

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Hidden Dragon Acupuncture PC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-20-1156-3723

Applicant's File No. N/A

Insurer's Claim File No. 675965-04

NAIC No. 16616

ARBITRATION AWARD

I, Brian Rudolph, 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: NA

1. Hearing(s) held on 08/13/2021
Declared closed by the arbitrator on 08/13/2021

Lee-Ann Trupia, ESQ. from The Law Offices of Hillary Blumenthal P.C. (Melville) participated for the Applicant

Helen Cohen, ESQ. from American Transit Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,232.50**, 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

Applicant seeks reimbursement of charges for an Office Visit, numerous Follow-ups, and numerous of Acupuncture, "cupping", and Infrared treatments performed between 4/4/17 and 7/20/17 on the claimant (NA 44-year-old female passenger), following a 2/14/17 motor vehicle accident. Respondent claims the Claimant failed to appear at two properly scheduled Examinations Under Oath (EUO) and denied the claims for dates of service between 4/4/17 and 6/29/17 on that basis. Respondent timely denied claims based upon the Independent Medical Examination (IME) conducted by Eric Roth, M.D. dated 5/16/17, and denied the claims for dates of service between 7/6/17 and 7/20/17 on that basis.

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in the ADR CENTER. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ADR CENTER maintained by the American Arbitration Association.

EUO NO-SHOW

The regulations contemplate an examination under oath as a means of verification, 11 NYCRR 65-3.5(e). An examination under oath is a condition of coverage under a policy of insurance.

An insurer is required to show that it twice duly demanded an examination under oath (EUO) and that the proposed examinee twice failed to appear to sustain its defense of breach of a policy condition, *IDS Property Casualty Ins. Co. v. Stracar Medical Services*, 116 A.D.3d 1005, 985 N.Y.S.2d 116 (2d Dept. 2014).

Respondent denied the claims based upon Claimant's failure to attend two scheduled Examinations Under Oath. Respondent argues that Respondent has proven timely mailing of the notices, so therefore, the claims were denied based a condition precedent and therefore all claims are denied retroactively to the date of loss.

If an eligible injured person fails to comply with an insurer's timely and valid request for an EUO/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). To prevail, a respondent must demonstrate that it requested that the applicant appear for Examinations Under Oath pursuant to the No-Fault policy of insurance, and that the applicant failed to appear on at least two occasions. *American Tr. Ins. Co. v. Solorzano*, 108 A.D.3d 449 (1st Dep't 2013). In the Second Department, it is also required to prove timely denials. *Interboro Ins. Co. v. Clennon*, 113 A.D.3d 596, 597 (2d Dep't 2014). However, in the First Department, there is no requirement to timely deny a claim based upon the failure to appear for an Examination Under Oath, as it is an absolute coverage defense. *Unitrin Advantage Ins. Co. v. Bayshore Physical Therapy, PLLC*, 82 A.D.3d 599 (1st. Dept., 2011).

The examinations under oath were scheduled by Respondent. The EUO scheduling letters were sent on 6/9/17 and 9/1/17 for examinations on 8/31/17 and 10/20/17. Respondent has failed to provide any proof of the alleged non-appearances by the Claimant for the 10/20/17 EUO.

Therefore, an award shall be issued in favor of the Applicant for dates of service between 4/4/17 and 6/29/17 in the amount of **\$3,437.64**.

IME CUT-OFF

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 2nd, 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. Slip Op 52116 (App. Term 1 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). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." Nir supra.

In support of its contention further treatment was not medically necessary respondent relies upon the examination report of Eric Roth, M.D. dated 5/16/17. A review of the examination report reveals all tests were objectively negative and unremarkable. The results of the examination presented a cogent medical rationale as to why further benefits were terminated. 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 applicant offers a rebuttal from Longyu Ma, L.Ac. The affidavit of Dr. Ma fails to meet the burden of persuasion in rebuttal. I do not believe Dr. Ma's affidavit sufficiently rebuts the IME report of Dr. Roth. Therefore, based upon all of the foregoing reasons; applicant has failed to meet its burden.

Based on the foregoing, the claims for dates of service between 7/6/17 and 7/20/17 are denied in their entirety.

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
	Hidden Dragon Acupuncture PC	04/04/17 - 04/28/17	\$1,079.38	Awarded: \$1,079.38
	Hidden Dragon Acupuncture PC	05/02/17 - 05/12/17	\$282.57	Awarded: \$282.57

	Hidden Dragon Acupuncture PC	05/17/17 - 05/30/17	\$640.40	Awarded: \$640.40
	Hidden Dragon Acupuncture PC	06/02/17 - 06/12/17	\$538.73	Awarded: \$538.73
	Hidden Dragon Acupuncture PC	06/16/17 - 06/29/17	\$896.56	Awarded: \$896.56
	Hidden Dragon Acupuncture PC	07/06/17 - 07/14/17	\$538.73	Denied
	Hidden Dragon Acupuncture PC	07/18/17 - 07/20/17	\$256.13	Denied
Total			\$4,232.50	Awarded: \$3,437.64

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/10/2020 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. However, the regulations toll the accrual of interest when 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 Insurance Department regulations." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the particular denial at issue was timely. *LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co.*, 12 N.Y.3d 217 (2009).

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(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6(i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 11 NYCRR 65-4.6(d).

- 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 Queens

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

09/13/2021

(Dated)

Brian Rudolph

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:
572b27fda8d95159644da94079fc0018

Electronically Signed

Your name: Brian Rudolph
Signed on: 09/13/2021