

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Nara PT, Chiro & Acupuncture PLLC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-19-1145-6835

Applicant's File No. 3091985

Insurer's Claim File No. 0478409955
2HB

NAIC No. 19232

ARBITRATION AWARD

I, John O'Grady, 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 02/08/2021
Declared closed by the arbitrator on 02/08/2021

Elvira Messina Esq. from Law Offices of Andrew J. Costella Jr., Esq. participated by telephone for the Applicant

Karen Stulgaitis Esq. from Law Offices Of Karen L. Lawrence participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,170.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the hearing the applicant reduced the amount in dispute from \$1170.00 to \$685.62, consistent with the proper amount payable for acupuncture pursuant to the Workers Compensation Fee Schedule.

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

Unless otherwise indicated in Section 3 below, in which case the dispute between the parties will be addressed in this Award, the parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits are 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

CASE SUMMARY

Applicant, as assignee of an eligible injured person, a 58-year-old female, seeks reimbursement of the following charge(s) following a motor vehicle accident on October 1, 2017: acupuncture services rendered between September 17 and November 21, 2018.

Respondent timely denied the claim(s) relying on the July 18, 2018 independent medical examination by the acupuncturist, Yong Gon Kim, after which respondent issued a Denial of Claim terminating benefits effective August 15, 2018.

ISSUE(S)

Whether respondent makes out its initial burden to show that there was no medical necessity for any treatment after the independent medical examination and, if so, whether applicant's proof is sufficient to overcome that demonstration.

4. Findings, Conclusions, and Basis Therefor

The respondent had the assignor examined by the chiropractor, Neeti Dureja, on April 4, 2018. At that time the assignor was complaining of pain in the neck with tingling in the right hand and pain in the lower back with numbness in the right toe as well as pain in the right shoulder and right knee. Dr. Dureja measured range of motion in the cervical spine as equal to the full ranges in all planes. Orthopedic testing was negative. Ranges of motion in the lumbar spine were also measured as equal to the full ranges in all planes and orthopedic testing was negative. Deep tendon reflexes were found to be equal and symmetric in the arms and legs; muscle strength was full in the arms and legs and sensation was normal. Dr. Dureja concluded that all cervical and lumbar spine strains and sprains were resolved, that there was no disability and that the assignor required no further chiropractic treatment.

The respondent had the assignor examined by the licensed acupuncturist, Yong Gon Kim, on July 18, 2018. At that time she was complaining of pain in the neck, lower back, right shoulder, right elbow and right knee. Mr. Kim performed a traditional Chinese medicine examination and found it to be without abnormality with normal vitality and facial and skin color; pink tongue; normal palpation and pulse; a clear and direct voice and clear and regular respiration with no Qi or blood stagnation.

Ranges of motion were measured in the cervical spine and lumbar spine, all measured equal to the normal range in each plane. There were no neurological abnormalities with respect to sensory deficits, muscle strength or deep tendon reflexes. There was no tenderness or palpation in the thoracic spine. An examination was performed to both

shoulders, both elbows, both wrists and hands, both hips, knees, ankles and feet. All ranges were measured equal to the normal range in each plane with negative orthopedic testing throughout. Mr. Kim concluded that the assignor was resolved of all sprains and strains of the cervical and lumbar spine, right shoulder, right elbow and right knee, and that no further Acupuncture treatment was recommended.

The respondent had the assignor examined by Dr. Raghava Polavarapu on August 29, 2018. At that time she complained of pain in the neck, radiating to the right arm, and in the low back, shoulders and right knee. Dr. Polavarapu measured range of motion in the cervical, thoracic and lumbar spine, all ranges measured equal to the normal ranges in all planes. Orthopedic testing was normal in the cervical and lumbar spine. The neurological examination was normal with equal and symmetric deep tendon reflexes, full muscle strength and no sensory deficits. There was no atrophy noted.

He also examined both shoulders and the right knee. Again, ranges were measured to be equal to the normal ranges in all planes. Orthopedic testing was negative. He concluded that all sprains and strains of the cervical and lumbar spine, left shoulder and right knee were resolved and that the assignor was in no further need of treatment.

The independent medical examinations note that the assignor underwent two right shoulder procedures, one on January 5 and one on April 20, 2018. The shoulder surgery on January 5, 2018 was to repair a SLAP tear. The assignor developed a frozen shoulder after that date. The shoulder procedure on April 20, 2018 was for an inter-scaling block with local sedation.

Shortly after the accident, in October, 2017, the assignor underwent MRI exams of the right shoulder and right knee which revealed abnormalities. The assignor was treating at Comprehensive Orthopedic & Spine Care. Facet block injections were performed by Hudson Pain Associates. The assignor also treated by Dr. Colin Clarke who performed trigger point injections to the spine. Electrodiagnostic testing in March, 2018 revealed no radiculopathy in the arms or legs. As of May, 2018 the assignor was still suffering with pain and complaints relative to the neck, low back, right shoulder and right knee. The assignor was treating at Work Specialty Orthopedics through May, 2018 regarding the right shoulder.

The proof in favor of the applicant includes the SOAP notes SOAP (Subjective, Objective, Assessment, Plan) Notes Of treatment by the acupuncturist, chiropractor and physical therapist. None of those notes provide detail of objective abnormalities.

The proof includes a chiropractic reevaluation note from October 1, 2018 when the assignor continued to complain of neck pain and lower back pain and with stiffness. The note does not include any quantified measurements of abnormality. In November 2018 a re-evaluation note is similarly without quantified evidence of abnormalities. In fact, the re-evaluation note is a SOAP note no detail of abnormality.

Applicant relies largely on a rebuttal letter by the chiropractor, Hoseok Kwak, who was treating the assignor. In the rebuttal letter it refers to chiropractic re-evaluation notes from March, 2018 through November 2018 which demonstrate positive objective

physical exams and restricted range of motion findings. The letter argues that the injuries were not resolved at the time of the independent medical examinations. It also argues that the "treating physician rule" dictates that the opinion of the treating physician is superior to that of any medical professional who performed an examination on behalf of the insurer. It refers to surgical notes from April, 2018. It also refers to "positive IME findings" although three independent medical examinations were performed and there were no positive findings. Nowhere does it detail positive objective findings consistent with subjective complaints to demonstrate persistent abnormality.

It is well settled that an applicant for no-fault benefits establishes its prima facie entitlement to payment by proof of the submission to the defendant of a claim form, proof of the fact and the amount of the loss sustained, and proof either that the defendant had failed to pay or deny the claim within the requisite 30-day period, or that the defendant had issued a timely denial of claim that was conclusory, vague or without merit as a matter of law. *Ave T MPC Corp. v. Auto One Ins. Co.*, 32 Misc.3d 128(A), 934 N.Y.S.2d 32 (Table), 2011 N.Y. Slip Op. 51292(U), 2011 WL 2712964 (App. Term 2d, 11th & 13th Dists. July 5, 2011). (see also Insurance Law §5106[a].

In evaluating the medical necessity of services where the proof of each party, particularly the conclusion, is contradictory, consideration must be given to the evidentiary burdens. Respondent must prove first that the services were not medically necessary. That proof must come from someone qualified by education, training and experience to give such opinion. A peer review report must set forth a factual basis to establish, prima facie, the absence of medical necessity and a conclusory assertion that certain procedures were medically unnecessary fail to create a triable issue of fact, *Choicenet Chiropractic PC v Allstate*, 2003 NY Slip Op 50672U, 2003 N.Y. Misc. LEXIS 314 (App. Term, 2nd and 11th Jud Dists 2003; *Amaze Medical Supply v Allstate Ins. Co.*, 3 Misc. 3d 43, 779 N.Y.S.2d 715, 2004 NY Slip Op 24119 (App Term 2d and 11th Jud Dists 2004

An opinion offered by respondent is more likely to withstand the opinion of a treating medical provider when it includes:

1. some reference to the standards in the applicable medical community for the services and treatment in issue;
2. an explanation as to when such services and treatment would be medically appropriate, preferably with an understandable objective criteria; and
3. an explanation of why it was not medically necessary in the instance at issue.

If the proof of the respondent is found to meet its burden, the proof of the applicant must be considered in opposition to it, mindful that it is likely offered by the provider who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services.

Respondent makes out its initial burden to show that there was no medical necessity for any treatment after the independent medical examination by its examiner's exam, report

and conclusion. Applicant's proof is insufficient to overcome that initial demonstration for the following reasons. First, respondent had the assignor examined by three different medical professionals, a chiropractor, acupuncturist and, most importantly, an orthopedist. All came to the same conclusion, that the assignor was not exhibiting any objective demonstration of continued injury. The medical proof in favor the applicant does not include objective evidence of continued abnormality at or about the time of any of the independent medical examinations were performed, or after then. SOAP notes are of little value in establishing continued objective abnormalities one do not detail objective abnormalities. The rebuttal letter provides no enlightening detail to demonstrate continued abnormality and the "treating physician rule" is an argument without substance. Applicant needs to come forward with substantial proof, that is, evidence of detailed objective abnormality consistent with the tip subjective complaints. Failing to do so, applicant fails to demonstrate the need for the continued treatment in issue here and the claim is denied.

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

02/09/2021

(Dated)

John O'Grady

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:
928ffaec3278064da409ea3e046a3ac2

Electronically Signed

Your name: John O'Grady
Signed on: 02/09/2021