

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Advanced Recovery Equipment & Supplies, LLC (Applicant)	AAA Case No.	17-22-1233-8513
	Applicant's File No.	00094738
	Insurer's Claim File No.	0642191150101013
- and -	NAIC No.	

Geico Insurance Company
(Respondent)

ARBITRATION AWARD

I, Paul Keenan, 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 AD

1. Hearing(s) held on 03/29/2023
Declared closed by the arbitrator on 03/29/2023

Sasha Hochman, Esq. from Drachman Katz, LLP participated virtually for the Applicant

Dustin Mole from Geico Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$708.65**, 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

ASSIGNOR, a 46-year-old male, was injured as a passenger in a motor vehicle accident (MVA) May 10, 2019, sustaining injuries to his neck, right shoulder and right hand. Subsequent to the subject MVA ASSIGNOR received physical therapy, acupuncture, massage therapy, heat treatment and TENS.

At issue herein is payment for a lumbosacral orthosis ("LSO") provided on October 22, 2021.

Respondent denied payment based on lack of medical necessity pursuant to orthopedic IME.

ASSIGNOR presented to William Walsh, M.D. November 23, 2021 with current complaints of pain in his neck, upper back, lower back, bilateral shoulders, elbows and wrists and hands. Records reviewed by Dr. Walsh included NF-2s medical, acupuncture and physical therapy records, MRIs and epidural steroid injection procedure reports

4. Findings, Conclusions, and Basis Therefor

Submissions are available through ADR filings.

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Cervical spine: no tenderness to palpation; no spasm; ranges of motion normal in all planes (with measurement); no upper extremities motor or sensory deficits; DTR present and equal bilaterally; 5/5 muscle strength; no muscular atrophy; negative Soto-Hall, negative compression, negative Jackson's and negative Distraction.

Thoracic spine: no spasm; no tenderness to palpation.

Lumbar spine: no spasm; no tenderness to palpation; ranges of motion normal in all planes (with measurement); DTR DTR 2+ throughout; lower extremities muscle strength 5/5 bilaterally; normal sensory examination; negative SLRT; no muscle atrophy; negative SLRT, Fabere, Ely's, Kemp's and Lasegue's tests.

Shoulders/arms: No heat, swelling, effusion, erythema or crepitus; no tender to palpation; ranges of motion normal in all planes (with measurement); negative Hawkins/Kennedy, Neer Impingement, Cross arm adduction, empty can (Jobe's), anterior/posterior drawer, drop-arm, O'Brien's Painful arc and Yergason tests.

Elbows; No heat, swelling, effusion, erythema or crepitus; no tender to palpation; ranges of motion normal in all planes (with measurement); negative Tinel's and Apley tests.

Hands/wrists: No heat, swelling, effusion, erythema or crepitus; ranges of motion normal in all planes (with measurement); digital ranges of motion WNL; negative Tinel's, Phalen's and Finklesteins tests.

To establish entitlement to No-Fault benefits, applicant is required to submit proof that respondent timely received its properly completed claim forms and the claim was not paid. See *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 742; 774 N.Y.S.2d 564; 2004 N.Y. App.Div. LEXIS 3597 (2nd Dept. 2004); *Amaze Medical Supply a/a/o Bermudez v. Eagle Insurance*, 2 Misc. 3d 128[A], 784 N.Y.S.2d 918 9(2003)). The burden then shifts to respondent to present admissible evidence demonstrating the existence of material issue(s) of fact in support of its basis for denying payment.

Where respondent insurer presents sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to provider to present its own evidence of medical necessity (See *Prince, Richardson on Evidence* §§ 3-104, 3-202 [Farrell 11 ed] th West *Tremont Medical Diagnostic P.C. v Geico Ins. Co.* 13Misc. 3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 WL2829826 (App. Term 2d & 11 Dists. Sept 29, 2006).

An affidavit of the treating health care provider which does not meaningfully refer to or discuss the conclusion of the insurer's independent medical examiner is insufficient to rebut the insurer's prima facie showing arising from the examiner's report which provides a factual basis and medical rationale. *Innovative Chiropractic, P.C. v. Mercury Ins. Co.*, 25 Misc. 3d 137(A), 906 N.Y.S.2d 773 (Table), 2009 N.Y. Slip Op. 52321(U), 2009 WL 3851582 (App. Term 2d, 11 & 13 Dists. Nov. 13, 2009).

Perusal of submissions fails to reveal rebuttal documents or medical examinations that are contemporaneous with or reasonably subsequent to the orthopedic IME that provides results of measurement and objective orthopedic testing.

Denial based on this IME is sustained.

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 NY

SS :

County of Nassau

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

04/27/2023

(Dated)

Paul Keenan

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:
11f703320e2a149767dbda39c471f63e

Electronically Signed

Your name: Paul Keenan
Signed on: 04/27/2023