

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

M & D Elite Pharmacy LLC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-19-1150-2348

Applicant's File No. ZJ161659543

Insurer's Claim File No. 1060700-03

NAIC No. 16616

ARBITRATION AWARD

I, Amanda R. Kronin, 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: SO

1. Hearing(s) held on 06/23/2021
Declared closed by the arbitrator on 06/23/2021

Victoria Tarasov, Esq from Law Offices of Zara Javakov, Esq. P.C. participated in person for the Applicant

Helen Cohen, Esq from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,031.09**, 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 Assignor, SO, a 34-year-old female, was involved in a motor vehicle accident on 5/31/19. At issue in this case are claims for diclofenac and tizanidine in the amount of \$1031.09. Respondent denied this claim based upon the failure of the Assignor to attend two properly scheduled Independent Medical Examinations (IMEs) and on the peer review report by Dr. Peter Chiu, dated 11/25/19. The issue presented is whether the Respondent can establish the defense that the Assignor failed to appear for the IMEs and if that defense fails, was the medication at issue medically necessary.

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. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

Applicant has established its prima facie case with proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]; Amaze Med. Supply v. Eagle Ins. Co., 2 Misc. 3d 128A, 784 N.Y.S. 2d 918, 2003 NY Slip Op 51701U [App Term, 2d & 11th Jud Dists]). The burden shifts to the insurer to prove that the services were not medically necessary.

It is well settled that the appearance of the eligible injured person or his or her assignee at an IME is a condition precedent to an insurer's liability on a policy (see Mega Billing, Inc. v. State Farm Fire & Casualty Company, 35 Misc.3d 145(A), 2012 N.Y. Slip Op. 51014(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012); Viviane Etienne Medical Care, P.C v. State Farm Mutual Automobile Ins. Co., 35 Misc.3d 127(A), 2012 N.Y. Slip Op. 50589(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012)). Thus, it follows that if an Assignor fails to comply with an insurer's timely and valid request for an IME, so long as the request strictly complies with the governing regulations, the insurer is entitled to dismissal of an action seeking no-fault benefits. (see Dover Acupuncture, P.C. v. State Farm Mutual Auto Ins. Co., 28 Misc.3d 140(A), 2010 N.Y. Slip Op. 51605(U) (App. Term 1st Dept. 2010); Great Wall Acupuncture, P.C. v. New York Central Mutual Fire Insurance Company, 22 Misc.3d 136(A), 2009 N.Y. Slip Op. 50294(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009)). In order for Respondent to make a prima facie showing of its defense based upon an assignor's failure to appear at scheduled IMEs, it has to demonstrate that its initial and follow-up requests for verification were timely issued pursuant to 11 NYCRR Section 65-3.5(b) and 65-3.6(b) and establish that the assignor failed to appear at the IMEs (see Essential Acupuncture Services, P.C. v. Ameriprise Auto & Home Ins. Co., 2012 N.Y. Slip Op. 52404(U) (App. Term 2nd, 11th and 13 Jud. Dists. 2012); Urban Radiology, th P.C. v. Clarendon National Insurance Company, 31

Misc.3d 132(A), 2011 N.Y. Slip Op. 50601(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2011); Advanced Medical, P.C. v. Utica Mutual Insurance Company, 23 Misc.3d 141(A), 2009 N.Y. Slip Op. 51023(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2009)).

In Neptune Medical Care, P.C. v Ameriprice Auto & Home Insurance, 48 Misc3d 139 (A) (App. Term 2d, 11th & 13th Jud. Dists. 2015) the court held that IME scheduling letters issued more than 15 business days after receipt of a bill and also more than 30 calendar days after its receipt are nullities. The ability to toll the 30-day deadline within which an insurer is required to pay or deny a bill through the issuance of a verification request pursuant to 11 NYCRR 65-3.8(a) does not grant an insurer an additional opportunity to make requests for verification that would otherwise be untimely. Based upon the record before me the IME requests are untimely. The Court in Neptune Medical Care, P.C. supra held that as per the Regulations: "any additional verification required by the insurer to establish proof of claim shall be requested within 15 business days of receipt of the [NF-3]" (11 NYCRR 65-3.5 [b] [emphasis added]). Defendant did not request that plaintiff appear for an IME until more than 15 business days, and even more than 30 calendar days (see generally 11 NYCRR 65-3.8 [l] [providing that deviations from the verification time frames reduce the 30 days to pay or deny the claim by the same number of days that the request was late]), after it had received the bills at issue. Thus, even if the IME scheduling letters were timely with respect to any other pending claims which may exist but are not before us, they were untimely with respect to the bills at issue.

Indeed, this would be true even though defendant had tolled the 30-day period within which it was required to pay or deny the bills at issue, by timely requesting verification pursuant to 11 NYCRR 65-3.8 (a), as the Regulations do not provide that such a toll grants an insurer additional opportunities to make requests for verification that would otherwise be untimely. Consequently, the IME scheduling letters were nullities with respect to the bills at issue..." The first letter requesting an IME was dated 9/26/19. The bill at issue was received on 8/05/19. It is clear that the initial IME scheduling letter was issued beyond 30 days of receipt of the bills and thus was a nullity. See, Neptune Medical Care, PC v. Ameriprise Auto & Home Ins., 48 Misc3d 139(A) (App Term, Aug. 5, 2015) See also 11 NYCRR 65-3.5 (b).

Applicant asserts that Respondent is not permitted to "stack" verification requests in order to lengthen its time to pay or deny a particular bill and that Respondent was required to request the IME of the Applicant within 30 business days of receipt of the bill. Applicant has asserted that the holding in the case of Neptune Medical Care, P.C. v. Ameriprise Auto & Home Insurance (see 48 Misc.3d 139(A), 2015 N.Y. Slip Op. 51220(U) (App. Term 2nd 11 and 13 Jud. Dists. 2015) supports these principles. The Neptune court held that even if the insurer had tolled the 30-day period within which it was required to pay or deny the bills at issue by issuing requests for verification, those verification requests do not allow the insurer to make subsequent verification requests that would otherwise be untimely".

After a careful consideration of the evidence, I find for the Applicant. Based upon the holding in Neptune, Respondent's scheduling letters for the IME of the Applicant for date of service 7/01/19, to be untimely and therefore a nullity. It is clear from the holding in Neptune that the timeliness of a request for an IME is evaluated with respect to each individual bill and that for certain bills from the same provider the request may be untimely whereas for other bills the request might be timely. In view of the foregoing, I find that Respondent could not rely on the failure of the Applicant to appear for these IME as a defense to the claim for reimbursement.

With regard to the diclofenac gel, Dr. Chiu opines that topical non-steroidal anti-inflammatory medications such as Diclofenac gel and tizanidine may be indicated in limited circumstances such as when there is a relative contraindication to the use of oral anti-inflammatories. He further noted that the treatment of choice according to these Guidelines would have been to provide a non-selective, oral non-steroidal anti-inflammatory medication, with or without an oral muscle relaxant. According to Dr. Chiu, acute and chronic low back pain, widespread musculoskeletal pain, does not support the use of topical non-steroidal anti-inflammatory medications. Based on the foregoing, Dr. Chiu concluded that the medication was not medically necessary.

I find that the peer review report set forth a sufficiently detailed factual basis and medical rationale to successfully rebut the presumption of medical necessity attached to Applicant's claim form, and establish prima facie that the billed for services were not medically necessary.

Based upon the foregoing, respondent has set forth a cogent medical rationale in support of its defense. Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, supra.

In opposition to the peer review report, Applicant offers a very detailed rebuttal by the treating physician, Jordan Fersal, MD. Dr. Fersal states: The patient has prescribed the topical medications as patients cannot take oral pain medication for a longer period of time as it may increase the chances of unwanted effects. Further, the oral medication cannot be taken more often than one dose after every eight hours; thus in between the doses, the patient can use the aforementioned topical gel. There are instances when patients get sudden and severe episodes of pain at a particular injured area which requires urgent medical treatment. The ultimate goal that motivates the development of topical preparations is the improvement of patient compliance to medical treatment, by providing efficient pain relief.

The conflicting medical expert opinions submitted by the parties sufficed to raise an issue of fact as to the medical necessity of the treatment underlying the provider's 13th Jud Dists., March 11, 2014); Pomona Med. Diagnostics, P.C. v. Praetorian Ins. Co., 2013 NY Slip Op 52131(U) (App Term 1st Dept., Dec. first-party No-Fault claim. See, Advanced Orthopedics, PLLC v. New York Cent. Mut. Fire Ins. Co., 2014 NY Slip Op 50418(U) (App Term, 2d, 11th & 13. 2013).

After careful review of the record, I find Dr. Fersal's rebuttal persuasive. Here, Dr. Fersal addresses the conclusions of Dr. Chiu with relevant and meaningful reference to the clinical record. Dr. Fersal states the specific findings led him to prescribe the topical gel and not an oral NSAID. In this regard, I find the opinion of Dr. Fersal to be more persuasive than the opinion of Dr. Chiu. Accordingly, Applicant's claim is granted in its entirety.

Reimbursement as requested is due and owing herein. This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
	M & D Elite Pharmacy LLC	07/01/19 - 07/01/19	\$1,031.09	Awarded: \$1,031.09
Total			\$1,031.09	Awarded: \$1,031.09

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/13/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. See generally, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment.

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5).

- 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 Suffolk

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

06/26/2021
(Dated)

Amanda R. Kronin

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:
58cb4af8e0b4f6873b9b08f2e02f8c6e

Electronically Signed

Your name: Amanda R. Kronin
Signed on: 06/26/2021