

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Aharon Gutterman MD, PLLC  
(Applicant)

- and -

Progressive Casualty Insurance Company  
(Respondent)

AAA Case No. 17-20-1153-8217

Applicant's File No. none

Insurer's Claim File No. 19-2569452

NAIC No. 24260

**ARBITRATION AWARD**

I, Valerie D. Greaves, 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: Patient/Claimant

1. Hearing(s) held on 09/29/2021  
Declared closed by the arbitrator on 09/29/2021

Walter Pisary from The Law Offices of Hillary Blumenthal P.C. (Melville) participated for the Applicant

Ashley Sforza from Progressive Casualty Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 3,119.44**, 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 in the sum of \$3119.44 for NCV/EMG of the upper and lower extremities performed on 10/30/2019, allegedly in connection with the treatment of injuries sustained by Patient (JZ) in a motor vehicle accident on 10/6/2019.

Respondent timely denied reimbursement contending that (1) Applicant billed in excess of the applicable fee schedule and (2) lack of medical necessity based on the peer review analysis report of Isandr Dumesh, MD, dated 12/11/2019.

Applicant's submission includes a peer rebuttal by Opeoluwa Eleyinafe, MD, dated 7/29/2020.

In response to the rebuttal is Dr. Dumesh's peer addendum dated 9/1/2020.

#### 4. Findings, Conclusions, and Basis Therefor

The decision below is based on the documents contained in the ADR Center as of the date of the hearing and the oral arguments of the parties. No witnesses testified at the hearing. All participants appeared remotely via Zoom.

The Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations [11 NYCRR 65-4.5 (o) (1) (Regulation 68-D)].

The Appellate Division, Second Department held that applicant "made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no-fault benefits were overdue." (Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004)). A "facially valid claim" is presented when it sets forth the name of the facility and/or health provider, date of the accident, the name of the patient, description of the services rendered, date of service(s) and the fees charged for those services. ( Vinings Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company, 186 Misc.2d 287; 717 NYS2d 466 (1<sup>st</sup> Dist. Ct. Nass. Co.)). Applicant has established a prima facie case of entitlement to reimbursement by submission of completed proof of claim, documenting the fact of the loss and the amount due.

Applicant is seeking reimbursement for NCV/EMG studies performed on 10/30/2019, allegedly in connection with the treatment of injuries sustained

by Patient (JZ) in a motor vehicle accident on 10/6/2019. Reportedly, Patient a male then 55 years old, was a restrained rear seat passenger when he became involved in the instant accident. Patient received immediate medical care in the emergency room of Good Samaritan Hospital, where he was treated and released. Patient was subsequently evaluated and underwent a course of conservative treatment including physical therapy, chiropractic care and acupuncture.

Patient initially presented to Aharon Gutterman, MD on 10/11/2019, the disputed NCV/EMG studies were conducted 19 days later on 10/30/2019; Dr. Gutterman's undated letter of medical necessity reads in pertinent part: *"There was slow improvement in his condition, and despite provided treatment during an extended period of time , the symptomatology was still persisting[a misstatement of fact since conservative treatment was initiated only 19 days prior to the testing]. Dr. Gutterman also asserts that "on the basis of the results derived from [the NCV/EMG] tests, we modified [Patient's] rehabilitation program to be more specifically tailored to [Patient's] conditions to provide the maximal effective treatment".* There is no documentation of any post-testing treatment alteration in the record.

Respondent timely denied reimbursement based on the peer review analysis report of Isandr Dumesh, MD, dated 12/11/2019. A persuasive peer review must contain a cogent basis for its opinion that Applicant deviated from medical community standards for the service under review or establish that the service was not medically necessary under the circumstances or demonstrate that the service was not causally related to the accident.

Respondent carries the initial burden of proof to timely raise and establish lack of medical necessity before the burden of proof shifts to the Applicant to establish that the disputed service(s) were medically necessary. If the insurer medical examination or peer review is not rebutted, the insurer is entitled to denial of the claim. Khodadadi Radiology v. New York Central, 16 Misc.3d 131(A), 841 N.Y.S.2d 824, (App. Term 2d & 11th Dists. (2007); Dayan v. Allstate Ins. Co., 49 Misc. 3d 151 (A), 29 N.Y.S. 3d 846, 2015 NY Slip Op 51751 (U) (App. Term 2d, 11th & 13th Dists. 2015). "...Once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb'." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., (2005). Where a peer review or insurer medical examination findings provide a factual basis and medical rationale for the opinion that a particular service is not medically necessary and Applicant fails to present any evidence to refute

that showing, the claim should be denied. Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 21 Misc.3d 142(A), 880 N.Y.S.2d 223 (Table), 2008 N.Y. Slip Op. 52450(U), 2008 WL 5146967 (App. Term 2d & 11th Dists. (2008)).

When the issue in contention involves the fee schedule, Respondent must first demonstrate that it has credibly established the basis of its denial(s) before the burden of proof shifts to Applicant to establish that Respondent's interpretation was contrary to No-Fault regulations and/or the applicable fee schedule. After Respondent meets this burden, Applicant must establish a prima facie case of entitlement to reimbursement by demonstrating credible evidence that Respondent's fee schedule contention(s) are incorrect. (See, Continental Medical PC v. Travelers Indemnity Company, 11 Misc. 3d 145(A), 2006 N.Y. Slip Op. 50841 (U) (App. Term 1st Dept. 2006); Westchester Medical Center v. Nationwide Mut. Ins. Co., 78 A.D.3d 1168, 911 N.Y.S.2d 907 (2d Dept. 2010). It is noted that a review of the record fails to support Respondent's fee schedule defense.

Respondent's peer reviewer, Isandr Dumesh, MD, advised that the disputed NCV/EMG of the upper and lower extremities were not medically necessary in pertinent part due to the following:

*"On 10/11/19, the claimant presented to Aharon Gutterman, MD, PLLC with the following complaints: pain in the neck and lower back. The physical examination revealed musculoskeletal injuries of the cervical spine and lumbar spine. The claimant was diagnosed with cervicalgia, segmental and somatic dysfunction of cervical region, cervicobrachial syndrome, cervical disc disorder, cervical radiculopathy, myalgia, muscle spasm of the back, lumbago, intervertebral disc disorder, myositis, lumbosacral radiculopathy. The claimant was started on physical therapy, was referred for cervical and lumbar epidural injections and recommended manipulation under anesthesia. On 10/30/19, the claimant was re-evaluated at the treating facility. At the time of this evaluation, the claimant reported occasional neck and lower back pain with radiation to the upper and lower extremities. Following the evaluation, the claimant underwent Upper and Lower Extremities EMG/NCV/F/H testing and was recommended to continue the present conservative therapy regimen...*

*In this particular case, the claimant sustained injuries in the motor vehicle accident, and was started on the conservative therapy following the initial evaluation of 10/11/19. The EMG/NCV/F/H testing was performed approximately three weeks later. According to*

*the records, the claimant has been undergoing the conservative therapy regimen on a continuous basis. There was no indication that any alternative treatment options were considered at that time and that any future therapy decisions were dependent upon the information obtained from the performance of the Upper and Lower Extremities EMG/NCV testing. The diagnoses in this case could have been made clinically, based on the subjective complaints and physical examination findings. There was no evidence that the results of the Upper and Lower Extremities EMG/NCV/F/H testing could have been incorporated into the treatment course at that point or affect any future treatment-related decisions."*

Applicant's peer rebuttal written by Opeoluwa Eleyinafe, MD, dated 7/29/2020, asserts that the testing was medically necessary because: *"Despite receiving conservative treatment, the patient did not find improvement in his conditions (when in fact conservative treatment had been initiated just 19 days earlier); therefore on 10/30/2019, he presented to Dr. Eleyinafe for an electrodiagnostic consultation...EMG/NCV studies of the upper and lower extremities performed on 10/30/2019 revealed evidence of the left ulnar sensory nerve, axonal and demyelinating peripheral neuropathy of the upper extremity, bilateral sural sensory nerves, and the left superficial peroneal sensory nerve, demyelinating peripheral neuropathy of the lower extremity, left C5-C7 cervical radiculopathy...Hence, EMG/NCV studies were performed to r/o cervical and lumbar radiculopathy and neuropathy. Although the peer rebuttal maintains that the testing was "...performed with a view to help in planning the patient's plan of care based on test results," there is no indication that Patient's treatment plan was altered due to the results of the testing. Although Patient's conservative treatment program was initiated on 10/11/2019 [the same date as Dr. Gutterman's initial examination], Dr. Gutterman's treatment plan recommended cervical epidural injection, lumbar epidural injection, as well as, manipulation under anesthesia because "conservative treatment to date has had minimal results in returning the patient to pre-injury status and a more aggressive form of treatment is necessary". It is the opinion of this Arbitrator that the rationale for Dr. Gutterman's treatment plan misrepresents the duration and efficacy of Patient's not yet begun conservative treatment program, and directly contradicts the rationale for the testing expressed by Dr. Eleyinafe.*

In response to the rebuttal, Dr. Dumesh's peer addendum report reiterated his peer review discussion and additionally opined that Applicant's rebuttal *"did not provide comprehensive arguments as to why [Patient needed the disputed testing] in the setting of an ongoing physical therapy regimen, and how the test results would change the treatment approach or outcome".* Dr.

Dumesh further opined that Patient's conservative treatment program was not reliant on the results of the NCV/EMG studies and there is no indication that Patient's conservative treatment program had been changed after the NCV/EMG studies.

I find that Respondent has established lack of medical necessity by a preponderance of the credible evidence.

I further find that Applicant's documentation is insufficient to credibly rebut lack of medical necessity.

Accordingly, Applicant is not entitled to No-Fault benefits.

This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator.

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 New York

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

10/21/2021  
(Dated)

Valerie D. Greaves

**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:**  
54d8571f12b77dfe2a26474a9b9873c9

### **Electronically Signed**

Your name: Valerie D. Greaves  
Signed on: 10/21/2021