

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Herschel Kotkes MD, PC
(Applicant)

- and -

Enterprise Rent A Car
(Respondent)

AAA Case No. 17-21-1227-2155

Applicant's File No. 2680112

Insurer's Claim File No. 16965696

NAIC No. Self-Insured

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 05/09/2022
Declared closed by the arbitrator on 05/09/2022

Neda Melamed, Esq. from Israel, Israel & Purdy, LLP (Great Neck) participated in person for the Applicant

Melanie Rosen, Esq. from McCormack, Mattei & Holler participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,180.76**, 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 39 year-old EIP was the driver of a motor vehicle that was involved in an accident on February 3, 2021. At issue in this case is \$1180.76 for treatment including cervical epidural injections with ultrasound guidance and trigger point injections performed on date of service August 5, 2021. The treatment was timely denied based upon an independent medical examination (IME) conducted by Douglas Unis, MD on July 2, 2021.

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.

Initially, I note that Respondent's denial notes that the claim was denied based upon IMEs by Dr. Unis dated July 2, 2021 and Getahun Kifle, MD dated July 20, 2021. At the hearing of this matter Respondent advised that it was not defending the instant claim based upon Dr. Kifle's IME. Therefore, Dr. Kifle's IME is not analyzed herein.

DR. UNIS' IME

On July 2, 2021, Dr. Unis conducted an orthopedic re-examination of the EIP. Dr. Unis previously examined the EIP on April 16, 2021. Dr. Unis' July 2, 2021 examination of the EIP's cervical spine, thoracic spine, lumbar spine, shoulders, elbows, wrists/hands, hips, knees, and ankles/feet all revealed full ranges of motion in all planes. Dr. Unis' diagnosis/impression was cervical, thoracic, and lumbar sprains - strains, resolved; bilateral shoulders sprains - strains, resolved; right knee sprain - strain, resolved; and right ankle sprain - strain, resolved. Following his examination and review of records, Dr. Unis concluded as follows:

Based on my examination, review of available medical records and history provided by the claimant, no treatment is necessary from an orthopedic viewpoint. There is no need for orthopedic treatment or physical therapy. It is my opinion that there is no necessity for household help, special transportation, diagnostic testing, durable medical supplies/equipment, massage therapy or surgery.

[The EIP] presented today for an orthopedic examination with complaints of pain to the neck, bilateral shoulders, mid back, low back, right knee and right ankle. In this particular case there was no complaint of tenderness, no muscle spasms and no decreased ranges of motion of the neck, mid back or low back. On examination of the bilateral shoulders there were no complaints of tenderness, no effusion and no decreased ranges of motion. On examination of the right knee there were no complaints of tenderness, no effusion and no decreased ranges of motion. On examination of the right ankle there were no complaints of tenderness, no swelling and no decreased ranges of motion. Therefore, no further physical therapy or orthopedic treatment is needed.

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 Dr. Unis' IME fails to set forth a clear factual basis and a medical rationale for Respondent's denial of Applicant's claim for the treatment in dispute herein and as such, I find that Respondent has failed to establish a lack of medical necessity for same. The evidence at ADR Center includes the report of a cervical spine MRI dated March 30, 2021, which revealed significant disc pathology including disc herniations at C2-3, C3-4, C4-5, and C5-6 among other findings. It does not appear that Dr. Unis was provided with this study as it is not noted in his list of reviewed records. His failure to review the EIP's diagnostic study renders his analysis incomplete and his report insufficient to meet Respondent's burden. Therefore, 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
	Herschel Kotkes MD, PC	08/05/21 - 08/05/21	\$1,180.76	Awarded: \$1,180.76
Total			\$1,180.76	Awarded: \$1,180.76

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/15/2021 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.

05/09/2022
(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:
7fdade112f78565fb0b30aee207ee1

Electronically Signed

Your name: Tasha Dandridge-Richburg
Signed on: 05/09/2022