

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mountain Surgery Center
(Applicant)

- and -

Avis Budget Group
(Respondent)

AAA Case No. 17-19-1149-7215

Applicant's File No. 00052360

Insurer's Claim File No. 188055338001

NAIC No. Self-Insured

ARBITRATION AWARD

I, Evelina Miller, 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: DG

1. Hearing(s) held on 08/30/2021
Declared closed by the arbitrator on 08/30/2021

Andrew Saraga Esq from Drachman Katz, LLP participated for the Applicant

Todd Hyman Esq from Brand Glick & Brand, Esqs. participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 16,325.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the time of the hearing Applicant amended amount in dispute to 1,423.89.
Respondent conceded that this amount is proper pursuant to the fee schedule.

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

3. Summary of Issues in Dispute

The dispute arises from the underlying automobile accident on December 1, 2018, in which the Assignor (DG), a 41-year-old-male was involved. Thereafter, Assignor sought private medical attention and was eventually evaluated by Applicant with complaints of radiating neck pain, as well as radiating lower back pain. Eventually patient was recommended to undergo nerve block injection which was performed on 8/13/19. Respondent denied Applicant's bill for date of service of 8/13/19 based on the IME of Dr

Richard Weiss performed on 6/4/19, all no-fault benefits were terminated effective 7/7/19.

The issue presented at the hearing is whether Respondent made out a prima facie case of lack of medical necessity, and if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions contained in MODRIA which are maintained by the American Arbitration Association. These submissions are the record in this case. My decision is based on my review of that file, as well as the arguments of the parties at the hearing.

I find that Applicant establishes its prima facie showing of entitlement to recover first-party no-fault benefits by submitting evidentiary proof that the prescribed statutory billing forms, setting forth the fact and 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 Co.*, 5 A.D.3d 742, (2d Dept., 2004). Once an applicant establishes a prima facie case, the burden then shifts to the insurer to prove its defense. See *Citywide Social Work & Psy. Serv. P.L.L.C v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 2004, NY Slip Op 24034 [Civ. Ct., Kings County 2004]).

Medical Necessity:

A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination, a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. *Healing Hands Chiropractic, P.C., v. Nationwide Assur. Co.*, 5 Misc., 3d 975, 787 N.Y.S. 2d 645 (Civ.Ct., New York County, 2004); *King's Med. Supply Inc. v. Country Wide Ins. Co.*, 5 Misc. 3d 767, 783 N.Y.S. 2d 448.

Once Respondent submits an IME report or peer review that has a sufficient factual basis and medical rationale, then the courts have routinely found that Respondent has established its prima facie defense that the disputed medical service is medically unnecessary. *A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co.*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table, Text in WESTLAW), Unreported Disposition, 2007 WL 1989432, 2007 N.Y. Slip Op. 51342(U) (N.Y. Sup. App. Term Jul 03, 2007). See also, *Amaze Medical Supply Inc. v. Eagle Insurance Company*, 2003 NY Slip Op 51701 (U), 2 Misc.3d. 128 (App. Term 2d & 11 Dist.-2003).

IME by Dr. Richard Weiss M.D

On June 4, 2019, Assignor was examined by Dr. Richard Weiss M.D. in an orthopedic evaluation. Dr. Weiss reviewed the patient's medical history as well as performed an evaluation of the Assignor. Based on the medical records presented and the results of the evaluation, Dr. Weiss concluded that claimant has reached maximum improvement and medical treatment was no longer necessary.

At the time of the examination patient presented with subjective complaints of radiating pain in the neck and lower back. Examination of the patient revealed no positive objective findings. All diagnosis were noted to be resolved. In conclusion of the examination, Dr. Weiss concluded that no future acupuncture intervention was indicated.

In order for an applicant to prove that the disputed expenses were medically necessary, it must meaningfully refer to, or rebut, the conclusions set forth in the IME reports.

Ortho-Med Surgical Supply, Inc. v. Progressive Cas. Ins. Co., 2012 NY Slip Op 50149(U) (App Term 2d, 11th & 13th Jud Dists Jan. 24, 2012); *Yklik, Inc. v. Geico Ins. Co.*, 2010 NY Slip Op. 51336(U) (App Term 2d, 11th & 13th Dists. July 22, 2010); *High Quality Medical, P.C. v. Mercury Ins. Co.*, 2010 N.Y. Slip Op. 50447(U) (App Term 2d, 11th & 13th Dists. Mar. 10, 2010); *Pan Chiropractic, P.C. v. Mercury Ins. Co.*, 24 Misc.3d 136(A), 2009 N.Y. Slip Op. 51495(U) (App Term 2d, 11th & 13th Dists. July 9, 2009).

A letter of medical necessity sworn to by a provider who had examined assignor, along with other medical documentation, may be sufficient to rebut the IME and establish the medical necessity of the services rendered. See *Quality Psychological Servs., P.C. v. Mercury Ins. Group*, 2010 NY Slip Op 50601(U) (App Term 2d Dept., April 2, 2010). See also *Neomy Med., P.C. v. Geico Ins. Co.*, 2012 NY Slip Op 50145(U) (App Term 2d, 11th & 13th Jud Dists Jan. 24, 2012); *Vinings Spinal Diagnostic, P.C. v. Geico Gen. Ins. Co.*, 2010 NY Slip Op 51897(U) (App Term 2d Dept., Nov. 8, 2010) (an affidavit from a chiropractor "meaningfully referred to" the peer and "sufficiently rebutted the conclusions set forth therein"); *Park Slope Med. & Surgical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 22 Misc.3d 141(A), 2009 NY Slip Op 50441(U) (App Term 2d, 11th & 13th Jud Dists 2009).

Likewise, an affirmation from the provider's assignor's treating doctor who stated that he had examined assignor around the time of the IME and whose findings contradicted the findings of the IME doctors is sufficient to raise an issue of fact as to the medical necessity of the disputed services. *Triumph Assocs. Physical v. New York Cent. Mut. Fire Ins. Co.*, 43 Misc. 3d 143(A), 2014 NY Slip Op 50875(U) (App Term 2d Dept. 2014).

Rebuttal by Applicant

Applicant submits an evaluation of the patient performed on 7/25/19. At the time of the evaluation patient presented with complaints of radiating pain in the neck and lower back. It was noted that the patient had undergone more than 8 weeks of P.T., massage and acupuncture, which have not helped. Motor and sensory examinations was noted to be normal. Reflexes were normal. There was some tenderness to palpation noted in the cervical and lumbar region. Facet loading was positive. SLR was positive on the right. In conclusion of the examination epidural steroid injection was recommended.

Conclusion:

After reviewing all the evidence submitted, as well as considering the arguments presented at the hearing, I find the following. Initially I find that Respondent's IME report presented sufficient factual basis and medical rationale, to establish that its prima facie defense that the disputed medical service is medically unnecessary. *A Khodadadi Radiology, P.C. v. NY Cent. Mut. Fire Ins. Co. Supra.*

At the time of the examination patient presented with subjective complaints of radiating pain in the neck and lower back. Examination of the patient revealed no positive objective findings. All diagnosis were noted to be resolved. In conclusion of the examination, Dr. Weiss concluded that no future acupuncture intervention was indicated.

Applicant submits an evaluation of the patient performed on 7/25/19. At the time of the evaluation patient presented with complaints of radiating pain in the neck and lower back. It was noted that the patient had undergone more than 8 weeks conservative care. Motor and sensory examinations as well as reflexes were noted to be normal. There was tenderness and facet loading noted in the cervical and lumbar region. SLR was positive on the right. In conclusion of the examination epidural steroid injection was recommended.

Based on the above, I find Applicant submitted sufficient evidence to rebut the findings of the IME doctor. According to the examination report performed on 7/25/19 the patient had undergone 8 weeks of conservative care which had failed, patient continued to present with subjective complaints as well as positive objective findings. The patient was recommended to undergo pain management in the form of epidural steroid injection.

Since Applicant submitted sufficient evidence to rebut the findings of the IME doctor, I find that Applicant's claim for reimbursement is granted.

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
	Mountain Surgery Center	08/13/19 - 08/13/19	\$16,325.00	\$1,423.89	Awarded: \$1,423.89
Total			\$16,325.00		Awarded: \$1,423.89

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/05/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the motor vehicle accident occurred after April 5, 2002, interest shall be calculated at the rate of two percent per month, simple, calculated on a pro rata basis using a 30 day month. 11 NYCRR 65-3.9(a). In accordance with 11 NYCRR 65-3.9c, interest shall be paid on the claims totaling \$1,423.89 from the date the arbitration was commenced.

C. Attorney's Fees

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

Respondent shall pay Applicant an attorney's fee upon the amount awarded plus the interest, as calculated in section "B" above, and in accordance with 11 NYCRR 65-4.6(e), i.e., 20 percent of the amount of first party benefits, plus interest thereon. The minimum attorney's fee payable shall be in accordance with 11 NYCRR 65-4.6c. For cases filed after February 4, 2015, there is no minimum attorney's fee but there is a maximum fee of \$1,360.00. 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(b)."

- 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 Kings

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

09/29/2021

(Dated)

Evelina Miller

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:
bb69665f54696e36e933858076b86e53

Electronically Signed

Your name: Evelina Miller
Signed on: 09/29/2021