

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Lemon Creek Physical Therapy PC , Seguine
Acupuncture PC , Touch Stone Chiropractic
P.C.
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No.	17-24-1338-7317
Applicant's File No.	N/A
Insurer's Claim File No.	9XINY04321-01
NAIC No.	29742

ARBITRATION AWARD

I, Donna Ferrara, 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 JL.

1. Hearing(s) held on 07/03/2024
Declared closed by the arbitrator on 07/03/2024

Roman Kulik, Esq. from Kulik Law Firm, PC participated virtually for the Applicant

James Scozzari, Esq. from Law Offices of Eric Fendt participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,333.24**, 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 dispute arises from the underlying motor vehicle accident of 4/27/23, wherein a 29 year old man was injured. Applicants submitted the bills for physical therapy, acupuncture and chiropractic treatment for the injured person on dates of service 11/1/23 to 1/30/24, to Respondent and Respondent denied payment based on the Independent Medical Examination (IME) of Joseph Y. Margulies, MD, dated 9/11/23, based on lack of medical necessity for further treatment. No Fault benefits were terminated effective 10/11/23 and based on the IME of Philip Cilio, DC, LAc, dated 9/6/23, based on lack of medical necessity for further treatment. No Fault benefits were terminated effective 10/9/23. Respondent alleged non-receipt of a number of bills.

Accordingly, the issue to be determined is whether Respondent's defenses should be sustained.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the file regarding this matter contained in the Modria Center record of the case maintained by the American Arbitration Association. This decision is based on my review of that file, as well as the arguments of the parties at the hearing.

"[A] plaintiff demonstrates prima facie entitlement to summary judgment by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim, using the statutory billing form, was mailed to and received by the defendant insurer." Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 25 N.Y.3d 498, 501, 14 N.Y.S.3d 283, 286 (2015).

NON-RECEIPT DEFENSE

Respondent alleges that the bills from **Applicant Seguire Acupuncture** were not received for dates of service 1/18/24 to 1/23/24 and 1/29/24 to 1/30/24.

Respondent submits an affirmation by Danuta Fudali, No fault Supervisor, who describes Respondent's mailing procedure and based on her review and personal knowledge, the bills from Applicant Seguire Acupuncture were not received for dates of service 1/18/24 to 1/23/24 and 1/29/24 to 1/30/24, were never received by Respondent.

A medical provider is required to submit proof of mailing through evidence in admissible form. Such proof may include the verification of treatment form and/or an affidavit from a person or entity (1) with knowledge of the claim and how it was sent to the insurer or (2) who has relied upon the forms in the performance of their business. Thus, even where an insurer is precluded from raising a defense to the proof of claim form because of its failure to timely deny the claim, the plaintiff medical provider must, as an initial matter, demonstrate its entitlement to summary judgement by submission of proof in admissible form. Viviane Etienne Medical Care, P.C. v. Country-Wide Ins. Co., 114 A.D. 3d 33, 977 N.Y.S. 2d 292 (App. Div. 2d Dept. 2013), aff'd 25 N.Y.3d 498, 14 N.Y.S.3d 283, (Ct of Appeals 2015).

A review of the submission reveals there is no proof of mailing for the above dates of service.

It is within the discretion of the arbitrator to determine whether the submitted evidence supports a fact.

Applicant has not proven its prima facie case as to these bills.

Respondent's non-receipt defense is sustained.

DR. MARGULIES' IME

Dr. Margulies reviewed the injured person's medical records including treatment reports and diagnostic tests. The injured person presented with neck, back, and right shoulder pain. Examination of the cervical and lumbosacral spine revealed normal range of motion, no tenderness, no spasm, administered tests were negative, normal deep tendon reflexes, sensory and muscle strength. Examination of both shoulders revealed normal range of motion, no instability, and negative administered tests. Exam of both knees revealed normal range of motion, normal testing and no effusion Dr. Margulies diagnosed resolved cervical and lumbar sprain, resolved contusion of the right shoulder and right knee and he opined that there is no further need for orthopedic treatment.

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc.3d 144(A), 2008 NY Slip Op 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see *AJS Chiropractic, P.C. v. Mercury Ins. Co.*, 22 Misc.3d 133(A), 2009; NY Slip Op 50208(U), 2009 WL 323421 (App. Term 2d & 11th Dist. Feb. 9, 2002), 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 NY Slip Op 50568(U), 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). The insured or the provider bears the burden of persuasion on the question of medical necessity. *Bedford Park Medical Practice P.C. v. American Transit Ins. Co.*, 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 NY Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). This burden of proof is properly placed on a claimant health care provider because presumably it is in possession of the injured party's medical records.

I find that Dr. Margulies established a factual basis and medical rationale for his asserted lack of medical necessity for further orthopedic treatment.

Respondent having made out a prima facie case of lack of medical necessity through the IME report, the burden shifted to Applicant to rebut and overcome it.

Applicant submits contemporaneous medical dated 9/6/23, by Ahmed Elsoury, MD. This was a follow-up visit and the injured person complained of neck, back, right shoulder and right knee. Exam of the right shoulder revealed tenderness, limited range of motion, weakness; exam of the right knee revealed tenderness, limited range of motion, and swelling; exam of the cervical thoracic lumbar spine revealed spasm and tenderness, decreased range of motion, motor 5/5, decreased sensation, normal reflex.

Based on a careful review of all the evidence, I find that Applicant has sustained its burden of proof and rebutted the lack of medical necessity for further orthopedic treatment established by Respondent. A contemporaneous medical exam noted pain, decreased range of motion, spasm, tenderness, weakness and decreased sensory.

I find that the injured person needed continued orthopedic treatment based upon these positive findings.

I find in favor of Applicant.

CHIROPRACTOR/ACUPUNCTURIST CILIO'S IME

Chiropractor/Acupuncturist Cilio reviewed the injured person's medical records including treatment reports and diagnostic tests. The injured person presented with complaints of right shoulder and low back pain. Examination of the cervical, thoracic and lumbosacral spine revealed normal range of motion, normal muscle strength and reflexes and unremarkable administered tests. He performed a traditional Chinese medicine evaluation (TCM) of the injured person. He determined that the injured person's pulse and tongue were unremarkable according to the principles of TCM and the channels noted were also unremarkable for musculoskeletal pathology. Acupuncturist/Chiropractor Cilio diagnosed resolved Qi and/or Blood stagnation of the channels and that there was no further need for acupuncture treatment. He also diagnosed resolved cervical, thoracic and lumbosacral injuries and opined that there was no further need for chiropractic treatment.

I find that Chiropractor/Acupuncturist Cilio established a factual basis and medical rationale for his asserted lack of medical necessity for further chiropractic and acupuncture services.

Respondent having made out a prima facie case of lack of medical necessity through the IME report, the burden shifted to Applicant to rebut and overcome it.

There is no contemporaneous acupuncture exam submitted by Applicant.

Based on a careful review of all the evidence and the arguments of the parties at the hearing, Respondent has established the lack of medical necessity for the disputed acupuncture services for the injured person by a preponderance of the credible evidence, and the claim is denied. This is because the evidence presented by Applicant did not refute the lack of medical necessity established by Respondent. The IME report indicated that the injured person's TCM exam was unremarkable and there were no contemporaneous acupuncture reports submitted by Applicant.

Applicant Seguire's proof did not refute the lack of medical necessity established by Respondent.

Applicant did not sustain its burden of proof.

I find in favor of Respondent regarding the acupuncture bills.

Regarding the chiropractic treatment, Applicant Touch stone submits contemporaneous medical dated 9/6/23, by Ahmed Elsoury, MD. This was a follow-up visit and the injured person complained of neck, back, right shoulder and right knee. Exam of the right shoulder revealed tenderness, limited range of motion, weakness; exam of the right knee revealed tenderness, limited range of motion, and swelling; exam of the cervical thoracic lumbar spine revealed spasm and tenderness, decreased range of motion, motor 5/5, decreased sensation, normal reflex.

Based on a careful review of all the evidence, I find that Applicant, Touch stone has sustained its burden of proof and rebutted the lack of medical necessity for further chiropractic treatment established by Respondent. A contemporaneous medical exam noted pain, decreased range of motion, spasm, tenderness, weakness and decreased sensory.

I find that the injured person needed continued chiropractic treatment based upon these positive findings.

I find in favor of Applicant.

There were no fee issues raised at the hearing.

The arbitration claim is granted as indicated below.

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
	Lemon Creek Physical Therapy PC	11/01/23 - 11/10/23	\$319.88	Awarded: \$319.88
	Lemon Creek Physical Therapy PC	11/15/23 - 11/29/23	\$251.32	Awarded: \$251.32
	Lemon Creek Physical Therapy PC	12/01/23 - 12/13/23	\$296.96	Awarded: \$296.96
	Lemon Creek Physical Therapy PC	12/15/23 - 12/20/23	\$182.76	Awarded: \$182.76
	Lemon Creek Physical Therapy PC	12/22/23 - 12/27/23	\$137.12	Awarded: \$137.12
	Lemon Creek Physical	01/03/24 -	\$319.88	Awarded:

	Therapy PC	01/15/24		\$319.88
	Seguine Acupuncture PC	01/04/24 - 01/15/24	\$220.08	Denied
	Seguine Acupuncture PC	01/18/24 - 01/23/24	\$165.06	Denied
	Seguine Acupuncture PC	01/29/24 - 01/30/24	\$110.04	Denied
	Touch Stone Chiropractic P.C.	12/29/23 - 01/06/24	\$165.07	Awarded: \$165.07
	Touch Stone Chiropractic P.C.	01/10/24 - 01/13/24	\$165.07	Awarded: \$165.07
Total			\$2,333.24	Awarded: \$1,838.06

B. The insurer shall also compute and pay the applicant interest set forth below. 03/01/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicants' award shall bear interest at a rate of two percent per month, calculated on a pro rata basis, 30 day month, from the date when payment became overdue, pursuant to 11 NYCRR 65- 3.9(a). Interest shall run from the filing date until the date of payment.

C. Attorney's Fees

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

This case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance regulation 68-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 NY

SS :

County of Suffolk

I, Donna Ferrara, 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)

Donna Ferrara

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:
c19a26e760bd83cbc406dffaab21751d

Electronically Signed

Your name: Donna Ferrara
Signed on: 07/17/2024