

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Brain & Spine Medical Services PLLC d/b/a	AAA Case No.	17-21-1207-2828
Invision Health	Applicant's File No.	RFA21-297755
(Applicant)	Insurer's Claim File No.	C020964NY19
- and -	NAIC No.	10914

Kemper Independence Insurance Company
(Respondent)

ARBITRATION AWARD

I, Tasha Dandridge-Richburg, 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: EIP

1. Hearing(s) held on 01/03/2022
Declared closed by the arbitrator on 01/03/2022

Dara Goodman, Esq. from Russell Friedman & Associates LLP participated in person for the Applicant

Arthur DeMartini, Esq. from De Martini & Yi, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,146.41**, 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 63 year-old EIP was a passenger in a motor vehicle that was involved in an accident on April 20, 2019. At issue in this case is \$2146.41 for MRIs of the left hip, cervical spine, and lumbar spine performed on date of service May 23, 2019. The studies were timely denied based upon a peer review prepared by Richard Kanoff, MD, dated July 8, 2019.

4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), 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. This Award is based upon a review of all of the documents contained within the ADR Center electronic case file as of the date of the Award, as well as upon any oral arguments by or on behalf of the parties and any testimony given during the hearing.

DR. KANOFF'S PEER REVIEW

Dr. Kanoff prepared a peer review of the appropriateness of the MRIs of the left hip, cervical spine, and lumbar spine performed on date of service May 23, 2019. Following his review of records, Dr. Kanoff concluded that the diagnostic studies were not medically necessary.

With respect to the left hip MRI, Dr. Kanoff cites to the National Imaging Associates Guidelines and argues that the EIP did not meet any of the criteria for the MRI. The National Imaging Associates Guidelines provides the following indications: evaluation of suspicious mass or tumor with an unconfirmed cancer diagnosis, evaluation of known cancer, evaluation of known or suspected infection or inflammatory disease, evaluation of avascular necrosis, evaluation of suspected or known autoimmune disease such as rheumatoid arthritis, evaluation of known or suspected fracture, preoperative evaluation, postoperative evaluation, and an abnormal bone scan. In terms of other specific indications for hip MR imaging, it suggested evaluation of a slipped capital femoral epiphysis, evaluation of a patient with hip prosthesis, and suspected labral tear. Also noted as an indication for MR imaging "for evaluation of persistent pain ..." This is described as chronic pain lasting three months or more and unresponsive to conservative therapy for a minimum of four weeks...

With respect to the lumbar spine MRI, Dr. Kanoff cites Guidelines established by the American College of Occupational and Environmental Medicine, which indicate that "MRI is not recommended for acute back pain or acute radicular pain syndromes in the first six weeks in the absence of red flags."

With respect to the cervical spine MRI, Dr. Kanoff argues the study was unnecessary because the neurosurgical evaluation did not mention any radicular complaints

Analysis

Once an applicant has established a prima facie case of entitlement to No-Fault benefits, the burden then shifts to the insurer to prove that the disputed services were not medically necessary. To meet this burden, the insurer's denial(s) of the applicant's claim(s) must be based on a peer review, IME report, or other competent medical evidence that sets forth a clear factual basis and a medical rationale for the denial(s). *Amaze Medical Supply, Inc. v. Eagle Ins. Co.*, 2 Misc. 3d 128A (App. Term, 2nd Dept.,

2003); *Tahir v. Progressive Cas. Ins. Co.*, 12 Misc. 3d 657 (N.Y.C. Civ. Ct., N.Y. Co., 2006); *Healing Hands Chiropractic, P.C. v. Nationwide Assurance Co.*, 5 Misc. 3d 975 (N.Y.C. Civ. Ct., N.Y. Co., 2004); *Millennium Radiology, P.C. v. New York Cent. Mut.*, 23 Misc. 3d 1121(A) (N.Y.C. Civ. Ct., Richmond Co., 2009); *Beal-Medea Prods., Inc. v GEICO Gen. Ins. Co.*, 27 Misc. 3d 1218(A) (N.Y.C. Civ. Ct., Kings Co., 2010); *All Boro Psychological Servs., P.C. v GEICO Gen. Ins. Co.*, 34 Misc. 3d 1219(A) (N.Y.C. Civ. Ct., Kings Co., 2012).

I find that Kanoff's peer review with respect to the cervical spine MRI, fails to set forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the study in dispute herein and as such, I find that Respondent has failed to establish a lack of medical necessity for same. With respect to the cervical spine MRI, Dr. Kanoff failed to cite to a medical standard in support of his argument. Therefore, his peer fails the test in *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544 (NYC Civ. Ct., Kings Co., 2005).

I find that Dr. Kanoff's peer review with respect to the left hip and lumbar spine MRIs sets forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the studies in dispute herein and, as such, I find that Respondent has established a lack of medical necessity for same. Therefore, the burden has now shifted to Applicant to present its own evidence of medical necessity. *See Amato v. State Farm Ins. Co.*, 40 Misc. 3d 129(A), App. Term, 2nd Dept., 2013; *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A), App. Term, 2nd Dept., 2006).

After a thorough review of the evidence, I find that Dr. Kanoff's peer is successfully rebutted by the results of the MRI studies and the medical evidence in the record. As Dr. Kanoff's report notes the EIP had undergone a lumbar spine MRI on April 1, 2019, which was described in Dr. Landi's May 17, 2019 report. According to Dr. Landi the prior study revealed disc pathology at the L34 and L4-5 levels. The study at issue also revealed disc pathology at the T11-12 and L5-S1 levels. With respect to the left hip MRI, the EIP had previously undergone a left hip X-ray, which was negative. Dr. Landi ordered the hip MRI for further evaluation of the EIP's hip, which said MRI revealed positive findings. For these reasons, Respondent's denial cannot be upheld.

Accordingly, I find for Applicant.

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
	Brain & Spine Medical Services PLLC d/b/a Invision Health	05/23/19 - 05/23/19	\$2,146.41	Awarded: \$2,146.41
Total			\$2,146.41	Awarded: \$2,146.41

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/10/2021 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 \$1360." *Id.* 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 Erie

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

01/04/2022
(Dated)

Tasha Dandridge-Richburg

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:
1b0ceeb763a2a859e96a6f78861f96d4

Electronically Signed

Your name: Tasha Dandridge-Richburg
Signed on: 01/04/2022