

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Zastava Medical Supplies Inc. (Applicant)	AAA Case No.	17-23-1309-1463
- and -	Applicant's File No.	MB-90100
	Insurer's Claim File No.	0707186755 SKV
Allstate Fire & Casualty Insurance Company (Respondent)	NAIC No.	29688

**ARBITRATION AWARD**

I, Robyn McAllister, 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

1. Hearing(s) held on 05/14/2024  
Declared closed by the arbitrator on 05/14/2024

Law Offices of Mark Bratkovsky from Law Offices of Mark Bratkovsky PC.  
participated by written submission for the Applicant

Frank Gissaro, Esq. from Law Offices of John Trop participated virtually for the  
Respondent

2. The amount claimed in the Arbitration Request, **\$3,972.35**, 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

Whether Respondent properly denied Applicant's claim for providing various medical supplies to Assignor (CW), a 57 year-old female driver, in connection with treatment of injuries sustained in a motor vehicle accident on March 18, 2023, based on a peer review by Dr. Julio Westerband.

4. Findings, Conclusions, and Basis Therefor

Applicant sought reimbursement in the amount of \$3972.35 for providing a shoulder orthosis, knee orthosis, car seat, massager, EMS belt, infrared lamp, whirlpool, TENS unit, cervical pillow, cervical collar, bed board, mattress, heating pad, back cushion, LSO and water circulating pump on April 4, 2023 to Assignor (CW), a 57 year-old female driver, in connection with treatment of injuries sustained in a motor vehicle accident on March 18, 2023. Respondent timely denied Applicant's claim predicated on a peer review dated June 9, 2023 by Dr. Julio Westerband.

This decision is based on the oral arguments of counsel at the hearing and the documents submitted. Applicant did not appear at the hearing and relied upon its written submission. I have reviewed the documents contained in the ADR Center as of the date of this award. Applicant established its prima facie case since Respondent's denial acknowledged receipt of Applicant's bills. *See Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co.*, 25 N.Y.3d 498 (2015); *AR Medical Rehabilitation v State-Wide Insurance Company*, 49 Misc.3d 919 (Civil Ct., Kings Co. 2015).

At the hearing, Respondent argued that it properly denied Applicant's claim since the medical supplies were not medically necessary. I agree. I was persuaded by the peer review report by Dr. Westerband, submitted by Respondent in support of its denial.

In order to support a defense of lack of medical necessity, the 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 Dist. 2014). It is the respondent's burden to demonstrate lack of medical necessity, which, if established, shifts the burden of persuasion to the applicant. *See Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006); *A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131 (A), 2007 N.Y. Slip Op. 51342(U) (App. Term 2d & 11<sup>th</sup> Dist. 2007).

Furthermore, a respondent's peer review must set forth more than just a conclusory or basic recitation of the expert's opinion. It is well-settled that a peer review is deficient when it fails to set forth the generally accepted medical practice and how the provider deviated from those standards. *See Elmont Open MRI & Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 23 Misc.3d 1110(A)(Dist. Ct. Nassau Co. 2009); *Nir v. Allstate*, 7 Misc.3d 544 (Civ. Ct. Kings Co. 2005).

I find that Dr. Westerband's peer review was sufficient to support Respondent's defense of lack of medical necessity. Thus, the burden shifted to Applicant to refute Dr. Westerband's assertions. *See A. Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., supra.*

Dr. Westerband noted Assignor presented to NP Wei Hong Xu on March 27, 2023 "with complaints of pain in the neck, mid and lower back, left shoulder, left knee, and left hip. Examination of the injured areas revealed pain, decreased range of motion, and tenderness. Neurological examination was negative for any abnormalities. Assessments were headache, headache due to trauma, bulging of the cervical disc without myelopathy. Spasm of thoracic back spasm, bulging of lumbar intervertebral; disc without myelopathy, derangement of the left shoulder joint, hip bursitis left, left knee sprain, and chest wall muscle strain. Treatment plan was of conservative treatment and prescription for pharmacy."

Dr. Westerband discussed each of the sixteen supplies ordered following the initial evaluation by NP Xu and explained why Assignor's condition did not require use of the supply. He noted that there was no spinal, shoulder or knee instability requiring support and that mobility rather than rigidity and restricting range of motion was the standard of care. He further explained why many of the supplies lacked proven efficacy in the treatment of neck, back, knee and shoulder pain and why the supplies were not necessary in addition to the prescribed conservative treatment that had not yet even begun.

He concluded that "The standard of care, for this claimant was, continued physical therapy modalities in a professional setting which would suffice for the claimant to reach the maximum possible improvement and the use of these devices in question would not be of any added value to the claimant's rehabilitation program. However, in this case, the claimant was provided the devices to use at home and therefore the treatment provided deviated from the standard of care."

In support of its claim, Applicant submitted the documents contained in the ADR Center including prescription and initial report by Wei Hong Xu, NP and a rebuttal to the peer review dated October 4, 2023 by Dr. Drora Hirsch. I was not persuaded by the medical evidence that the medical supplies were warranted.

Applicant did not submit a letter of medical necessity by the treating NP or physician. Dr. Hirsch was not a treating physician and I was not persuaded by her generic rebuttal. She discussed the supplies in general but failed to adequately explain why this particular patient would require the extensive number of supplies routinely ordered following an initial evaluation that failed to reveal any significant findings. I note that in the linked case heard on the same date, 17-23-1310-4415, the passenger in the vehicle was also prescribed numerous supplies by NP Xu following an initial evaluation. After careful consideration, I find that Dr. Westerband's opinion was more persuasive and find that Applicant failed to satisfy its burden of rebutting Dr. Westerband's credible opinion.

Accordingly, Applicant's claim is denied in its entirety.

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 Westchester

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

05/18/2024  
(Dated)

Robyn McAllister

**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:**  
84396d679d96bf8f022cc1ad7ab6f25d

### Electronically Signed

Your name: Robyn McAllister  
Signed on: 05/18/2024