

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metropolitan Medical and Surgical, P.C. (Applicant)	AAA Case No.	17-21-1221-9011
- and -	Applicant's File No.	152003
	Insurer's Claim File No.	0623643798 2CA
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

**ARBITRATION AWARD**

I, Mitchell Lustig, 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 06/22/2022  
Declared closed by the arbitrator on 06/22/2022

John Gallagher, Esq. from The Law Offices of John Gallagher, PLLC participated in person for the Applicant

Rachel Berzin, Esq. from Allstate Fire & Casualty Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,479.46**, 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 Applicant Metropolitan Medical and Surgical, P.C.'s claim as the assignee of a 64- year-old male injured in a motor vehicle accident on April 19, 2021, for reimbursement in the sum of \$1,479.46 for an EMG/NCV of the upper and lower extremities performed by Dr. Yekaterina Slukhinsky on June 8, 2021.

The aforesaid testing, which revealed evidence of bilateral L5-S1 lumbosacral nerve roots irritation, was recommended by Dr. Slukhinsky after examining the Assignor on June 8, 2021.

The Respondent timely denied the claim based upon a peer review by Dr. Cyrus Kao dated July 19, 2021 concluding that the EMG/NCV was not medically necessary. Thus, the issue presented for my determination is whether the Respondent has proved that the acupuncture services provided to the Assignor were not medically necessary.

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

I have reviewed the documents contained in the ADR Center. This decision is based upon the submissions of the parties and the arguments made by the parties at the hearing.

It is well settled that a health care provider establishes its prima facie entitlement to No-Fault benefits 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. Westchester Medical Center v. Lincoln General Insurance Company, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2<sup>nd</sup> Dept. 2009). I find that the Applicant has established a prima facie case.

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. A.B. Medical Services, PLLC v. Lumbermens Mutual Casualty Company, 4 Misc.3d 86, 2004 N.Y. Slip Op. 24194 (App. Term 2d and 11<sup>th</sup> Jud. Dists. 2004).

#### WHETHER THE SERVICES WERE MEDICALLY NECESSARY

In the event that an insurer relies on a peer review report or independent medical examination to demonstrate that a particular service was medically unnecessary, the medical expert's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. In addition, the expert's opinion must be supported by evidence of generally accepted medical/professional practice or standards. Nir v. Allstate Insurance Company, 7 Misc3d 544, 2005 N.Y. Slip Op. 25090 (N.Y. Civ. Ct. Kings Co. 2005). Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y. Civ. Ct. Kings Co. 2004).; Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance Company, 20 Misc.3d 144(A), 2008 N.Y. Slip Op. 51863(U) (App. Term 2<sup>nd</sup> and 11<sup>th</sup> Jud. Dists. 2008).

In concluding that the EMG/NCV of the upper and lower extremities was not medically necessary, Dr. Kao stated as follows in his peer review report dated July 19, 2021:

"This is a claimant with neurocompressive etiology already identified on diagnostic imaging. Clinical presentation corroborates with clinched diagnosis on diagnostic imaging. An EMG/NCS would not be elaborative or change the course of management for this claimant. As such, the EMG/NCS is not medically necessary and not according to the medical standard of care."

After careful review of the evidence, I find that the Respondent has not submitted sufficient evidence to satisfy its burden of proof that the EMG/NCV of the upper and lower extremities was not medically necessary. Dr. Kao fails to cite any persuasive medical authority and merely gives his opinion that the EMG/NCV testing was not medically necessary. The peer review doctor simply asserts in a conclusory fashion, without the citation of persuasive medical authority, that an EMG/NCV "would not change the course of management for this claimant."

The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. See Cambridge Medical, P.C. v. Government Employees Insurance Company, 18 Misc.3d 1144(A), 2008 N.Y. Slip Op. 50435(U) (N.Y. Civ. Ct. Richmond Co. 2008); Williamsbridge Radiology & Open Imaging v. Travelers Indem. Co., 2007 N.Y. Slip Op. 50224(U) (N.Y. Civ. Ct. Kings Co. 2007); City Wide Social Work & Psychological Services, PLLC v. Travelers Indemnity Company, 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y. Civ. Ct. 2004).

Without evidence of accepted medical practice, a peer reviewer's opinion is simply a different professional judgment which, in and of itself, does not establish that the disputed services were not medically necessary. Id.

Given that Dr. Kao failed to set forth a sufficient factual basis and medical rationale for his opinion that the EMG/NCV of the upper and lower extremities performed herein was not medically necessary, I find that the Respondent did not establish, *prima facie*, a lack of medical necessity for this disputed service.

Accordingly, the Respondent's denial based upon Dr. Kao's peer review is vacated and I find in favor of the Applicant in the sum of \$1,479.46.

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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
	Metropolitan Medical and Surgical, P.C.	06/08/21 - 06/08/21	\$1,479.46	Awarded: \$1,479.46
Total			\$1,479.46	Awarded: \$1,479.46

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/07/2021 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The insurer shall pay interest on the claim from October 7, 2021, the date that arbitration was requested, until such time as payment is made.

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 the applicant an attorney's fee equal to 20% of that total sum, subject to a maximum of \$1,360.00. See 11 NYCRR 65-4.6(d). 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 Section 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, Mitchell Lustig, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

06/24/2022

(Dated)

Mitchell Lustig

#### **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:**  
1333c9e39bd942a12f7c7cd858fdbb45

### **Electronically Signed**

Your name: Mitchell Lustig  
Signed on: 06/24/2022