

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Elite Medical Supply of New York, LLC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1293-5552

Applicant's File No. 121467

Insurer's Claim File No. 0677835167
SKD

NAIC No. 29688

ARBITRATION AWARD

I, Gillian Brown, 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.

1. Hearing(s) held on 12/20/2023
Declared closed by the arbitrator on 12/20/2023

Heather Shevlin, Esq., from Heather E. Shevlin, Esq. participated virtually for the Applicant

Marissa Allis, Esq., from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,289.22**, 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 41-year-old female EIP was involved in a motor vehicle accident on 7/11/22. On 10/1/22, she was provided with a Multi-Mode Stimulator (MMS"), a lumbosacral orthotic ("LSO") and a cervical traction unit ("CTU"). Reimbursement for all three items has been denied based on a peer review by Dr. Kevin Portnoy, DC, signed 11/2/22.

4. Findings, Conclusions, and Basis Therefor

Pursuant to 11 NYCRR §65-4.5(o)(1), the 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 arbitrator may question any witness or party and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations. This hearing was conducted using documents contained in the ADR Center. Any documents contained in the ADR Center folder for this matter are hereby incorporated into this hearing. I have reviewed all relevant exhibits contained in the ADR Center maintained by the American Arbitration Association.

On 7/11/22, the EIP - a 41-year-old woman - was the restrained driver of a vehicle which was struck from behind while stopped at a traffic light. She did not lose consciousness, and airbags did not deploy. She did not require emergency medical attention at the scene, and she did not go to a hospital for evaluation or treatment. On 7/29/22, she was prescribed an LSO, MMS and CTU. The items were provided on 10/1/22. Reimbursement has been denied based on a peer review by Dr. Kevin Portnoy, DC, signed on 11/2/22.

Upon reviewing the evidence contained in the record herein, I find the claimant has submitted sufficient credible evidence to establish its *prima facie* case. It is well settled that a healthcare provider establishes its prima facie entitlement to No-Fault benefits as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of No-Fault benefits were overdue. Westchester Medical Center v. Lincoln General Insurance Company, 60 AD3d 1045, 877 N.Y.S.2d 340 (2nd Dept. 2009); Mary Immaculate Hospital v. Allstate Insurance Company, 5 AD3d 742, 774 NYS2d 564 (2nd Dept. 2004).

The Respondent must establish a detailed factual basis and a sufficient medical rationale for its position that the medical service was not medically necessary. *See*, Vladimir Zlatnick, M.D. P.C. v. Travelers Indem. Co., 12 Misc.3d 128(A), 2006 NY Slip Op 50963 (U) (App Term 1st Dept. 2006). The burden is on the insurer to prove that the medical services were unnecessary. *See*: Behavioral Diagnostics v. Allstate Ins. Co., 3 Misc. 3d 246, 776 N.Y.S. 2d 178, 2004 Slip Op. 24041 (Civ. Ct. Kings County 2004); A.B. Medical Services v. Geico Ins., 2 Misc. 3d 26, 773 N.Y.S.2d 773, 2003 Slip Op 23949 (App Term, 2d Dept 2003). *See also*: Elm Medical P.C. v. American Home Assurance Co., 2003 Slip Op. 51357U 2003 N.Y. Misc. LEXIS 1337 (Civ. Ct., Kings Co., 2003); Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co., 196 Misc. 2d 801,766 NYS2d 748 (Civ. Ct., Queens Co., 2003).

On the record before me, I cannot sustain denials based on the Portnoy peer review.

Regarding the CTU, Dr. Portnoy specifically writes that the failure of the EIP to have a positive cervical distraction test indicates a lack of medical necessity for the device. However, I note that the prescription, which is a "checkbox" format document, does indicate that a positive cervical distraction test was administered. I also note that the medical records contained within the submissions do show that the EMG test confirmed radiculopathy, which is also indicated by a positive cervical distraction test.

Regarding the LSO, Dr. Portnoy indicates that the EIP did not show any signs of spinal instability, which he opines is a requirement for such a brace. However, the articles to which he refers include one which concludes that lumbar orthoses should be "used only after individual consideration of the indications in each case." He provides another reference to an article which labels "bracing" as "controversial;" this does not represent a statement of a generally accepted standard of care, nor is there a medical rationale or factual basis for the conclusions presented by Dr. Portnoy regarding this specific EIP.

Finally, regarding the MMS, I note that Dr. Portnoy's peer review specifically concedes that electrical stimulation can be palliative. Dr. Portnoy then refers to the device as a "Tri-Wave Frequency Generator" device. He provides a citation to a website which is for a company that appears to make measuring equipment of some kind. The link to the specific product is non-functioning. Dr. Portnoy appears to have reviewed an entirely different product, which does not even appear to be durable medical equipment. His other citations do not present a statement of a generally accepted standard of care, and he does not acknowledge that the treatment notes specifically acknowledge continuous use of electrical therapy for the EIP. His peer review is clearly insufficient to shift the burden of proving medical necessity to the claimant.

Dr. Portnoy's peer review is insufficient on its face to serve as a basis for a denial of reimbursement. I find for the claimant. By agreement between the parties, the award for the MMS is a non-monetary disposition.

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
	Elite Medical Supply of New York, LLC	10/01/22 - 10/01/22	\$2,289.22	Awarded: \$2,289.22
Total			\$2,289.22	Awarded: \$2,289.22

B. The insurer shall also compute and pay the applicant interest set forth below. 04/14/2023 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 N.Y.3d 217 (2009).

C. Attorney's Fees

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

Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

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 Erie

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

12/21/2023
(Dated)

Gillian Brown

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:
b0fee5afe7417d2a517f9832e236ea6d

Electronically Signed

Your name: Gillian Brown
Signed on: 12/21/2023