

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

VKA Medical Supply Corp.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-22-1270-0755

Applicant's File No. DK22-263163

Insurer's Claim File No. 1108752-3

NAIC No. 16616

ARBITRATION AWARD

I, Yael Aspir, 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 12/21/2023
Declared closed by the arbitrator on 12/21/2023

Henry Guindi from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Helen Cohen from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,301.10**, 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 EIP, MB, a 29 year old female passenger, was injured by a motor vehicle involved in an accident on 01/29/22. In dispute is the Applicant's claim for \$3,301.10 for treatment provided to the EIP on 02/08/22.

Respondent denied the claims based on EUO testimony of the EIP, a biomechanical report and a 09/09/22 peer report of Dr. Richard Coven. Respondent did not provide a fee audit in its submission.

The issue to be determined is whether Respondent's denials can be sustained.

4. Findings, Conclusions, and Basis Therefor

The case was decided on 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 the electronic file for both parties and make my decision in reliance thereon.

It is well settled that a health care provider establishes its prima facie entitlement to payment as a matter of law by proof that it submitted a proper claim, setting forth the fact and the amount charged for the services rendered and that payment of no-fault benefits was overdue (see Insurance Law § 5106 a; Mary Immaculate Hosp. v. Allstate Ins. Co., 5 AD 3d 742, 774 N.Y.S. 2d 564 [2004]).

EUO testimony - causality

Respondent timely denied the claim in dispute, stating that: "Entire claim is denied based on examination under oath conducted 08/23/22. American Transit is asserting a lack of coverage, as it has established the "fact or founded belief" that the claimant's treated condition was unrelated to the motor vehicle accident".

A claimant's prima facie showing establishes a presumption of coverage, and the burden of going forward on the issue of coverage falls upon the insurer; once the insurer comes forward with proof for its belief that the claimed loss was a staged accident, the burden shifts to the claimant to prove coverage by a preponderance of the evidence. New York Massage Therapy P.C. v. State Farm Mutual Ins. Co., 14 Misc.3d 1231(A), 836 N.Y.S.2d 494 (Table), 2006 N.Y. Slip Op. 52573(U), 2006 WL 4057169 (Civ. Ct., Kings Co., Sylvia G. Ash, J., Dec. 22, 2006).

Unsupported conclusions and suspicions, as well as unsubstantiated hypotheses and suppositions are insufficient to raise a triable issue of alleged fraud. A.B. Medical Services PLLC v. Eagle Ins. Co., 3 Misc.3d 8, 776 N.Y.S.2d 434 (App. Term 9th & 10th Dists. 2002). Of necessity an insurer's founded belief that a collision was staged will be established by circumstantial evidence. A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co., 7 Misc.3d 822, 795 N.Y.S.2d 843 (Civ. Ct. Kings Co. 2005). The strength of inferences of fraud must be measured by common sense and the logic of common experience itself. A.B. Medical Services PLLC v. State Farm Mutual Automobile Ins. Co., 7 Misc.3d 822, 831, 795 N.Y.S.2d 843, 851 (Civ. Ct. Kings Co. 2005) (citing Schneider v. Kings Highway Hospital Center, Inc., 67 N.Y.2d 743, 744-745 (1986)).

Respondent denied payment of services based on a defense of lack of coverage predicated on the EUO testimony of the EIP. The submission includes copies of the denials, verification requests, the NF-2, police report, EUO scheduling letters and the transcript of the 08/23/22 EUO of the EIP.

After reviewing all of the submissions and upon the oral arguments of the parties at the hearing, I find that Respondent failed to establish its lack of coverage/causation defense. I find that there is insufficient credible evidence in the record to substantiate the 'fact or founded belief' that the EIP's condition was unrelated to the motor vehicle accident. Respondent relies on the EUO transcript to support its allegations but, I find it unclear as what specific testimony Respondent believes supports its defense. Respondent did not upload any witness statements or SIU affidavit discussing the investigation or explaining how or why the determination was made.

Accordingly, based on my review of the EUO transcript, I find Respondent's defense unsubstantiated.

Bio mechanical report - Causality

Respondent's NF-10 states: "Claim denied based on a lack of causation as opinion based on the biomechanical science expert report of Zachary Merrill, PH.D., dated 09/14/2022".

With regard to causation of injuries in No-Fault matters, the courts have held that causation is presumed since "it would not be reasonable to insist that (an applicant) must prove as a threshold matter that (a) patient's condition was 'caused' by the automobile accident." Mount Sinai Hosp. v. Triboro Coach, 263 A.D.2d 11, 20 (2d Dept. 1999). Thus, the initial burden is on the insurer to come forward with proof establishing by "fact or founded belief" its defense that the claimed injuries have no nexus to the accident, *id.* at 19 (quoting Central Gen. Hosp. v. Chubb Group of Ins. Cos., 90 N.Y.2d 195, 199), that is, that the conditions were not caused or exacerbated by the accident. See Mount Sinai, 263 A.D.2d 11, 18 - 19; Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D. 3d 13, 871 N.Y.S.2d. 680 (2d Dept. 2009). Since No-Fault covers exacerbations of pre-existing conditions, see Wolf v. Holyoke Mut. Ins. Co., 3 A.D.3d 660 (3d Dept. 2004), and if the insurer's own medical expert does not eliminate the possibility that the injured person sustained an exacerbation of a degenerative process, Respondent will be liable for coverage. See Sanclimente v. MTA Bus Co., 116 A.D.3d 688 (2d Dept. 2014); Rodgers v. Duffy, 95 A.D.3d 864 (2d Dept. 2012); Pfeiffer v. New York Cent. Mut. Fire Ins. Co., 71 A.D.3d 971 (2nd Dept. 2010).

Respondent submitted a biomechanical analysis report prepared by Zachary Merrill, PH.D., dated 09/14/22. Dr. Merrill described his credentials and described biomechanics as a discipline with a focus on the failure of biological material in reaction to mechanical external or internal forces. Most of his report contains this discussion about biomechanics as well as Newton's Law of Motion. In the section of his report which he entitled as "Accident Analysis," Dr. Merrill stated that based on the crash description provided in the Police Report and the EIP's testimony, the dynamics of the impact between the vehicles in the subject accident was a minor impact which would not have caused traumatic injuries.

In Santos v. Nicolas, 24 Misc.3d 999 (Sup. Ct., Bronx Co., 2009) the court held that a biomechanical engineer is not a doctor and as such is not qualified to testify about the

causal relationship between a motor vehicle accident and the injuries sustained by the claimant.

In Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 17 Misc. 3d 97 (App. Term, 1st Dept., 2007) the court held: While generally speaking, accident reconstruction evidence may often prove useful in explaining how an accident occurred, its probative value on issues related to causation is limited unless amplified by a meaningful medical assessment of the claimed injuries. This is certainly true in the first-party no-fault scenario, where an insurer disclaiming coverage has the burden of establishing that "the medical condition for which the assignor was treated was not related to the accident at all" (Mount Sinai v Triboro Coach, 263 AD2d at 18-19 [internal quotation marks omitted]). Whether a causative nexus exists between an accident and injury "cannot be resolved without recourse to the medical facts" (id. at 19). Id at 99.

I find that Dr. Merrill's Biomechanical Analysis Report, standing alone, is insufficient to establish that the EIP's condition was not related to, or exacerbated by, the accident. Dr. Merrill, a non-physician, is not qualified to render a medical opinion regarding causation.

Accordingly, I find Respondent's defense unsubstantiated.

Medical Necessity

Since Respondent's denial was timely, it was within its rights to assert lack of medical necessity as a defense. Liberty Queens Medical, P.C. v. Liberty Mutual Insurance Co., 2002 WL 31108069 (App. Term 2d & 11th Dists. June 27, 2002). A peer review report relied upon by an insurer in timely denying a claim is a proper vehicle to assert the defense of lack of medical necessity. S & M Supply, Inc. v. Allstate Ins. Co., 2003 N.Y. Slip Op. 51191(U), 2003 WL 21960336 (App. Term 2d & 11th Dists. July 9, 2003).

A peer reviewer must establish a factual basis and medical rationale for his asserted lack of medical necessity of the health care provider's services. See Amaze Medical Supply Inc. v. Allstate Ins. Co., 12 Misc.3d 142(A), 824 N.Y.S.2d 760 (Table), 2006 N.Y. Slip Op. 51412(U), 2006 WL 2035559 (App. Term 2d & 11th Dists. July 12, 2006). If the peer review satisfies these standards, it becomes incumbent on the claimant to rebut the peer review, (See Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc3d 139(A), 2008 WL 506180 (App. Term 2d & 11th Dists. Feb. 21, 2008), because the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Shtarkman v. Allstate Insurance Co., 2002 WL 32001277 (App. Term 9th & 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company).

Respondent's evidence established that the claim for an osteogenesis stimulator was timely denied based on the 09/09/22 peer report of Dr. Richard Coven. Dr. Coven reviews the records and relies on medical literature to support his position. He opines:

There was no medical necessity for the PEMF Device and waterproof tape provided on date of service 02/08/22. "Our study findings indicate that PEMF therapy is safe in patients with chronic non-specific neck pain. However, it does not provide further improvement in pain and functionality when applied in addition to a conventional physical therapy." "Effectiveness of pulsed electromagnetic field therapy on pain, functional status, and quality of life in patients with chronic non-specific neck pain: A prospective, randomized-controlled study", Turk J Phys Med Rehabil. 2020 May 18;66(2):140-146.

"Low-energy pulsed electromagnetic field (PEMF) therapy has been suggested as a promising therapy to increase microcirculation, which is of great concern in patients with fibromyalgia ... this study demonstrated that low-energy PEMF therapy was not efficient in reducing pain and stiffness or in improving functioning in women with fibromyalgia." "Pulsed electromagnetic field therapy in the treatment of pain and other symptoms in fibromyalgia: a randomized controlled study", Multanen, J., et al. Bioelectromagnetics. 2018 Jul;39(5):405-413.

"To evaluate the efficacy of classical pulsed electromagnetic field therapy on patients with knee osteoarthritis ... pulsed electromagnetic field therapy is beneficial for improving physical function despite having no advantage in treating pain and stiffness. Further randomized controlled trials are needed to confirm these findings and determine the optimal parameters and treatment regimen for pulsed electromagnetic field therapy." "Effects of pulsed electromagnetic field therapy on pain, stiffness and physical function in patients with knee osteoarthritis: A systematic review and meta-analysis of randomized controlled trials", Rehabil Med. 2019 Dec 16;51(11):821-827.

"PEMF could alleviate pain and improve physical function for patients with knee and hand OA, but not for patients with cervical OA. Meanwhile, a short PEMF treatment duration (within 30 min) may achieve more favorable efficacy. However, given the limited number of study available in hand and cervical OA, the implication of this conclusion should be cautious for hand and cervical OA." "Efficacy and safety of the pulsed electromagnetic field in osteoarthritis: a meta [1]analysis", BMJ Open. 2018 Dec 14;8(12). Note: there was no literature specifically on MVA related sprain/strain injuries. The current medical literatures do not support this type of device in treating the various musculoskeletal pain conditions; therefore, this device was not medically necessary.

In opposition, Applicant relies on the medical records in evidence including the initial evaluation, follow up reports and the 11/12/23 Rebuttal of Dr. Deonarine Rampershad, NP. He reviews the peer report and notes his disagreement, relying on citations to current medical literature to support his position.

Comparing the relevant evidence presented by both parties against each other and the above referenced medical necessity standard, I find Applicant's medical records in evidence are sufficient to rebut the findings of the peer doctor. The peer report notes the benefits of PEMF, yet mainly focuses on the efficacy and need for additional studies to evaluate electromagnetic therapy. There is no standard of care, or deviation from said standard, provided for review. The fact that there is a need for further studies to confirm the benefits of electromagnetic therapy does not mean that the treatment is not medically necessary.

Accordingly, Applicant's claim is awarded.

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
	VKA Medical Supply Corp.	02/08/22 - 02/08/22	\$3,301.10	Awarded: \$3,301.10
Total			\$3,301.10	Awarded: \$3,301.10

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/13/2022 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." 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

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.

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

12/26/2023
(Dated)

Yael Aspir

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:
feb74560940abb1a033c3dd925dabc5d

Electronically Signed

Your name: Yael Aspir
Signed on: 12/26/2023