American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

TOV Medical Supply Inc. (Applicant)	AAA Case No.	17-23-1289-9175
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	A00004426457
	NAIC No.	16233
Erie Insurance Company Of New York (Respondent)		

ARBITRATION AWARD

I, Neal S Dobshinsky, 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: J Doe

1. Hearing(s) held on 10/19/2023
   Declared closed by the arbitrator on 10/19/2023

   Ian Besso from The Sigalov Firm PLLC participated virtually for the Applicant

   Desiree Ortiz from Robyn M. Brilliant, P.C. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,227.36**, 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

   Applicant furnished J Doe with an array of medical equipment/supplies that had been prescribed by a physician. Applicant sought payment for the various items.

   Based on a report by its peer reviewer, Insurer denied Applicant's claim on the ground that each of the items was not medically necessary.

   Were any of the items medically necessary?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the AAA ADR case file and the authorities cited by the parties that could be located and are not behind a paywall. I have heard and considered the arguments of counsel. I find as follows:

Background

On 9/14/22, J Doe, then 16 years old, was the driver of a motor vehicle that was in an accident. The vehicle was insured for no-fault benefits by respondent Insurer. Doe claimed he was injured. He then sought care and treatment.

On 9/27/22, Doe was seen at All Boro Medical Services for an initial exam for complaints of pains in his neck, upper back, and lower back. The record is signed by both David Carmili, MD, and Moshtaq Ahmed, RSA, a registered specialist assistant. (Note, in New York RSAs, registered special assistants, are registered to provide medical care under the supervision of a physician in one of four specialty areas only: orthopedics, acupuncture, radiology, or urology. Educ Law §6549).

Doe was examined. Examination of the cervical spine revealed tenderness, muscle spasms, restricted ranges of motion in all planes, and other positive findings. Examination of the lumbar spine revealed tenderness, muscle spasms, restricted ranges of motion in all planes, and other positive findings. The rest of the exam was normal or negative.

The diagnoses included cervical, thoracic, and lumbar sprains. The treatment plan included physical therapy, oral and topical medicines, and a nerve block injection.

Doe was provided with a durable medical equipment prescription, dated 9/27/22, for a bed board, cervical collar, egg crate mattress, lumbar support 10" back panel, and a TENS/EMS unit.

On 10/19/22, applicant TOV Medical Supply furnished Doe with the various items.

Applicant's Claim and Insurer's Denial

Applicant, as Doe's assignee, timely submitted a claim for $1,227.36 to Insurer for no-fault benefits for payment for the various items.

Based on a report by its peer reviewer, Insurer denied payment for the equipment/supplies on the ground that each item was not medically necessary.

The only issue argued and submitted for determination is whether any of the items was medically necessary. All other issues were waived.

Medical Necessity and the Burden of Proof

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology*

P.C. v Travelers Ins. Co., 11 Misc3d 131[A], 2006 NY Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Here, Applicant's submission established the presumption that each of the items was medically necessary.

The insurer "bears both the burden of production and persuasion" as to its lack of medical necessity defense. *Nir v Allstate Ins. Co*., 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co*., 2 Misc3d 128[A], 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary" (citations omitted). *Radiology Today, P.C. v Geico Ins. Co*., 58 Misc3d 132[A], 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

The Peer Review and Insurer's Lack of Medical Necessity Defense

Insurer denied the claim based on an affirmed peer review by Isandr Dumesh, MD, a physician board certified in internal medicine. In his 11/23/22 report, Dumesh states his reasons and opinions why each of the items was not medically necessary.

Dumesh states that he reviewed the 9/27/22 initial evaluation. He mentions the accident and that Doe was the driver. Doe complained of pains in his neck, mid back, and low back. Dumesh notes the initial exam, the findings, the recommendations, and recommendations.

Dumesh mentions each of the items and explains why each was not medically necessary. Dumesh cites medical authorities to support his opinions. His opinions are consistent with the accident history, Doe's complaints, the injuries sustained, the treatment regimen, the records reviewed, and the authorities he cites.

This peer review sets forth an adequate factual basis and medical rationale for Insurer's denial of payment. Insurer met its initial burden of production and persuasion. Insurer established its lack of medical necessity defense.

Applicant's Rebuttal as to Medical Necessity

In response to the peer review, Applicant submits an affirmed rebuttal by Carmili. In his 12/28/22 rebuttal, Carmili gives his reasons and opinions why each item was medically necessary.

Carmili disagrees with Dumesh, but he never states why any particular item was medically necessary. Carmili's discussion is general. He does not specifically relate his discussion to any of the exam findings. He never points to any specific finding(s) regarding Doe to say this is what this item would be helpful treating, for the following reasons, with the following expected benefits and results.

Carmili does not dispute Dumesh's description of the nature and extent of Doe's injuries. He does not effectively explain why the standards posited by Dumesh are wrong or do not apply. The rebuttal is not persuasive. Carmili failed to overcome Insurer's showing that each of the items was not medically necessary.

Conclusion

Insurer established its lack of medical necessity defense. Applicant did not overcome that showing.

Based on the parties' submissions, their arguments, the law, the regulations, and the weight of the credible evidence, I conclude that Applicant not entitled to payment.

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 New York

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

11/17/2023
(Dated)

Neal S Dobshinsky

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:
f7bf053a96c1240bfbbcbbcd3693dc0c

Electronically Signed

Your name: Neal S Dobshinsky
Signed on: 11/17/2023