

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Medihealth Medical PC
(Applicant)

- and -

State Farm Fire & Casualty Company
(Respondent)

AAA Case No. 17-20-1157-9075

Applicant's File No. 20-001413

Insurer's Claim File No. 32-3B19-880

NAIC No. 25143

ARBITRATION AWARD

I, Kevin R. Glynn, 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 04/15/2021
Declared closed by the arbitrator on 04/15/2021

Jeanine Oberster, Esq. from Super & Licatesi P.C. participated in person for the Applicant

Anna Pacca, Esq. from James F. Butler & Associates participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,571.42**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount in dispute was amended to \$2,741.52. The amended amount reflects a reduction to the amount allowable under the appropriate Fee Schedule.

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

3. Summary of Issues in Dispute

The Assignor, IM, is a 25yo female driver who was injured in a motor vehicle accident on 8/29/13. IM suffered injuries which resulted in her seeking treatment. In dispute are Applicant's claims for twelve dates of service of physical therapy; seven dates of service of an office visit, pulse oximetry, and range of motion tests; and three dates of service of

injections. These claims were denied pursuant to a Neurological IME by Dr. Uriel Davis, D.O., performed on 8/7/17, effective on 8/16/17. Therefore, there is an issue regarding the medical necessity of these claims.

Also in dispute are Applicant's claim for three dates of service of physical therapy provided on 12/6/17, 12/13/17 and 12/20/17, in the total amended amount of \$202.80. Respondent alleges non-receipt of these claims. Therefore, there is an issue if Applicant can establish that it had submitted these bills to Respondent.

There is another issue regarding the proper amount of reimbursement pursuant to the appropriate fee schedule.

4. Findings, Conclusions, and Basis Therefor

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. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

Negative IME Defense:

Regarding the claims denied based on the negative neurological IME, I find that Applicant established a prima facie case of entitlement to reimbursement for its claims. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I also find that Respondent has timely denied each of these claims.

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 2d, 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 Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). To rebut an IME report, and meet its burden of persuasion, Applicant must submit records or reports that are based on a contemporaneous examination of the patient that address or rebut the objective medical findings in respondent's report. See Arnica Acupuncture, P.C. v Interboard Ins. Co., 2016 NY Slip Op 01434 (App Term 1st Dept. 2016).

Respondent's evidence established that the claims were timely denied pursuant to the Neurological IME by Dr. Uriel Davis, D.O., performed on 8/7/17. Dr. Davis noted the Assignor's present complaints of intermittent headaches; numbness on her entire right side and legs; she reported that her hip feels like it pops out of its socket; depression and anxiety. Dr. Davis stated the neurological findings as:

PHYSICAL EXAMINATION: The claimant is a 29-year-old right-handed female with black hair and brown eyes. She stands 5' 4" tall and weighs 185 pounds.

GAIT: The claimant's gait is normal, however, the claimant tends to hold her head immobile during ambulation, but not when distracted. She stated that she drove to today's appointment. She is able to walk on her heels and toes as well as transfer herself to and from the examination table without any assistance.

NECK: Thyroid not palpably enlarged. No carotid bruit.

HEART: Regular rate and rhythm.

LUNGS: Clear to auscultation.

HIGHER CORTICAL FUNCTION: The claimant is somewhat apprehensive and anxious, but without any gross cognitive deficits. She is able to follow three step commands without difficulty or right-left confusion. She is able to abstract and make associations well. Her fund of general knowledge is fine. She had some difficulty with simple calculations, but corrected.

CRANIAL NERVES: The cranial nerves are normal. Fundi and visual fields are grossly normal. The pupils are equal and reactive to light. Sensation is intact over all three branches of the trigeminal nerve. The facial muscles are symmetric without any signs of weakness. There is no nystagmus or diplopia. No rotary or horizontal nystagmus. Tongue and uvula are midline with good motility. No photophobia. There is no dysarthria. Sternocleidomastoid power is full,

HEAD/FACE: Atraumatic. No palpable mass or tenderness, No facial tics. No facial twitches.

MOTOR EXAMINATION: There are no fasciculations, twitches or jerks. No involuntary motor activity. There is no atrophy of the thenar or hypothenar eminence. No interossei wasting. No disuse atrophy. No arm drift. Motor tone is within normal limits. Power against resistance is full. Grip strength is within normal limits.

CEREBELLAR: No tremor. No dysmetria on finger-to-nose testing or heel-knee-shin testing. No ataxia with tandem gait.

SENSORY EXAMINATION: Grossly intact to primary modalities. Sensation to vibration over lower extremities distally is within normal limits bilaterally. Romberg's Sign is negative.

The ranges of motion of the cervical and lumbar spines were normal except for cervical rotation which Dr. Davis noted improved when distracted. The remaining examination findings were normal.

Respondent has presented a medical rationale and factual basis to support its defense of lack of medical necessity. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, supra.

Applicant relies on the submitted medical records, specifically the 8/28/17 Follow Up Examination report by Dr. Ahmed Elfiky, wherein there were multiple positive findings including limited ranges of motion; weakness; tenderness and muscle spasm; positive SLR. Dr. Elfiky's impression was of post traumatic headaches, posttraumatic anxiety disorder; cervical HNP with thecal sac and spinal cord impingement; radiculopathy; disc bulges; right hip bursitis; lumbar radiculopathy. Dr. Elfiky recommended continued pain medications as needed; continued home exercise program and a follow up.

I find that this examination report was sufficiently contemporaneous to the IME and documented sufficient objective findings to rebut the negative IME report by Dr. Davis. Applicant's proofs are sufficient to support the position that the services provided to the assignor after the IME cut-off date were medically necessary.

Applicant Proof of Mailing:

Respondent alleges non-receipt of the claims for dates of service 12/6/17, 12/13/17 and 12/20/17, therefore there is an issue if Applicant can establish that it had submitted the claims to Respondent.

Generally, "proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee" (*Matter of Rodriguez v Wing*, 251 AD2d 335, 336 [1998] [internal quotation marks omitted]). "The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (*Residential Holding Corp. v Scottsdale Ins. Co.*, 286 AD2d 679, 680 [2001]). See *New York & Presbyt. Hosp. v Allstate Ins. Co.*, 29 A.D.3d 547, 2006 NY Slip Op 03558 (2d Dept.2006); *Hospital for Joint Diseases v. Nationwide Mut. Ins. Co.*, 284 A.D.2d 374, 375 (2d Dept. 2001).

Applicant fails to submit proof that these bills were mailed to Respondent. As such, Applicant fails to meet its prima facie burden and these claims are denied.

Fee Schedule

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. See Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 2006 NY Slip Op 26240, 12 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedule, Respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. See, Continental Medical PC v. Travelers Indemnity Co., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y. Misc. LEXIS 1109 (App. Term, 1st Dep't, per curiam, 2006).

Respondent submits the fee schedule coder affidavit by Mercy Acuna, RN, BSN, CPC, dated 7/30/20. Ms. Acuna presents a detailed, supported explanation for each claim and each date of service establishing competent evidentiary proof that the total amount due to Applicant was \$2,236.01. Applicant's claims for three dates of service in the amended amount of \$202.80, so Applicant is awarded the total amount of \$2,033.21.

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
	Medihealth Medical	08/23/17 -	\$112.14	\$124.61	Awarded:

	PC	08/23/17			\$107.01
	Medihealth Medical PC	08/30/17 - 08/30/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	09/13/17 - 09/13/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	09/20/17 - 09/20/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	10/04/17 - 10/04/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	10/11/17 - 10/11/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	10/18/17 - 10/18/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	10/25/17 - 10/25/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	11/08/17 - 11/08/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	11/15/17 - 11/15/17	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	12/06/17 - 12/06/17	\$112.14	\$124.61	Denied
	Medihealth Medical PC	12/13/17 - 12/13/17	\$112.14	\$124.61	Denied
	Medihealth Medical PC	12/20/17 - 12/20/17	\$112.14	\$124.61	Denied

	Medihealth Medical PC	01/17/18 - 01/17/18	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	02/28/18 - 02/28/18	\$112.14	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	02/14/18 - 02/14/18	\$168.69	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	08/28/17 - 08/28/17	\$214.40	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	11/29/17 - 11/29/17	\$214.40	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	01/10/18 - 01/10/18	\$214.40	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	05/16/18 - 05/16/18	\$246.63	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	11/01/17 - 11/01/17	\$400.40	\$124.61	Awarded: \$107.01
	Medihealth Medical PC	09/25/17 - 09/25/17	\$430.40	\$124.71	Awarded: \$107.03
Total			\$3,571.42		Awarded: \$2,033.21

B. The insurer shall also compute and pay the applicant interest set forth below. 02/26/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In the instant matter Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR 65-3.9 (a) provides that Interest shall be calculated "at a rate of two percent

per month, calculated on a pro rata basis using a 30-day month." Pursuant to 11 NYCRR 65-3.9 (c), "if an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken." Applicant submitted its claim for arbitration 2/26/20, more than thirty days after receipt of the denial of claims. Therefore, interest shall run effective 2/26/20.

C. Attorney's Fees

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

An attorney's fee of 20% shall be paid on the sum of the awarded claim plus interest, subject to a maximum of \$1,360.00.

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

05/17/2021

(Dated)

Kevin R. Glynn

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:
a7c99111a34d67c26e6aed08261cb5ef

Electronically Signed

Your name: Kevin R. Glynn
Signed on: 05/17/2021