

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BCJ Medical PC
(Applicant)

- and -

American Family Connect Insurance Company
f/k/a Ameriprise Insurance Company
(Respondent)

AAA Case No. 17-23-1291-1408
Applicant's File No. 165.297
Insurer's Claim File No. 01004103979-01
NAIC No. 12504

ARBITRATION AWARD

I, Tracy Morgan, 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: injured person-assignor

1. Hearing(s) held on 11/29/2023
Declared closed by the arbitrator on 11/29/2023

Allen Tsirelman, Esq. from Tsirelman Law Firm PLLC participated virtually for the Applicant

Glenda Cunningham, Esq. from Claudia P. Lovas & Associates participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,477.30**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant amended the amount in dispute to \$4,273.20. The intentions of the parties at the hearing was to align the amount in dispute with the fee schedule which is reflected by the audit of the expert coder on this Record. My calculation from the audit yields a different amount - \$4,981.80. As this amount is consistent with the parties' intent, the correct amount in dispute is \$4,981.80.

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

The Applicant is the assignee of no-fault benefits from injured person-assignor (MM), a 55 year old female who reported she was involved in a motor vehicle accident

as a pedestrian on November 17, 2021. Following the accident, the injured person-assignor underwent physical therapy, outcome assessment testing and extracorporeal shockwave therapy performed by Applicant May 31, 2022-July 5, 2022. Respondent denied Applicant's claims contending a lack of medical necessity based upon the Independent Medical Examination performed by Samuel P. Thampi, M.D. on May 3, 2022.

The issue presented on this arbitration is whether the services in dispute were medically necessary?

4. Findings, Conclusions, and Basis Therefor

This hearing was conducted using documents contained in ADR Center. Any documents contained in the folder are hereby incorporated into this hearing. I have reviewed the relevant exhibits contained in the electronic file maintained by the American Arbitration Association and have considered all of the stipulations and arguments presented by both parties at the hearing of this matter. No witnesses appeared or testified.

I find that Applicant established its prima facie entitlement to No-fault benefits as proofs of claim were mailed to and received by the insurer and payment of No-Fault benefits is overdue See Insurance Law § 5106 [a]; 11 NYCRR 65.15 [g]; *Viviane Etienne Medical Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498 (2015).

Respondent timely denied Applicant's claims contending a lack of medical necessity based upon the Independent Medical Examination (IME) performed on May 3, 2022 by Samuel P. Thampi, M.D.

Where a health care provider establishes its prima facie entitlement to no-fault benefits, the burden shifts to the insurer to prove that the medical services were not medically necessary *Nir v Allstate Ins. Co.*, 7 Misc. 3d 544 (2005); *Amaze Medical Supply Inc. v Eagle Insurance Co.*, 2 Misc3d 128(A), 2003 NY Slip Op. 51701(U) (App Term 2d, 11th & 13th Dists.). 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).

To support its denials, Respondent relied upon the IME report of Dr. Thampi. He documented that the injured person-assignor presented to the IME assisted by a cane and wearing a left knee brace and ankle boot. She reported current complaints of neck pain, low back pain, left knee pain, left ankle pain and right elbow pain. His examination demonstrated tenderness of the cervical region and diminished ranges of motion as well as positive Spurling's test. There were no positive findings in the thoracic region. Lumbar ranges of motion were within normal limits but he detected weakness, positive lumbar facet and myofascial tenderness and positive straight leg raises. Bilateral shoulder assessment was negative as were the right elbow and right wrist examinations. Positive tenderness was noted for the left knee and ranges of motion were restricted. There was no effusion. The left ankle demonstrated normal ranges of motion, no swelling but there was tenderness. He diagnosed the injured person-assignor with cervical and lumbar sprains resolving, shoulder sprain resolved, right wrist and right

elbow sprains resolved and left knee and left ankle sprains resolving. He acknowledged that she had not reached an endpoint for treatment but opined that further physical therapy was not medically necessary. Rather, he recommended cervical and lumbar injections and over the counter medication. He further recommended follow up each month for three months and a repeat IME in 3 months.

I find that Dr. Thampi's conclusion that no further physical therapy will benefit the injured person-assignor is conclusory. He acknowledged that she was in need of further treatment but failed to explain why his recommendation for injections over physical therapy will resolve her condition. Further, he overlooked her left knee and left ankle injuries as he recommended spinal injections and failed to provide recommendations for those conditions. Most significant, he recommended a repeat IME to assess her condition in three months but there is no evidence of any further IME performed. Respondent's proof only demonstrates that further treatment was warranted. An IME report must set forth a factual basis and medical rationale for the conclusion that services are not medically necessary *See Ying Eastern Acupuncture, P.C. v Global Insurance*, 20 Misc3d 144(A), 2008 NY Slip Op 51863(U) (App Term 2d & 11th Dists, Sept. 3, 2008). Dr. Thampi failed to support his conclusion with a sufficient factual basis and/or medical rationale.

Respondent's IME is insufficient to carry Respondent's burden of proof on the issue of medical necessity. Consequently, the burden does not shift to the Applicant and Applicant's claim is therefore awarded. In light of this determination, Applicant's contention concerning the sufficiency of Respondent's denials is rendered moot and needs not be decided. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not raised at the time of the 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	Amount Amended	Status
	BCJ Medical PC	07/05/22 - 07/05/22	\$700.39	\$700.39	Awarded: \$700.39
	BCJ Medical PC	06/28/22 - 06/28/22	\$700.39	\$700.39	Awarded: \$700.39
	BCJ Medical PC	06/27/22 - 06/27/22	\$700.39	\$700.39	Awarded: \$700.39
	BCJ Medical PC	05/31/22 - 05/31/22	\$280.12	\$0.00	Awarded: \$0.00
	BCJ Medical PC	05/31/22 - 06/22/22	\$994.84	\$779.46	Awarded: \$779.46
	BCJ Medical PC	06/15/22 - 06/15/22	\$700.39	\$700.39	Awarded: \$700.39
	BCJ Medical PC	06/14/22 - 06/14/22	\$700.39	\$700.39	Awarded: \$700.39
	BCJ Medical PC	06/08/22 - 06/08/22	\$700.39	\$700.39	Awarded: \$700.39
Total			\$5,477.30		Awarded: \$4,981.80

B. The insurer shall also compute and pay the applicant interest set forth below. 03/17/2023 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." See, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has 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 NY3d 217 (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 newly promulgated 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 dispute, subject to a maximum fee of \$1,360.00."

- 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 Nassau

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

12/19/2023
(Dated)

Tracy Morgan

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:
958c8f6e77264ea28cb526934ee8d978

Electronically Signed

Your name: Tracy Morgan
Signed on: 12/19/2023