

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Horvath Chiropractic Center
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-20-1168-3371
Applicant's File No.	20-22701
Insurer's Claim File No.	0637868100101014
NAIC No.	22055

ARBITRATION AWARD

I, Michelle Murphy-Louden, 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 04/02/2021
Declared closed by the arbitrator on 04/02/2021

Nicole Jones, Esq. from The Morris Law Firm, P.C. participated in person for the Applicant

Jason Ciani, Esq. from Law Office of Daniel R. Archilla participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ **619.12**, 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

Whether Applicant is entitled to reimbursement for treatment rendered from March 11, 2020, to October 21, 2020, as a result of an October 18, 2018, motor vehicle accident.

Respondent reimbursement based upon a February 28, 2019, chiropractic independent medical examination (IME) performed by John Gaiser, D.C.

This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments of the parties and any testimony given during the hearing.

4. Findings, Conclusions, and Basis Therefor

The 24 year old EIP was reportedly involved in a motor vehicle accident on December 14, 2018, when the vehicle in which he was the restrained driver was struck on the passenger's side by a vehicle attempting to merge into his lane.

According to the records, following the accident the EIP presented as a walk-in to the emergency department of Kenmore Mercy Hospital where he was reportedly evaluated and discharged for complaints of right knee, right shoulder, and upper back pain.

On January 18, 2019, the EIP presented for initial orthopedic evaluation with Zair Fishkin, M.D., reportedly complaining of non-radiating low back pain 7-8/10 on average and 10/10 at worst and occasional numbness and paresthesias to the left lower extremity. It was documented that the EIP had been involved in a prior motor vehicle accident on March 5, 2018, for which he had been undergoing chiropractic treatment and that the EIP had undergone a cervical MRI on April 27, 2018, which according to Dr. Fishkin revealed small disc protrusions at C3-C6, a lumbar MRI on April 28, 2018, which according to Dr. Fishkin revealed interval spondylolisthesis at L5-S1 with superimposed disc herniation, as well as a lumbar MRI on November 3, 2010, which according to Dr. Fishkin revealed a bilateral L5 pars fracture. Following examination, Dr. Fishkin diagnosed the EIP with C3-C6 disc protrusions, L2-L3 disc bulge with right-sided facet synovial cyst, L4-L5 facet arthrosis, bilateral L5 pars defects, L5-1 grade 1 anterolisthesis, and L5-S1 HNP and recommended continuation of chiropractic treatment.

On February 20, 2019, the commenced chiropractic treatment with Julius Horvath, D.C., for a reported complaint of 9/10 neck, back and arm/shoulder pain, back stiffness, and hand/finger numbness.

On March 9, 2019, the EIP underwent a lumbar MRI which was with the impression of straightening of the lordosis, L5-S1 grade 1 anterior spondylolisthesis with bilateral pars defects and associated subligamentous disc protrusion similar to the previous exam creating bilateral foraminal narrowing, L4-L5 disc bulge with more lateral than central components similar to the previous exam extending to the inferior aspects of the neural foramen without contact upon the exiting nerve roots, and L2-L3 minimal disc bulge unchanged.

On March 20, 2019, the EIP underwent a cervical MRI which was with the impression of C3-C4 spondylosis about the right uncovertebral joint and minimal spondylotic ridging with tiny annular tear of the posterior annulus, C4-C5 minimal spondylosis particularly about the left uncovertebral joint with mild-to-moderate narrowing of the left neural foramina, and C5-C6 some desiccation and a small central 1.5 mm disc bulge.

On July 17, 2019, the EIP was seen in follow-up by Dr. Fishkin reportedly complaining of persistent 5/10 low back pain radiating to the right buttock and posterior thigh with numbness and tingling in the right thigh. Examination reportedly revealed steady gait, no difficulty standing up from a seated position, cervical spine tenderness, mildly restricted cervical extension and lumbar flexion, 5/5 muscle strength, 1+ reflexes and intact sensation of the bilateral upper and lower extremities, negative Hoffman sign, and negative straight leg raise bilaterally. Dr. Fishkin recommended continuation of chiropractic treatment.

On September 4, 2019, the EIP was re-evaluated by Dr. Horvath. The EIP's subjective complaints are unknown as this section of Dr. Horvath's report is too light to read. Examination reportedly revealed decreased cervical and lumbar ranges of motion in all planes, cervical, thoracic and lumbar subluxations, and rhomboid and lumbar spasms. In a Pain Relief Questionnaire the EIP indicated that after each treatment he felt better, that the change lasted until the next treatment, and that overall he felt treatment was helping.

On September 26, 2019, the EIP was seen in follow-up by Dr. Fishkin reportedly complaining of low back pain radiating equally to the bilateral lower extremities. The EIP reported that his typical low back pain was 4/10 but that it could be exacerbated to 10/10 with simple activities such as carrying groceries. Dr. Fishkin stated "[p]ast treatment has included chiropractic adjustments for over a year. He states that he has reached a plateau with treatment." Dr. Fishkin recommended physical therapy.

Dr. Horvath's treatment notes for the time period in dispute consistently document complaints of neck, mid-back, and low back pain and objective findings of decreased cervical, thoracic and lumbar ranges of motion (values not reported) and cervical, thoracic and lumbar subluxations and hypertonic musculature.

RESPONDENT'S IME

On August 19, 2019, the EIP underwent a chiropractic IME performed by Christopher Ferrante, D.C., who previously examined the EIP on June 17, 2019, at which time he was reportedly complaining of low back, left shoulder, and left knee pain. The EIP reported that his symptoms had improved.

The findings of Dr. Ferrante's examination are set forth in his report as follows:

GENERAL OBSERVATION:

[The EIP's] gait was observed and revealed no limping and a normal gait.

CHIROPRACTIC EVALUATION:

Cervical Spine:

Range of motion of the cervical spine as follows:

- Flexion at 50 degrees (50 degrees normal).
- Extension at 60 degrees (60 degrees normal).
- Right lateral bending at 45 degrees (45 degrees normal).
- Left lateral bending at 45 degrees (45 degrees normal).
- Right rotation at 80 degrees (80 degrees normal).
- Left rotation at 80 degrees (80 degrees normal).

There is no paraspinal spasm. There is complaint of mild paraspinal tenderness upon palpation over C5-C6 levels.

The following orthopedic tests are performed:

- Foraminal Compression Test - negative bilaterally.
- Shoulder Depression Test - negative bilaterally.
- Cervical Distraction Test - negative bilaterally.
- Jackson's Compression Test - negative bilaterally.

Thoracic Spine:

There is no complaint of trapezial tenderness upon palpation. There is no complaint of paraspinal tenderness upon palpation. There is no paraspinal spasm.

Lumbar Spine:

Range of motion of the lumbar spine as follows:

- Flexion at 60 degrees (60 degrees normal).
- Extension at 25 degrees (25 degrees normal).
- Right lateral flexion at 25 degrees (25 degrees normal).
- Left lateral flexion at 25 degrees (25 degrees normal).

There is no paraspinal spasm. There is complaint of mild paraspinal tenderness upon palpation over L3-L5 levels.

The following orthopedic tests are performed:

- Straight leg raise is negative at 60 degrees bilaterally (90 degrees normal).
- Kemp's Test - negative bilaterally.
- Yeoman's Test - negative bilaterally.
- Ely's Test - negative bilaterally.
- Sacral Press Test - negative bilaterally.

Neurological Examination of the Upper Extremities:

Muscle mass is normal. Motor strength is 5/5. Deep tendon reflexes are 2+/2.

Neurological Examination of the Lower Extremities:

Muscle mass is normal. Motor strength is 5/5. Deep tendon reflexes are 2+/2.

Dr. Ferrante diagnosed the EIP with resolved lumbar spine sprain/strain and grade 1 anterior spondylolisthesis of L5 on S1 with bilateral pars defects per MRI, pre-existing, and opined that no further chiropractic treatment was indicated.

Based upon Dr. Ferrante's opinion, Respondent denied Applicant's claims.

ANALYSIS

Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s).

Amaze Medical Supply, Inc. v. Eagle Ins. Co., 2 Misc. 3d 128A (App. Term, 2nd Dept., 2003); Tahir v. Progressive Cas. Ins. Co., 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co., 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); Millennium Radiology, P.C. v. New York Cent. Mut., 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); Beal-Medea Prods., Inc. v. GEICO Gen. Ins. Co., 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); All Boro Psychological Servs., P.C. v. GEICO Gen. Ins. Co., 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

I find that Dr. Ferrante's IME sets forth a clear factual basis and a medical rationale for Respondent's denials of Applicant's claims for the treatment in dispute herein and as such I find that Respondent has established a lack of medical necessity for same. Therefore, the burden has shifted to Applicant to present its own evidence of medical necessity (*see* Amato v. State Farm Ins. Co., 40 Misc. 3d 129(A), App. Term, 2nd Dept., 2013; West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc. 3d 131(A), App. Term, 2nd Dept., 2006). Based upon the evidence submitted, I find that Applicant has failed to meet this burden.

One month before Dr. Ferrante's IME the EIP was examined by Dr. Fishkin who's only reported positive findings were cervical spine tenderness and mildly restricted cervical extension and lumbar flexion. Dr. Fishkin's findings correlate with those of Dr. Ferrante. However, two weeks after Dr. Ferrante's IME the EIP was examined by Dr. Horvath who found decreased cervical and lumbar ranges of motion in all planes, cervical, thoracic and lumbar subluxations, and rhomboid and lumbar spasms. This indicates a worsening of the EIP's condition post-IME despite continued treatment.

Dr. Horvath did not re-evaluate the EIP again after September 4, 2019, and thus there is no evidence of objective improvement in the EIP's condition with the continued treatment.

Although under No-Fault treatment that provides palliative benefit can be compensable, in order for the treatment to be compensable it must be documented in the records that the treatment provided significant quantifiable palliative benefits to the injured party (*see e.g.* Scott A Croce, DC, PC and Farmington Casualty Company, AAA Case No. 17-14-9024-6746, Arb. Mona Bargnesi, 2/28/16; BuffChiropractic P.C. and Garrison Property & Casualty Insurance, AAA Case No. 17-15-1010-2249, Arb. Gillian Brown,

5/18/16; Munroe Chiropractic PC and Allstate Property and Casualty Insurance Company, AAA Case No. 17-15-1006-0101, Arb. Douglas Coppola, 6/16/16; Amherst Medical Supply, LLC and Liberty Mutual Insurance Company, AAA Case No. 17-15-1010-7238, Arb. Kent Benziger, 9/12/16, *citing Hobby v. CNA*, 267 A.D.2d 1084, App. Div., 4th Dept., 1999. *See also Applicant and Allstate Ins. Co.*, AAA Case No. 99-15-1018-6438, Master Arb. Richard Ancowitz, 6/21/17 - lower arbitrator misapplied Hobby v. CNA as the respondent's IME physician only focused upon whether the disputed treatment was curative, "and not whether same was palliative").

Some of Dr. Horvath's treatment notes indicate that he had assessed the EIP's condition as "improving". However, Dr. Horvath failed to indicate the basis for this assessment, a failure which I find significant given that in each and every of Dr. Horvath's treatment notes he documented neck, mid-back, and low back pain and decreased cervical, thoracic, and lumbar ranges of motion and cervical, thoracic and lumbar subluxations and hypertonic musculature.

As for the Pain Relief Questionnaire completed by the EIP on September 4, 2019, while this could possibly support a finding of palliative benefit from the treatment rendered before that date, treatment which is not in dispute herein, it does not support a finding of palliative benefit from the treatment rendered after that date, and it is of very significant note that three weeks later the EIP reported to Dr. Fishkin that he had reached a plateau with chiropractic treatment resulting in the EIP being referred for physical therapy.

Therefore, based upon the foregoing, Respondent's denials are upheld.

ACCORDINGLY, 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 Erie

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

04/14/2021

(Dated)

Michelle Murphy-Louden

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:
6e23749ae2e4b9d147972774a70c75ce

Electronically Signed

Your name: Michelle Murphy-Louden
Signed on: 04/14/2021