

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bay Orthopedic & Rehab Supply
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-19-1149-9384

Applicant's File No. 80655

Insurer's Claim File No. 0492226634 2EZ

NAIC No. 19232

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 10/21/2020, 01/20/2021
Declared closed by the arbitrator on 01/27/2021

Janene Cangro, Esq. from Fazio, Rynsky & Associates, LLP participated by telephone for the Applicant

David Kelly, Esq. from Law Offices of James F. Sullivan, PC participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 292.50**, 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

The claimant was the 41 year-old female restrained driver of a motor vehicle that was involved in an accident on 2/18/18. Following the accident the claimant suffered injuries which resulted in the claimant seeking treatment. Thereafter, on 6/7/19 the claimant was required to appear at an Independent Medical Examination ("IME") where Dorothy Scarpinato, M.D. found further orthopedic treatment was not medically necessary. At issue is the medical necessity of a right wrist splint with addition dispensed by Applicant on 6/6/19.

4. Findings, Conclusions, and Basis Therefor

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

After the 10/21/20 hearing Arbitrator Stacey Erdheim requested a hearing continuation and provided the following directive "Please schedule in front of another Arbitrator. Respondent's doctor, Dr. Dorothy Scarpinato, is my treating Orthopedist."

The claimant was the 41 year-old female restrained driver of a motor vehicle that was involved in an accident on 2/18/18. Among the claimant's injuries was impliedly injury to her right wrist. There was no reported loss of consciousness. There were no reported lacerations or fractures. Following the accident the claimant was transported to Good Samaritan Hospital where she was evaluated, treated, and released. On or before 5/23/18 the claimant presented to Christopher Mileto, M.D. with complaints of left knee and right wrist pain and a right wrist MRI was ordered. The 6/1/18 right wrist MRI interpreted by [name illegible] produced an impression of mild degeneration of the first carpometacarpal joint and partial tear of the scapholunate ligament without evidence for widening of the scapholunate joint. On 8/19/18 Dimitrios Christoforou, M.D. conducted a follow-up examination and a cockup wrist splint and CSI (Central Sensitization Inventory) vs. surgery was discussed. On 10/30/18 Dr. Mileto conducted a follow-up examination and hyalauronic acid injections were discussed. On 11/13/18 Dr. Christoforou ordered a right wrist MR Arthrogram that was subsequently performed suggesting evidence of a "low-grade partial intramembranous tear of the membranous portion of the scapholunate ligament. Dorsal and volar scapholunate ligament is intact. There is no diastases. TFCC is intact. DRUJ unremarkable. Radiocarpal and intercarpal joints are intact. CMC joint intact." On 4/30/19 Dr. Christoforou performed right wrist surgery consisting of arthroscopic synovectomy and scapholunate ligament thermal capsulorrhaphy. On 6/6/19 Dr. Christoforou removed the cast and claimant was to be transitioned to a forearm based thumb spica splint with addition that was prescribed and dispensed the same day by Bay Orthopedic & Rehab Supply (Applicant). The 6/6/19 right wrist splint with addition is at issue here.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order 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 2, 11th and 13th

Jud. Dists. 20140. 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 1 Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

An IME report asserting that no further treatment is not medically necessary must be supported by a sufficiently detailed factual basis and medical rationale, which includes mention of the applicable generally accepted medical/professional standards. *Carle Place Chiropractic v. New York Central Mutual Fire Ins. Co.*, 19 Misc.3d 1139(A), 866 N.Y.S.2d 90 (Table), 2008 N.Y. Slip Op. 51065(U), 2008 WL 2228633 (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008).

Respondent's timely denial states "AS PER THE INDEPENDENT MEDICAL EXAMINATION CONDUCTED BY DR. DOROTHY SCARPINATO ON 6/7/19, THE RIGHT WRIST SURGERY PERFORMED ON 4/30/19 WAS NOT MEDICALLY NECESSARY OR CAUSALLY RELATED TO THE 2/18/18 ACCIDENT. THEREFORE, THE SURGERY AND RELATED TREATMENT IS BEING DENIED."

On 6/7/19 the claimant was required to present to Dorothy Scarpinato, M.D. for an independent orthopedic reexamination (IME). After reviewing the claimant's history, treatment, and medical records, Dr. Scarpinato documents the claimant's then current complaints as right wrist pain. Dr. Scarpinato notes "examination of the right wrist/hand reveals healed portal sites. I was unable to examine ROM due to pain for the claimant's pain and she just had her cast removed yesterday. There is a subjective complaint of diffuse wrist tenderness and diffuse swelling." Dr. Scarpinato's right wrist diagnosis was "right wrist sprain - resolved." Dr. Scarpinato opines "if the history provided is accurate and based on the medical records provided and my examination performed today, there is a direct correlation between the claimant's initial complaints of pain and the accident of record. The MRI of the right wrist revealed chronic and pre-existing pathology, therefore the right wrist arthroscopy was not medically necessary or causally related to her MVA." Dr. Scarpinato concludes "based on my physical examination and medical records reviewed the claimant's subjective complaints were correlated by objective findings of the right wrist, however the decrease in range of motion is due her right wrist arthroscopy which was not causally related to the MVA. Therefore there is no medical necessity for any further orthopedic treatment including physical therapy to any of the examined areas. There is no medical necessity for special transportation, household help, prescription medication or medical supplies."

Here this Arbitrator is compelled to find for Applicant. Dr. Scarpinato's cursory examination finding of "healed portal sites" is self evidently insufficient to support her diagnosis of "right wrist sprain - resolved." The inadequacy of the examination is highlighted by Dr. Scarpinato's defining tenderness and diffuse swelling as "subjective" when no tactile or visual examination is documented establishing either the presence of

swelling or the lack thereof. Dr. Scarpinato then opines "the MRI of the right wrist revealed chronic and pre-existing pathology, therefore the right wrist arthroscopy was not medically necessary or causally related to her MVA." Dr. Scarpinato conveniently ignores the MRI finding of "partial tear of the scapholunate ligament," the MR Arthrogram, the intraoperative findings, the possibility that the "pre-existing pathology" was exacerbated by the subject MVA, or that the medical necessity for the subject DME didn't arise from the performance of the surgery itself and would therefore be attenuated from the subject MVA. Finally even if Dr. Scarpinato's conclusion based on her 6/7/19 IME that "there is no medical necessity for special transportation, household help, prescription medication or medical supplies;" were valid it would not operate retroactively to serve as a denial for medical supplies dispensed prior to the IME on which said denial was based.

Accordingly, Applicant is awarded \$292.50.

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	Status
	Bay Orthopedic & Rehab Supply	06/06/19 - 06/06/19	\$292.50	Awarded: \$292.50
				Awarded:

Total	\$292.50	\$292.50
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- B. The insurer shall also compute and pay the applicant interest set forth below. 12/03/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest runs from 12/3/19 (the filing date for this case) until the date that payment is made at two percent per month, simple interest, on a pro rata basis using a thirty day month.

C. Attorney's Fees

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

Pursuant to 11 NYCRR §65-4.6 (d), ". . . the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon for each applicant for arbitration or court proceeding, subject to a maximum fee of \$1,360."

- 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 Nassau

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

02/19/2021
(Dated)

Charles Blattberg

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:
471f0dbec3e4153533f4a1264e24dd56

Electronically Signed

Your name: Charles Blattberg
Signed on: 02/19/2021