

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Health Choice NY Medical, PC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-23-1293-3126

Applicant's File No. 136766

Insurer's Claim File No. 0694523846
2DA

NAIC No. 19232

ARBITRATION AWARD

I, Nicholas Tafuri, 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: EIP (ME)

1. Hearing(s) held on 11/30/2023
Declared closed by the arbitrator on 11/30/2023

Edilaine D'Arce from Law Offices of Eitan Dagan (Woodhaven) participated virtually for the Applicant

Peggy Gizzarelli from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$700.39**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated that there are no fee schedule disputes.

3. Summary of Issues in Dispute

EIP (ME), is a 43-year-old male, who was involved in a motor vehicle accident on December 4, 2022. Following the accident, EIP sought medical treatment. Health care services are provided by Applicant on date of service: December 14, 2022.

Applicant's claim for reimbursement was denied by Respondent, based upon a peer review by Dr. Alexander Merson, M.D., dated 1/31/23.

The issue to be determined at the hearing: Whether the health services provided were properly denied by Respondent based on a lack of medical necessity pursuant to a peer review?

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center Record as of the date of the hearing and this Award is based upon my review of the Record and the arguments made by the representatives of the parties at the Hearing. Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5 (o) (1), an Arbitrator shall be the judge of the relevance and materiality of the evidence offered, and strict conformity to legal rules of evidence shall not be necessary. The case was decided on the submissions of the Parties as contained in the ADR Center Record maintained by the American Arbitration Association, and the oral arguments of the parties' representatives. There were no witnesses.

EIP (ME), is a 43-year-old male, who was involved in a motor vehicle accident on December 4, 2022. Following the accident, EIP sought medical treatment. Health care services are provided by Applicant on date of service: December 14, 2022.

It is well settled that an applicant establishes its prima facie showing of entitlement to No-Fault benefits by submitting evidentiary proof that the prescribed statutory billing forms had been mailed, received by the respondent and that payment of no-fault benefits were overdue. Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2d Dept. 2004). I find Applicant establishes its prima facie case of entitlement to No-Fault compensation for its claim. The burden shifts to Respondent to prove that the bill in question was properly denied.

Applicant's claim for reimbursement was denied by Respondent, based upon a peer review by Dr. Alexander Merson, M.D., dated 1/31/23.

Medical Necessity

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 [or

examining physician'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 2d, 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 Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 specifics as to the claim at issue, is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 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.

In support of its contention that the services provided by Applicant, extracorporeal shockwave therapy was not medically necessary, Respondent relies upon a peer review report by Alexander Merson, M.D., dated January 31, 2023.

Upon his review of the medical records, Dr. Merson notes that EIP's accident occurred on December 4, 2022. On December 6, 2022, EIP was referred for physical therapy. On December 14, 2022, EIP underwent extracorporeal shockwave treatment. Dr. Merson avers that EIP was prescribed multiple modalities during therapy sessions in the office, and there was no need to introduce any additional treatment when the prescribed therapy was available. Citing a medical journal article, Dr. Merson states that a systemic review of the effectiveness of ESWT for common lower-limb conditions found only low-level evidence supporting the use of ESWT for Achilles tendinopathy. In addition, in this case, Dr. Merson notes that EIP did not have any registered contra-indications to modalities of conventional therapy. The standard of care for the injuries sustained in this case would include a physical examination, appropriate imaging tests,

medication, rest, and the initiation of a course of rehabilitation, including physical therapy. The standard of care would not include continuation with unrelated modalities. EIP did not require any experimental treatment for the symptoms to be improved when the conventional therapy was in progress. There was no rationale presented, and no evidence that the provided conventional rehabilitation program was not effective. Based on the foregoing, Dr. Merson concludes that there was no medical necessity for the extracorporeal shockwave therapy session conducted on 12/14/22.

I find that Respondent has provided sufficient evidence of a lack of medical necessity.

"Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th Ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006).

In response to the peer review report, Applicant relies on submitted medical records, and a rebuttal, dated 5/16/23, by Rafael Antonio Delacruz-Gomez, M.D.

Dr. Delacruz-Gomez avers that extracorporeal shockwave treatments were administered to treat EIP's painful conditions. "Based on the patient's ongoing symptomology, he was referred for Extracorporeal Shockwave Therapy...". Dr. Delacruz-Gomez states that it is up to the clinician to decide whether the treatment provided is appropriate. Citing several studies to establish its efficacy, Dr. Delacruz-Gomez concludes that shockwave therapy was necessary to a reasonable degree of medical certainty, to aid in the early recovery of EIP, and return the patient to the pre-accident state.

Upon consideration of the arguments of counsel, and after a thorough review of all submissions, I find that Applicant has not successfully refuted the opinion of the Respondent's peer review expert regarding the services provided, and has failed to establish the medical necessity for it by a preponderance of the evidence. I am more persuaded by Respondent's proof that the extracorporeal shockwave therapy service was not medically necessary. Dr. Delacruz-Gomez states that EIP was referred for ESWT based on his "ongoing symptomology". The subject accident occurred on 12/4/22, and a review of submitted records establish that EIP was referred

for physical therapy on 12/6/22, only 8 days prior to the shockwave therapy being performed. After only recently commencing physical therapy, I am not persuaded that conventional treatment was not sufficient to alleviate EIP's condition. Since the Applicant failed to refute Respondent's prima facie showing of a lack of medical necessity for the services provided, Respondent's denial is upheld.

Based on the foregoing, Applicant's reimbursement claim, for date of service 12/14/22, is denied.

This decision is in full disposition of all claims for no-fault benefits presently before this arbitrator.

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

12/03/2023
(Dated)

Nicholas Tafuri

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:
e04bb1b2055724d9a66b06d0bf3b9d4f

Electronically Signed

Your name: Nicholas Tafuri
Signed on: 12/03/2023