

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McCulloch Orthopaedic Surgical Services,
PLLC DBA NYSJ Orthopaedic Specialists
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1297-4231

Applicant's File No. 2934738

Insurer's Claim File No. 0673160040
MAD

NAIC No. 29688

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 12/13/2023
Declared closed by the arbitrator on 12/13/2023

Neda Melamed, Esq. from Israel Purdy, LLP participated virtually for the Applicant

Eliza Filipowski, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$142.62**, 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 Applicant is the assignee of no-fault benefits from injured person-assignor (AD), a 35 year old female who reported she was involved in a motor vehicle accident on May 25, 2022. Following the accident, the injured person-assignor sought medical treatment and underwent an evaluation performed by Applicant on January 6, 2023. Respondent denied Applicant's claim for reimbursement contending a lack of medical necessity based upon the Independent Medical Examination performed by Bo Headlam, M.D. on November 21, 2022.

The issue presented on this arbitration is whether the service in dispute was 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 first person no-fault benefits as proof of claim was 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 claim contending that the service at issue was not medically necessary based upon the results of the Independent Medical Examination (hereafter referred to as "IME") performed by Bo Headlam, M.D. on November 21, 2022.

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).

Respondent relies upon the IME report of Dr. Headlam dated November 21, 2022 to support its denial of claim. Dr. Headlam took a history and noted that the injured person-assignor reported complaints of neck and midback pain. Dr. Headlam's examination of the cervical and lumbar regions of her spine yielded no tenderness and no spasms. Tenderness in the thoracic region was noted but no spasms were detected. Ranges of motion throughout the spine were within normal limits. Spurling's and straight leg raise tests were negative and the injured person-assignor was able to rise on heels and toes. Muscle strength, sensation and reflexes were normal throughout.

Bilateral shoulder ranges of motion were normal and there was no tenderness, no swelling and no crepitus. Impingement sign was negative. His examination of the injured person-assignor's elbows, wrists, hands, knees, hips, ankles and feet were similarly negative. He diagnosed the injured person-assignor with cervical, thoracic and lumbar sprains/strains resolved. He explained that the complaint of thoracic tenderness was subjective and that there were no objective findings. He concluded that no further treatment was necessary.

Dr. Headlam's report provides a sufficient factual basis and medical rationale for the contention that the services herein were not medically necessary and therefore the burden shifts to Applicant, who bears the ultimate burden of persuasion *See Delta Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 21 Misc. 3d 142A (App Term 2d & 11th Jud Dist 2008); *Crossbridge Diagnostic Radiology, PC v. Progressive Casualty Ins. Co.*, 20 Misc. 3d 143A (App Term 2d & 11th Jud Dist. 2008).

Applicant did not submit a rebuttal. Included in the Record is the evaluation report by Dr. Kenneth McCulloch for the claim presently in dispute. His evaluation was on January 6, 2023 and noted that she was not currently attending physical therapy and performs exercises learned at home. She stated initially after the accident she had some discomfort in the right shoulder, but her pain now is primarily localized to the neck. She denied any shoulder pain with overhead activities including lifting, reaching, pulling and pushing at this time. She reported significant improvement of her shoulder pain. His examination was limited to her right shoulder and noted mild tenderness and decreased range in motion but documented good strength with resisted external rotation, negative Neer's test and negative Hawkin's test. There was very minimal pain and good strength with supraspinatus stress test and O'Brien's test. Neurovascular status was grossly intact distally. His diagnosis was traumatic right shoulder possible internal derangements/soft tissue contusions. He did not recommend further in-office treatment or physical therapy but recommended she continue her at home therapy and if pain persisted or worsened to return. There is no evidence suggesting that she ever returned to Dr. McCulloch. Dr. McCulloch alluded to complaints relative to the cervical region but he did not assess the cervical region or any additional body part other than her right shoulder and his conclusions concerning the right shoulder fall short of rebutting Dr. Headlam's IME and opinion. No other contemporaneous records or reports were included in the Record. The remaining medical records submitted demonstrate that she initially complained of neck and upper back pain and underwent physical therapy for those complaints. She treated with Dr. Chugtai who saw her on September 21, 2022 and noted that she had stopped physical therapy 3 months earlier. He recommended a resumption of physical therapy for her cervical and thoracic region but there are no further reports other than the physical therapy notes from September 23, 2022-October 6, 2022. The treatment notes fail to document objective evidence and I find that the September 21, 2022 evaluation by Dr. Chugtai is not contemporaneous with the IME of November 21, 2022 and therefore fails to rebut the findings and opinion of Dr. Headlam.

There are no further contemporaneous evaluations submitted on this Record that provide objective clinical determinations to rebut Dr. Headlam's findings. I find that the

Applicant's evidence fails to constitute a comprehensive evaluation of the injured person-assignor and fails to reflect any recommendation for further professional treatment. Applicant's evidence is insufficient to rebut the detailed examination and conclusions of Dr. Headlam *Pan Chiropractic P.C. v Mercury Ins. Co.*, 24 Misc3d 136A (App Term 2d, 11th & 13th Jud Dists 2009). *See also Flushing Traditional Acupuncture, P.C. a/a/o AK v GEICO Ins. Co.*, 36 Misc3d 156A, (App Term 2d Dept 2012); *Eastern Star Acupuncture, P.C. v Mercury Ins. Co.*, 26 Misc3d 142[A], 907 NYS2d 436, (App Term 2d, 11th & 13th Jud Dists 2010). Applicant's claim is therefore denied. Any further issues raised in the 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 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, 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.

01/02/2024
(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:

0d73f41c40f828dff49efd0dabed19a1

Electronically Signed

Your name: Tracy Morgan
Signed on: 01/02/2024