American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Passive Rehab PT PLLC (Applicant)	AAA Case No.	17-23-1311-9490
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	22-8566518
	NAIC No.	24260
Progressive Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Anne Malone, 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 06/18/2024
   Declared closed by the arbitrator on 06/18/2024

   Galina Feldsherova, Esq. from Kopelevich & Feldsherova, PC participated virtually for the Applicant

   Erin Ferrone from Progressive Casualty Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$2,462.18**, was AMENDED and permitted by the arbitrator at the oral hearing.

   The amount claimed was amended by the applicant to $1,948.54 to conform to the appropriate fee schedule and to reflect payments made by the respondent. The respondent did not agree to this amended amount.

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

3. Summary of Issues in Dispute

The 41 year old EIP reported involvement in a motor vehicle accident on August 22, 2022; claimed related injury and underwent an initial office visit on August 30, 2022 and physical therapy treatment provided by the applicant from August 30, 2022 to February 23, 2023.

The applicant also submitted charges for PPE supplies/services at $15.00 for each date of service.

The applicant submitted a claim for these medical services. The respondent made partial payment for the pre-IME physical therapy treatments provided from August 30, 2022 to September 8, 2022 pursuant to its calculation of the correct reimbursable amount pursuant to the appropriate fee schedule.

Payment of the remainder of the charges for physical therapy provided from January 5, 2023 to February 23, 2023 was timely denied by the respondent based on the IME of the EIP by Wei Shen, M.D. which was performed on January 3, 2023. The IME cut-off was effective on January 25. 2023. In response, the applicant submitted a rebuttal dated May 15, 2024 by Ashishkumar Patel, DPT who was the EIP's treating physical therapist.

The issues to be determined at the hearing are:

Whether the respondent established its fee schedule defense for the pre-IME initial office visit, and physical therapy services and PPE supplies/services provided from August 30, 2022 to September 8, 2022.

Whether the respondent established that the post IME physical therapy treatment provided by the applicant from January 5, 2023 to February 23, 2023 were not medically necessary.

Whether the respondent established its fee schedule defense for the PPE supplies/services provided from February 5, 2023 to February 23, 2023.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed in the Modria File as well as the arguments made by counsel and/or representative at the arbitration hearing. Only the arguments presented at the hearing are preserved in this decision; all other arguments not presented at the hearing are considered waived.

<u>Payment for pre-IME dates of service August 30, 2022 to September 8, 2022</u>

The applicant billed a total of $760.09 for an initial office visit, physical therapy treatment and PPE supplies/services provided from August 30, 2022 to September 8, 2022.

The respondent made payment of $90.00 for the PPE services/supplies and denied the remainder of the charges based on its calculation of the correct reimbursable amount pursuant to the New York Workers' Compensation Medical Fee Schedule.

To prevail in its fee schedule defense, the respondent must demonstrate by competent evidentiary proof that the applicant's claims are in excess of the appropriate fee schedule. If the respondent fails to do so, its defense of noncompliance with the New York Workers' Compensation Medical Fee Schedule cannot be sustained. See Continental Medical, P.C. v Travelers Indemnity Co., 11 Misc. 3d 145A (App. Term 1st Dept. 2006.)

An insurer fails to raise a triable issue of fact with respect to a defense that the fees charged were not in conformity with the Workers' Compensation fee schedule when it does not specify the actual reimbursement rates which formed the basis for its determination that the claimant billed in excess of the maximum amount permitted. See St. Vincent Medical Services, P.C. v. GEICO Ins. Co., 29 Misc.3d 141(A), 907 N.Y.S.2d 441 (App. Term 2d, Dec. 8, 2010.)

A fee schedule defense does not always require expert proof. There are two fee schedule scenarios. The first involves the basic application of the fee codes and simple arithmetic. The second scenario involves interpretation of the codes and often requires testimony and expertise beyond that of a lay individual. I find that the fee schedule issue presented in this case is analogous to the former scenario and does not require an expert opinion.

The applicant billed $115.93 for physical therapy treatment and on 5 dates of service from September 1, 2022 to September 9, 2022 for a total of $115.93 and $90.44 for an initial office visit on August 30, 2022.

The correct reimbursable amount for these services is $90.44 for the office visit and a total of $573.00 for the physical therapy for a total of $663.44.

The denial submitted by the respondent was insufficient to establish its fee schedule defense.

Therefore, the applicant is awarded $663.44 for the pre-IME services rendered from August 8, 2022 to September 9, 2022.

Medical Necessity

The applicant billed a total of $1,702.09 for the post-IME physical therapy and PPE supplies/service provided from January 5, 2023 to February 9, 2023, payment of which was denied by the respondent for a lack of medical necessity.

To support a lack of medical necessity defense respondent must "set forth a factual basis and medical rationale for the peer reviewer's [or examining physician's] determination that there was a lack of medical necessity for the services rendered." Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term2d, 11th and 13th Jud. Dists. 2014.) 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 Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

The Civil Courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his/her findings; and 3) the peer review report fails to provide specifics as to the claim at issue; is conclusory or vague. See Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. 2005.)

To support its contention that the services provided to the EIP were not medically necessary, the respondent relied upon the report of the independent medical examination of the EIP by Dr. Shen which was objectively negative and unremarkable. Range of motion was determined with the assistance of a goniometer. The report presents a factually sufficient, cogent medical rationale in support of respondent's lack of medical necessity defense. Dr. Shen performed a complete and comprehensive examination of the EIP which did not identify any objective positive findings and determined that his injuries were resolved.

Based upon the physical examination and medical records reviewed, Dr. Shen determined that despite his subjective complaints, the EIP was not disabled and that he could perform his activities of daily living and working full time without restrictions or limitations. It was Dr. Shen's opinion that there was no medical necessity for further orthopedic treatment, physical therapy, massage therapy, surgery, injections, prescription medication, diagnostic testing, durable medical equipment, household help or special transportation.

Respondent has factually demonstrated that the services provided by the applicant were not medically necessary. Accordingly, the burden now shifts to

the applicant, who bears the ultimate burden of persuasion. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

In response to the report of the physical examination of the EIP by Dr. Shen the applicant relied upon the submissions, including the rebuttal by Dr. Patel who treated the EIP and determined that he was in need of post-EUO physical therapy. Dr. Patel described in detail the injuries sustained by the EIP and the treatment rendered to him. He also described the general benefits of physical and the subjective complaints of this particular EIP.

It was Dr. Patel's opinion that subjective complaints of pain are sufficient to warrant continued treatment. He stated that in addition to complaints of pain there were findings of dysfunction of the cervical, thoracic and lumbar regions which he believed contradicted Dr. Shen's conclusion that the EIP's condition was resolved.

Dr. Patel concluded that the post-IME services were necessary as an effective method of treating pain and relied upon the post-IME physical therapy progress noted to support this opinion.

Based on the submissions, I find that the applicant failed to document sufficient contemporaneous objective findings that would warrant continued treatment after the IME cut-off date and has not met the burden of persuasion in rebuttal. The medical records submitted do not meaningfully address the arguments that are raised in the IME report and are insufficient to overcome the burden of production established by respondent.

Therefore, the respondent has established that the physical therapy services at issue were not medically necessary.

Under these circumstances, the fee schedule issue related to the PPE supplies/services is moot.

Therefore, the claim for physical therapy treatment provided from January 5, 2023 to February 23, 2023 is dismissed with prejudice.

Accordingly, the applicant is awarded $663.44 and the remainder of the claim is dismissed with prejudice.

Any further issues submitted in the record are held to be moot and/or waived insofar as they were not raised at the time of this hearing. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator.

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**
	Passive Rehab PT PLLC	**08/30/22 - 09/08/22**	**$760.09**	**$663.44**	**Awarded: $663.44**
	Passive Rehab PT PLLC	**01/05/23 - 02/06/23**	**$1,047.44**		**Denied**
	Passive Rehab PT PLLC	**02/09/23 - 02/23/23**	**$654.65**		**Denied**
Total			**$2,462.18**		**Awarded: $663.44**

B. The insurer shall also compute and pay the applicant interest set forth below. 08/15/2023 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." See 11 NYCRR §64-3.9(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. Where a claim is untimely denied, or not denied or paid, interest shall accrue as of the 30th day following the date the claim is presented by the claimant to the insurer for payment. Where a claim is timely denied, interest shall accrue as of the date an action is commenced or an arbitration requested, unless an action is commenced or an arbitration requested within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the date the denial is received by the claimant. 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 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

Applicant is awarded statutory attorney's fees pursuant to the no fault regulations. For cases filed after February 4, 2015 the attorney's fee shall be calculated as follows: 20% of the amount of first-party benefits awarded, plus interest thereon subject to no minimum fee and a maximum of $1,360.00. See 11 NYCRR §65-4.6(d.)

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 CT
SS :
County of Fairfield

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

07/17/2024
(Dated)

Anne Malone

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:
44de824e29c3b89d8a6c453b4255cf87

Electronically Signed

Your name: Anne Malone
Signed on: 07/17/2024