

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Stanley-Sangwook Kim D.O. PC (Applicant)	AAA Case No.	17-22-1248-3801
- and -	Applicant's File No.	RFA22-306409
	Insurer's Claim File No.	0597495398 2BC
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

ARBITRATION AWARD

I, Ritesh Mallick, 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: CG

1. Hearing(s) held on 10/30/2023
Declared closed by the arbitrator on 10/31/2023

Alexander Mun, Esq. from The Russell Friedman Law Group LLP participated virtually for the Applicant

Michael Rago, Esq. from Law Office Of Lawrence & Lawrence participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$407.53**, 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 Assignor CG was injured in a motor vehicle accident that occurred on 8/16/2020. CG was a 45-year-old female passenger at the time of accident and complained of injuries to the left shoulder, neck, and back post-accident. In dispute is the billing for an office visit and testing performed on 5/4/21. Respondent timely denied the claim for lack of medical necessity based upon the 3/15/21 IME of Dr. Thomas Nipper, M.D. The issue to be decided is the validity of Respondent's denial based upon lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

IME DENIAL

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 Dep't 2006).

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co., 2006 NY Slip Op 50963(U) (App. Term, 1st Dep't 2006); accord Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co., 21 Misc. 3d 142(A), 2008 NY Slip Op 52450(U) (App. Term, 2d Dep't, 2nd & 11th Jud. Dists. 2008).

Applicant's claim is for an office visit and testing performed on 5/4/21. Respondent timely denied reimbursement of the specified billing for lack of medical necessity predicated upon the objectively negative 3/15/21 examination of the claimant as memorialized by Dr. Thomas Nipper, M.D. in his concomitant 3/15/21 IME report. Respondent consequently sets forth a cogent medical rationale in support of its defense. The burden of persuasion thereby shifts to Applicant. Bronx Expert, 2006 NY Slip Op 52116.

Applicant submits the 3/23/21 report of Dr. Kim, D.O. in opposition to Dr. Nipper's IME report. The 3/23/21 medical report is deemed to be contemporaneous with the IME report and reflects the claimant had unresolved symptomatology as indicated by restricted range of motion in the cervical spine region, restricted range of motion in the lumbar spine region, restricted range of motion with respect to the shoulders, and a positive Spurling's test bilaterally being amongst the findings memorialized.

The decision issued in Amato v. State Farm Ins. Co. (30 Misc. 3d 238, 910 N.Y.S.2d 637 [Nassau Dist. Ct. 2010]) states an IME is a snapshot of the injured party's medical condition as of the date of the IME, and the opinion of the doctor conducting an IME and issuing a report indicating that a claimant requires no further treatment is nothing more than an expert's opinion rendered at the time the examination was conducted. Applicant's submitted medical records serve to satisfy its burden of persuasion, precipitating the determination that the services at issue were medically necessary.

Notwithstanding the foregoing determination, Respondent contends Applicant is not entitled to reimbursement for the outcome assessment testing based upon the fee schedule.

A fee schedule defense may be raised at any time pursuant to 11 NYCRR § 65-3.8 (g) (1) (ii) for those claims arising on or after April 1, 2013. E.g., Saddle Brook Surgicenter, LLC v. All State Ins. Co., 48 Misc. 3d 336 (Civ. Ct., Bronx County 2015).

Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. E.g., Robert Physical Therapy PC v. State Farm Mut. Auto Ins. Co., 13 Misc. 3d 172, 822 N.Y.S.2d 378 (Civ. Ct., Kings County 2006). If Respondent fails to demonstrate by competent evidentiary proof that Applicant's claims were in excess of the appropriate fee schedules, Respondent's defense of noncompliance with the appropriate fee schedules cannot be sustained. See, Cont. Med. PC v. Travelers Indem. Co., 11 Misc. 3d 145A, 819 N.Y.S.2d 847 (App. Term, 1st Dep't 2006, per curiam).

Respondent contends Applicant may not bill for the outcome assessment testing in conjunction with the office visit per the CPT Assistant, with the applicable excerpt in evidence. Respondent's fee schedule position is therefore substantiated. Applicant has not come forth with any evidence to contravene Respondent's fee schedule contentions. Applicant's recovery will be limited accordingly.

Lastly, to the extent Respondent contends any additional precludable defense is applicable to this controversy, the following is noted.

Arbitrator Stathopoulos in his decision for American Arbitration Association Case # 17-19-1146-4348 explained an insurer must stand or fall upon the defense which served as the basis for denial of reimbursement.

Specifically, Arbitrator Stathopoulos stated:

A no-fault insurer is bound by the "four corners of the denial" and "must stand or fall upon the defense upon which it based its refusal to pay". See, Todaro v. Geico General Insurance Company, 46 A.D.3d 1086, 848 N.Y.S.2d 393 (3 Dept. 2007).

Respondent's defenses as noted on the duly issued denial of claim form have been addressed. No additional defense applicable to this matter has been advanced by Respondent.

Applicant's claim is consequently granted in part and denied in part.

Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of hearing.

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
	Kim Stanley-Sangw ook D.O. PC	05/04/21 - 05/04/21	\$407.53	Awarded: \$127.41
Total			\$407.53	Awarded: \$127.41

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/29/2022 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." 11 NYCRR § 65-3.9 (c). The Superintendent and the New York Court of Appeals have 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 (Ct. App. 2009).

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

As this matter was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR § 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee in accordance with the mandate of 11 NYCRR § 65-4.6 (d). For claims that fall under the Sixth Amendment to the regulation, the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360."

- 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 NY

SS :

County of Putnam

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

11/29/2023

(Dated)

Ritesh Mallick

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:
f3b999e81d945cc5acaa28fd80be25a1

Electronically Signed

Your name: Ritesh Mallick
Signed on: 11/29/2023