

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Christopher S. Whyte, DC  
(Applicant)

- and -

Allstate Insurance Company  
(Respondent)

AAA Case No. 17-19-1127-4381

Applicant's File No. 285051

Insurer's Claim File No. 0503599135  
2BN

NAIC No. 19232

### ARBITRATION AWARD

I, Eileen Hennessy, 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-J.G.

1. Hearing(s) held on 12/09/2020  
Declared closed by the arbitrator on 12/09/2020

Neil Menashe from Neil Menashe Attorney At Law P.C. participated by telephone for the Applicant

John Pallatianos from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,695.54**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute from the original amount of \$1,695.54 to \$1,100.00. Applicant seeks reimbursement for the bill for date of service 7/26/2018 for the EMG/NCV testing of the upper extremities. The remaining bills were withdrawn with prejudice.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim

was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the amount claimed does not exceed the maximum permissible charges under the fee schedule applicable to the disputed services.

### 3. Summary of Issues in Dispute

The record reveals that the Assignor-J.G., a 53-year-old female, claimed injuries as a passenger of a motor vehicle involved in an accident that occurred on 5/26/2018. Applicant seeks reimbursement for EMG/NCV testing of the upper extremities conducted on 7/26/2018. Respondent denied the bill based on the peer review of Craig Horner, D.C., M.S., L.Ac., dated 8/23/2018. The issue to be determined is whether the services were medically necessary?

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

Applicant seeks reimbursement for EMG/NCV testing of the upper extremities. This case was decided based upon the submissions of the Parties as contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

11 NYCRR 65-4.5 (o) (1) (Regulation 68-D), reads as follows: The arbitrator shall be the judge of the relevance and materiality of the evidence offered and strict conformity to legal rules of evidence shall not be necessary. The arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations.

#### Legal Standards for Determining Medical Necessity

To support a lack of medical necessity defense, respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). 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 generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). 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 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*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a Respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007). "[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of 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), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "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 11 ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11 Dists. Sept. 29, 2006).

#### Application of Legal Standards

EMG/NCV testing of the upper extremities was conducted on 7/26/2018. In support of its contention that the services were not medically necessary, Respondent relies upon the peer review of Craig Horner, D.C., M.S., L.Ac., dated 8/23/2018. A formal rebuttal was not submitted.

After review of the record, I find Respondent has met its evidentiary burden. The peer review authored by Craig Horner, D.C., M.S., L.Ac., dated 8/23/2018, adequately set forth the factual basis and medical rationale to support the conclusion that the EMG/NCV studies of the upper extremities was not indicated for the Assignor. Dr. Horner noted: "In the electrodiagnostic reports dated 07/26/18 and 07/31/18, Dr. Whyte documented complaints of neck pain with radiation to the upper extremities and low back pain with radiation to lower extremities. However, Dr. Whyte did not provide any detailed related information that would substantiate the medical necessity for the electrodiagnostic studies that were performed, such as the findings of a detailed physical

examination including a neurological evaluation assessed on those days". The peer notes that: "EDX studies are a supplement to, not a replacement for, a careful history and physical examination by the referring physician and by the EDX physician as part of the EDX consultation (citations omitted)." Dr. Horner noted that the claimant was initially evaluated by Dr. Whyte on 05/29/18 with complaints of neck pain with radiation to arms and low back pain radiating to legs. No complaints of upper and lower extremities weakness, numbness or tingling were reported. Neurological examination revealed hypoesthesia over bilateral C5 and bilateral L5 dermatomal distributions. Examination of the deep tendon reflexes and muscle strength was not described. This is the only examination by Dr. Whyte in the record. After this office visit, the claimant was started on a course of chiropractic treatment. Dr. Horner stated: "In the electrodiagnostic reports dated 07/26/18 and 07/31/18, Dr. Whyte stated that the testing was done in order to rule out radiculopathy but no differential diagnosis was considered. An EMG is not necessary for the diagnosis of intervertebral disc disease with radiculopathy; rather, its value lies in differentiating other types of neuritis, neuropathy, or muscle abnormalities from radicular neuropathy and for cases where the etiology of the pain is not clear (citations omitted)". Dr. Horner continued: "Furthermore, Dr. Whyte did not explain what the purpose of this testing is and how the testing results/impressions would impact the treatment plan for this particular individual. Dr. Whyte did not present any invasive treatment possibilities such as surgery that might be considered depending on the results of this testing. EDX studies should not be performed if the information will not potentially enhance patient's care (citations omitted)." That being so, the burden shifts to the Applicant to counter Respondent's showing.

In order to rebut the defense of lack of medical necessity Applicant needs to rebut the conclusions set forth in the peer review. *See Yklik, Inc. v. GEICO Ins. Co.*, 2010 NY Slip Op 51336(U) [28 Misc 3d 133(A)]. Where there is no such showing or the claimant fails to respond the Respondent is entitled to prevail. (*A. Khodadadi Radiology v. NY Central Mutual Ins.*, 16 Misc 3d 131(A) (Appellate Term, 2nd Dept.)).

In this matter, I am faced with conflicting opinions concerning the medical necessity for the disputed services herein. There are no legal issues to resolve. This dispute involves solely an issue of fact, that is, whether the service was medically necessary. Resolution of that fact is determined by which opinion is accepted by the trier of fact.

In this case, Applicant has not submitted a rebuttal. The failure to submit one is not an automatic bar to recovery. There may be instances when the information contained within the medical reports meaningfully addresses the points that are raised in the peer review. However, when the evidence does not speak to the issues that are voiced by the peer reviewer, the question of medical necessity will preponderate in the insurer's favor. Here, after comparing the relevant evidence presented by both parties as against each other, I find for the Respondent. After careful review of the record, I find Respondent has set forth a factual basis and medical rationale for denying payment. The evidence, including the initial evaluations by Dr. Christopher Whyte, DC, dated 5/29/2018, and the MRI reports of the cervical and lumbar spine, dated 6/16/2018, do not suffice to rebut Dr. Horner's determination. There is no detailed neurological examination

contemporaneous to the test and it is unclear when the Assignor was referred for the test. Having carefully considered the evidence, I find that Applicant has failed to prove its case. The weight and credibility of the evidence favors the Respondent.

Accordingly, Applicant's claim is denied in its entirety. This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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

01/07/2021  
(Dated)

Eileen Hennessy

**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:**  
f7f14882696b6533ef55c8eddefe8822

**Electronically Signed**

Your name: Eileen Hennessy  
Signed on: 01/07/2021