

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Ouagou Medical Inc
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-22-1279-8530

Applicant's File No. 72256

Insurer's Claim File No. 680356

NAIC No. Self-Insured

ARBITRATION AWARD

I, Eileen Hennessy, 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-K.C.L.

1. Hearing(s) held on 11/08/2023
Declared closed by the arbitrator on 11/08/2023

Aleksey Selipanov from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Tracy Bader Pollack from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,100.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute from the original amount of \$2,100.00 to \$131.01 in accordance with Respondent's fee audit.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent and (ii) Respondent's denial of the subject claim was timely issued.

3. Summary of Issues in Dispute

The record reveals that the Assignor-K.C.L., a 19-year-old female, claimed injuries as the passenger of a motor vehicle involved in an accident that occurred on 3/5/2022. Applicant billed for dry needling conducted on 10/20/2022. Respondent denied the claim based on a lack of medical necessity as determined by the peer review report of Isandr Dumesh, M.D., dated 12/5/2022. The issue to be determined is whether the services are medically necessary?

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking reimbursement for dry needling. This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing held via Zoom.

An arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary in accordance with 11 NYCRR 65-4.5(o) (1). Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

Legal Standards for Determining Medical Necessity

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 issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. *Amherst Medical Supply, LLC v. A Central Ins. Co.*, 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 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 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 Ins. Co.*, 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); *See also, All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a Respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. *Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co.*, 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); *A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007. "[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" *Bedford Park Medical Practice, P.C. v. American Transit Ins. Co.*, 8 Misc.3d 1025(A), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "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 11 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 & 11 Dists. Sept. 29, 2006).

Application of Legal Standards

Applicant billed for dry needling conducted on 10/20/2022. In support of its contention that the dry needling was not medically necessary, Respondent relies upon the peer review of Isandr Dumesh, M.D., dated 12/5/2022. A formal rebuttal was not submitted.

Respondent has met its evidentiary burden. The peer review authored by Isandr Dumesh, M.D., dated 12/5/2022, adequately sets forth the factual basis and medical rationale to support the conclusion that the dry needling in dispute was not medically necessary. That being so, the burden shifts to the Applicant to counter Respondent's showing.

In order to rebut the defense of lack of medical necessity Applicant needs to rebut the conclusions set forth in the peer review. *See Yklik, Inc. v. GEICO Ins. Co.*, 2010 NY Slip Op 51336(U) [28 Misc 3d 133(A)]. Where there is no such showing or the claimant fails to respond the Respondent is entitled to prevail. (*A. Khodadadi Radiology v. NY Central Mutual Ins.*, 16 Misc 3d 131(A) (Appellate Term, 2nd Dept.).

Applicant has not submitted a formal rebuttal. The failure to submit one is not an automatic bar to recovery. There may be instances when the information contained within the medical reports meaningfully addresses the points that are raised in the peer review. However, when the evidence does not speak to the issues that are voiced by the peer reviewer, the question of medical necessity will preponderate in the insurer's favor.

Here, after comparing the relevant evidence presented by both parties against each other, I find for the Respondent. After careful review of the records, I find Respondent has set forth a factual basis and medical rationale for denying payment. Applicant relies on the examinations, by Sonia Sikand, PA-C, dated 4/12/2022, by Yeseniya Aronova, M.D., dated 6/7/2022, by Oryan Baruch, dated 7/21/2022, 9/1/2022, and 9/21/2022, by Jean Pierre Louie, PA, dated 10/20/2022, a trigger point injection procedure report, dated 4/12/2022, a lumbar epidural steroid injection procedure report, dated 9/7/2022, and all of the medical records incorporated into the electronic file, and I find, as a matter of fact, that the dry needling in dispute was not medically necessary. Applicant failed to rebut Dr. Dumesh's position that the dry needling in dispute was not medically necessary. The weight and credibility of the evidence favors the Respondent. Applicant's claim for date of service 10/20/2022 (\$131.01) is denied.

CONCLUSION

Accordingly, Applicant's claim 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, Eileen Hennessy, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

12/08/2023
(Dated)

Eileen Hennessy

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:
9e16da8e96a232ecbdd2c9f0507352d3

Electronically Signed

Your name: Eileen Hennessy
Signed on: 12/08/2023