim is awarded.

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 |
|---------|----------------------------------|---------------------|--------------|----------------|---------------------|
| | Island Community Acupuncture, PC | 06/26/17 - 12/02/17 | \$4,499.53 | \$3,631.01 | Awarded: \$3,601.01 |
| Total | | | \$4,499.53 | | Awarded: \$3,601.01 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/28/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

I find that the date for interest to accrue is the date of the filing of the arbitration, 9/28/18 as this is the date when the Applicant's filing was processed and notice of the arbitration sent to the Respondent. As per Insurance Regulation 65-3.9, interest is due until such amount is paid, and without demand therefor.

C. Attorney's Fees

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

The insurer shall pay the Applicant's attorney as per 11 NYCRR 65-4.6 (e). However, if the award and interest is equal to, or less than, Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon 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 Suffolk

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

12/12/2020

(Dated)

James Hogan

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:
2c860c0604633c32f3a1f812296e8fad

Electronically Signed

Your name: James Hogan
Signed on: 12/12/2020