

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Prompt Direct Supply Corp
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-21-1227-8693

Applicant's File No. NA

Insurer's Claim File No. 1099548-02

NAIC No. 16616

ARBITRATION AWARD

I, Melissa Abraham-LoFurno, 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: JM

1. Hearing(s) held on 09/07/2022
Declared closed by the arbitrator on 09/12/2022

Roman Kulik, Esq. from Kulik Law Firm, PC participated in person for the Applicant

Christopher Fingerhut, Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,355.25**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The Parties stipulated to Prima Facie and Fee Schedule.

3. Summary of Issues in Dispute

The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter.

The claimant in this case is a 44-year old male hereinafter "JM", who was a passenger involved in an accident that occurred on 06/27/21. Following the accident JM suffered injuries which resulted in the claimant seeking treatment. JM came under the care of

Applicant for the following DME: electric pad, knee orthosis, whirlpool, bed board, water circulating pump and LSO provided on 08/02/21. JM was also provided an LSO provided by Applicant on 08/10/21. Respondent denied the date of services at issue based on the peer review report of Dr. Peter Chiu dated 10/21/21 which found the LSO to be not medically necessary. All of the DME provided on 08/02/21 were denied based on the peer review report of Dr. Howard Levy dated 10/28/21 which found all of the DME to be medically unnecessary.

ISSUE:

Whether the DME at issue were medically necessary?

4. Findings, Conclusions, and Basis Therefor

In order to support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Medical Supply, LLC v. A Central Ins. Co.*, 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, *Nir v. Allstate*, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "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." *Nir, supra*. The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Country-Wide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17

Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. *Id.*

In support of its contention that the DME provided on 08/10/21 was not medically necessary, Respondent relies on the peer review report of Dr. Peter Chiu dated 10/21/21. Dr. Chiu lists the medical records reviewed and details JM's relevant medical history. He contends that the DME at issue (the LSO) was not medically necessary. Dr. Chiu states in his peer review report, with regard to the DME that:

"There was no indication nor medical necessity for DME."

In the instant case, Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, *supra*.

In rebuttal, Applicant provides numerous medical records for review and the formal rebuttal of Dr. Ruben Oganessov. It must be stated here that Dr. Oganessov is not the treating doctor. In the rebuttal, Dr. Oganessov states:

"The devices provided by Applicant were medically necessary."

With regard to the DME items provided on 08/02/21, Respondent denied these items based on the peer review of Dr. Howard Levy dated 10/28/21. Dr. Levy lists the medical records reviewed and details JM's relevant medical history. He contends that none of the DME items at issue were not medically necessary. Dr. Levy states in his peer review report, with regard to the DME that:

"The DME was not medically necessary."

In the instant case, Respondent has factually demonstrated the services rendered were not medically necessary. Accordingly, the burden now shifts to applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, *supra*.

In rebuttal, Applicant provides numerous medical records for review and the formal rebuttal of Dr. Ruben Oganessov. It must be stated here that Dr. Oganessov is not the treating doctor. In the rebuttal, Dr. Oganessov states:

"It is my opinion that the items together with the supervised therapy are an effective way to treat pain."

Comparing the relevant evidence presented by both parties against each other, I am not persuaded by Applicant's medical documentation nor its formal rebuttals. I find that neither the documentation nor the rebuttals establish why this particular claimant required these particular DME items at the time that they was ordered. Based on the aforementioned, Applicant has failed to sustain its burden of persuasion in rebuttal and as such, Applicant's claim is denied as not being medically necessary.

Accordingly, Applicant's claim is denied.

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 Suffolk

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

10/07/2022
(Dated)

Melissa Abraham-LoFurno

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:
27cdb40b76500ded0ed6daa6ebaf7d94

Electronically Signed

Your name: Melissa Abraham-LoFurno
Signed on: 10/07/2022