American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

| | | |
|---|---|---|
| NYC Southern Blvd Medical P.C. (Applicant) | AAA Case No. | 17-20-1186-9236 |
| | Applicant's File No. | ROPC 24.01 |
| - and - | Insurer's Claim File No. | IMA9129-003 |
| | NAIC No. | 38130 |
| St. Paul Travelers Insurance Co. (Respondent) | | |

**ARBITRATION AWARD**

I, Bryan Hiller, 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 12/08/2021
   Declared closed by the arbitrator on 12/08/2021

   Michael Lamond, Esq. from Akiva Ofshtein PC participated in person for the Applicant

   Albert Galatin from Law Offices of Tina Newsome-Lee participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 3,418.70**, 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 for the fees associated with upper and lower extremity EMG-NCV testing Assignor attended on August 13, 2020 in connection with injuries sustained in a motor vehicle accident on July 9, 2020 in light of the Respondent's Peer Review performed by Dr. Peter Chiu on November 17, 2020 stating that the services were not medically necessary?

4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement, along with interest and counsel fees, under the No-Fault Regulations, for the costs associated with upper and lower extremity EMG-NCV testing performed on August 13, 2020 in connection with injuries sustained by Assignor in a motor vehicle accident on July 9, 2020. Payment for the electrodiagnostic exam was denied following a review of the medical records and a Peer Review report by Dr. Peter Chiu on November 17, 2020 at Respondent's behest after which payment for the EMG-NCV test was denied as not medically necessary. The denial was timely. This decision is based upon the written submissions of counsel for the respective parties as well as oral argument at the hearing conducted on December 8, 2021. I have reviewed the documents contained in the Record as of the date of the hearing. At the time of the hearing, Respondent stated that it was not pursuing a fee schedule defense so I deem that defense abandoned.

Assignor, a then 63 year old female pedestrian, was struck by an automobile on July 9, 2020. Following the accident, Assignor was taken to the emergency room at Methodist Hospital where she was evaluated, had x-rays that revealed no evidence of fracture, treated and discharged. Due to continued symptomology, Assignor came under the care of multiple conservative treatment providers. When symptoms persisted despite treatment, Assignor was referred to Dr. Hong Park for an electrodiagnostic evaluation. Following the evaluation, Dr. Park diagnosed shoulder and knee sprains and recommended the subject EMG-NCV testing. The EMG-NCV testing at issue was performed at Applicant NYC Southern Blvd Medical PC's facility on August 13, 2020 and the notes related to that treatment are attached to the Record.

Upon proof of a prima facie case by the applicant, the burden shifts to the insurer to prove that the services were not medically necessary (see A.B. Medical Services, PLLC v. Lumbermens Mutual Casualty Company, 4 Misc.3d 86, 2004 N.Y. Slip Op. 24194 (App. Term 2d and 11th Jud. Dists. 2004)).

The Respondent must establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity (see Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co., 21 Misc.3d 142A, 880 N.Y.S.2d 223 (2nd Dept. 2008)). Additionally, it must be proven that said rationale is supported by evidence of the generally accepted medical/professional practices (see Prime Psychological Servs., P.C. v. Progressive Cas. Ins. Co., 24 Misc.3d 1244A, 901 N.Y.S.2d 902 (Civ. Ct. Richmond Cty. 2009)). Once the Respondent makes a sufficient showing to carry its burden of coming forth with evidence of lack of medical necessary, the Applicant must rebut it (see A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Insurance, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (2007)). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/Peer doctor with his own facts (see Park Slope Medical and Surgical Supply, Inc. v. Travelers, 37 Misc.3d 19 (2012)).

To support their position, the Respondent submitted a denial based upon the peer review report of Dr. Peter Chiu, dated November 17, 2020, which he outlined the course of the treatment prior to the performance of the testing and he argued that the treating

physician's records did not indicate how the performance of the test would aid in devising, altering, reducing the number of visits or enhancing the Assignor's clinical prognosis. Dr.Chiu pointed to minimal non-specific neurological deficit. Dr. Chiu noted that the treating physician's records failed to note a consideration for any alternative invasive or surgical treatment, no signs of rapidly declining neurological condition or no diagnostic dilemma to be resolved. Dr. Portnoy specifically noted that there was diagnosed cervical and lumbar radiculopathy clinically. Lastly, Dr. Chiu argued that the standard of care after a motor vehicle accident would be a reasonable trial of conservative treatment, and in the face of progressive neurological or orthopedic deficits, perform MRIs. Only with progressive and worsening neurological deficits would an EMG-NCV be considered but the testing should not be prescribed in the routine course of care. Dr. Chiu cited to medical authority regarding his positions and concluded that the EMG-NCV was not medically necessary.

I find that Respondent has established a lack of medical necessity for the EMG-NCV testing, with the conclusions of Dr. Chiu supported by sufficient evidence and a medical rationale (see Nir v. Allstate, 7 Misc 3d 544; 796 N.Y.S.2d 857 (Civ. Ct., Kings, 2005)). When the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see West Tremont Medical Diagnostic P.C., v. GEICO, 13 Misc.3d 131 (A), 824 NYS 2d 759 (App. Term 2d & 11th Dists, 2006)). Dr. Chiu's reliance on the prior examinations with limited neurological deficits and clinically obvious symptoms of radiculopathy was enough to shift the burden to the Applicant to prove the medical necessity of the testing.

Applicant submitted a rebuttal by prescribing chiropractor Dr. Hong S. Park. Dr. Park outlined the course of care and noted that the Assignor complaints of radiating pain approximately one months post-accident. Dr. Park argued that the testing was done to differentiate between radiculopathy and other neurological conditions that was not able to be resolved without the electrodiagnostic testing.

Based upon the foregoing, I find that Applicant, the treating physician of Assignor, has failed to established its own evidence of medical necessity for the upper and lower extremity EMG-NCV study by a preponderance of the evidence. The findings of Respondent's peer review report were sufficient to shift the burden to the Applicant to prove the necessity of the testing. In this regard, I note the lack of findings that could have led to a differential diagnosis as well as the clear clinical diagnosis of radiculopathy without any mention of alternative neuropathic diagnoses. The ordering and performing physician, Dr. Park failed to rebut, the peer reviews contentions regarding the difference between the lack of a differentiate diagnosis with any specificity or the differences between ruling out or ruling in a diagnosis of radiculopathy to satisfy Applicant's burden. It was clear the peer reviewer reviewed the examination results with a clear diagnosis of radiculopathy. Dr. Park's conclusory position that there were potential differential diagnoses of without establishing any examination findings that would warrant such potential diagnoses. Lastly, the clear clinical diagnoses of radiculopathy by multiple physicians on their reports was significant. As such,

Applicant's claim for the EMG-NCV is denied. However, the peer review failed to address the initial visit. As the initial was not addressed, Applicant's claim for the initial evaluation in the amount of $299.26 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** | **Status** |
|---|---|---|---|---|
| | **NYC Southern Blvd Medical P.C** | **08/13/20 - 08/13/20** | **$3,418.70** | **Awarded: $299.26** |
| **Total** | | | **$3,418.70** | **Awarded: $299.26** |

B. The insurer shall also compute and pay the applicant interest set forth below. 12/03/2020 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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to no minimum and a maximum of $1360.00. However, if the benefits and interest awarded thereon is equal to or less than the Respondent's written offer during the conciliation process, 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 Nassau

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

12/11/2021
(Dated)

Bryan Hiller

**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:**
c192ced8c7da83c17e557ac4b973f083

**Electronically Signed**

Your name: Bryan Hiller
Signed on: 12/11/2021