

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Accurate Monitoring LLC
(Applicant)

- and -

Allstate Fire & Casualty Insurance
Company
(Respondent)

AAA Case No. 17-21-1215-4406
Applicant's File No. AM-ANY-BXNY-066
Insurer's Claim File No. 0614761500
NAIC No. 29688

ARBITRATION AWARD

I, Anthony Kobets, 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 01/12/2022
Declared closed by the arbitrator on 01/12/2022

David Quinones, Esq. from Callagy Law, PC participated in person for the Applicant

John Palatianos, Esq. from Law Offices Of Karen L. Lawrence participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$527.07**, 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

In dispute is the Applicant's bill totaling \$527.07 for intraoperative neurophysiologic monitoring performed on the patient (CG) on 5/22/21 as a result of injuries alleged to have been sustained in a motor vehicle accident on February 4, 2021.

Respondent denied the monitoring based upon the peer review report of Cyrus Kao, M.D. dated 7/6/21. Was the Applicant entitled to reimbursement for the services provided to the EIP?

4. Findings, Conclusions, and Basis Therefor

The parties' representatives agreed that medical necessity was the sole issue in dispute herein.

The EIP (CG) was a 50-year old female passenger who was involved in a motor vehicle accident on February 4, 2021. Thereafter on 5/22/21, she underwent intraoperative neurophysiologic monitoring performed by the Applicant. Applicant seeks no-fault reimbursement for these services.

Bill for date of service 5/22/21 in the amount of \$527.07.

Respondent timely denied payment of the above referenced bill based upon the peer review report of Dr. Cyrus Kao dated 7/6/21. Dr. Kao's peer review was based upon his review of the available medical documents and he indicated, inter alia, that "According to medical standards of care, intraoperative neurophysiologic monitoring (IOM) is not recommended for routine elective low-risk spinal surgery or procedures including the following: Laminectomy (single level), discectomy, fusion (single level), anterior cervical discectomy and fusion (ACDF), epidural injection (steroid or analgesic), radiofrequency ablation/neurotomy procedures, or placement of spinal cord stimulator or intrathecal pain pump. Postoperative neurologic deficit has been highly correlated with intraoperative changes based on some monitoring modalities. However, an abnormal SSEP or dermatomal sensory evoked potential (DSEP) during surgery often does not correlate with postoperative neurologic injury because of a high false-positive rate."

Dr. Kao also explained that "[b]ased on the available medical records and appropriateness of the service in question, I have come to the determination of the medical necessity for the needle electromyography of upper extremities and intraoperative neurophysiologic monitoring was not met due to the following rationale: This is a claimant who has undergone lumbar percutaneous discectomy procedure. The conclusion from recent studies suggest that there is not sufficient evidence that the use of intraoperative neurophysiologic monitoring (IOM) has reduced rates of postoperative neurological complications. Recent studies show IOM during surgery often does not correlate with postoperative neurologic injury because of a high false-positive rate. As such, routine IOM for this type of procedure is questionable. As such, IOM performed for this procedure was not medically necessary nor according to medical standards of care." Respondent's counsel argued that the peer review met its burden regarding the lack of medical necessity.

"Where 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 Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006); A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co., 2007 NY Slip Op 51342(U).

Applicant's counsel argued that the peer review report failed to meet its burden regarding the lack of medical necessity for the services rendered by disregarding the patient's subjective complaints as well as the objective findings. Applicant also relied on a rebuttal report from Dr. Vladimir Gressel dated 12/4/21, wherein he indicated that "Spine surgery carries an inherent risk of damage to critical neural structures. Intraoperative neurophysiological monitoring (IONM) is frequently used to improve the safety of spine surgery by providing real-time assessment of neural structures at risk. Evidence-based guidelines for safe and efficacious use of IONM are lacking and its use is largely driven by surgeon preference and medicolegal issues."

The records herein indicated that Dr. Baruch Kim examined the patient on 05/19/2021 for complaints of neck pain, low back pain and bilateral shoulders pain. Examination of the cervical spine revealed paraspinal muscle spasms. Tenderness along cervical spinal processes, nuchal ridge, trapezius and facet lines. Cervical spine range of motion was limited with pain. Lumbar spine range of motion is limited due to pain. There are palpable taut bands with significant tenderness and spasms identified by palpation of the left L3-L4 paraspinal muscles... Neurological examination revealed diminished muscle strength of the lower extremities. The diagnosis was sprain of ligament of lumbar spine. The patient was recommended lumbar trigger point injections.

The patient underwent a percutaneous lumbar discectomy and decompression L4-L5, nucleus pulposus ablation L4-L5, modulation of annulus using bipolar L4-L5 and transforaminal lumbar epidural steroid injection L4-L5 on 05/22/2021 by Dr. Baruch Kim.

Based upon a review of the evidence and the arguments of counsel, I find that Dr. Kao's peer review sufficiently set forth the medical standard, a factual basis and persuasive medical rationale for his opinion regarding the lack of medical necessity for the intraoperative monitoring performed on the patient. Dr. Kao reviewed the available medical records and outlined the history of the treatment including the lack of justification to warrant the monitoring based on the patient's symptomology and response to treatment. I am persuaded by Kao's assessment of the medical records and explanation that "IOM performed for this procedure was not medically necessary nor according to medical standards of care."

I further find that the Applicant's proofs did not effectively rebut the arguments made in the peer review regarding this particular patient's necessity for the monitoring based on the patient's diagnosis. The Applicant's records failed to adequately explain why the services herein were medically necessary at that point in the patient's treatment regimen. I find that the patient's medical records did not adequately support the medical necessity for the services in dispute herein and instead supported the conclusions in the peer report. Where the assertions of a peer reviewer setting forth a factual basis and medical rationale for his determination that there was a lack of medical necessity for services rendered are un rebutted by the provider, judgment should be granted to the insurer. AJS Chiropractor, P.C. v. Travelers Ins. Co., 25 Misc.3d 140(A), 906 N.Y.S.2d 770 (Table), 2009 N.Y. Slip Op. 52446(U), 2009 WL 4639680 (App. Term 2d, 11th & 13th Dists. Dec. 1, 2009). Since the Applicant failed to adequately rebut the insurer's prima facie

showing of lack of medical necessity, Respondent's denial is upheld and the Applicant's claim is denied in its entirety. Hong Tao Acupuncture, P.C. v. Praetorian Insurance Company, 35 Misc.3d 131(A), 2012 N.Y. Slip Op. 50678(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2012). Thus, comparing the evidence presented by both parties against each other and the above referenced medical necessity standard, **I find in favor of the Respondent and deny reimbursement for the 5/22/21 date of service in the amount of \$527.07.** This decision is in full disposition of all claims for No-Fault benefits presently before this Arbitrator. 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.

This arbitrator has not made a determination that benefits provided for under Article 51 (the No-Fault statute) of the Insurance Law are not payable based upon the assignor's lack of coverage and/or violation of a policy condition due to the actions or conduct of Assignor. As such and in accordance with the provisions of the prescribed NYS Form NF-AOB (the assignment of benefits), Applicant health provider shall not pursue payment directly from Assignor for services which were the subject of this arbitration, notwithstanding any other agreement to the contrary.

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 Nassau

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

02/11/2022
(Dated)

Anthony Kobets

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:
aa76804e354b2321ee276fdb9c031f9a

Electronically Signed

Your name: Anthony Kobets
Signed on: 02/11/2022