

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

BV Physical Therapy PC  
(Applicant)

- and -

Electric Insurance Company  
(Respondent)

AAA Case No. 17-23-1289-6696

Applicant's File No. DK23-343137

Insurer's Claim File No. 20220706A17

NAIC No. Self-Insured

**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 06/27/2024  
Declared closed by the arbitrator on 06/27/2024

Jennifer Raheb, Esq. from Korsunskiy Legal Group P.C. participated virtually for the Applicant

Todd Hyman, Esq. from Carman, Callahan & Ingham, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,228.00**, 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 33 year old EIP reported involvement in a motor vehicle accident on July 5, 2022; claimed related injury and underwent Activity Limitation Measurement & Training (ALM&T) provided by the applicant July 20, 2022 and August 24, 2022.

The applicant submitted a claim for these medical services, payment of which was denied by the respondent based on the peer review by Dr. Cyrus Kao, M.D. dated August 23, 2022 . In response, the applicant submitted a rebuttal dated May 20, 2024 by Boris Vasserman, Esq. and Dr. Kao submitted an addendum dated June 10, 2024.

The applicant contends that the denial for date of service August 24, 2022 is late on its face.

**The issues to be determined at the hearing are:**

**Whether the denial for date of service August 24, 2022 is timely and proper.**

**Whether the respondent established that the medical services provided to the EIP were not medically necessary.**

#### 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.

##### Timeliness of the Denial for date of service August 24, 2022

Before a determination can be made regarding the defense of lack of medical necessity a determination must be made regarding the timeliness of the denial for date of service August 24, 2022.

The penalty for an insurer's failure to issue a timely and proper denial of claim is that it will be precluded from objecting to the claim. In Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co., 114 A.D.3d 33 (2d Dept. 2013) the Appellate Division held that:

Challenges and objections regarding whether the services were in fact rendered, were causally related to a covered accident or were medically necessary are not available to the defendant insurer after the onset of litigation unless the insurer proffered a timely and proper denial of claim within the prescribed time frame.

According to the NF-10, the bill for date of service August 24, 2022 was received by the respondent on September 7, 2022 and the denial is dated November 22, 2022, which is more than 30 days after receipt of the bill.

Under these circumstances, the respondent did not issue a proper and timely denial within the prescribed time frame of 30 days from receipt of the bill in question and is precluded from objecting to the claim. Viviane Etienne, supra.

Therefore, the respondent has failed to establish any defense for the medical services provided to the EIP on August 24, 2022.

**Therefore, the applicant is awarded \$614.00 in disposition of the bill for date of service August 24, 2022.**

Medical Necessity for date of service July 20, 2022

In order 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, 11<sup>th</sup> and 13<sup>th</sup> 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 1<sup>st</sup> Dept. 2006.)

The Civil Courts have held that a defendant's peer review or report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 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.)

In support of its contention that the medical services provided by the applicant on July 20, 2022 were not medically necessary, respondent relies upon the report of the peer review by Dr. Kao who reviewed the medical records of the EIP and noted the injuries claimed and the treatment rendered to him. Dr. Kao considered possible arguments and justification for the need for the medical services at issue and determined that they were not warranted under the circumstances presented.

Dr. Kao discussed the standard of care for the ALM&T provided to the EIP and determined that he did not meet these criteria. It was his opinion that this type of testing is not recommended as a primary criterion in determining routine musculoskeletal evaluation which should be included initially in range of motion testing.

Dr. Kao supported, with relevant medical literature, his opinion that the ALM&T provided to the EIP was not medically necessary.

Respondent has factually demonstrated that the services at issue were not medically necessary. Accordingly, the burden now shifts to the applicant, who bears the ultimate burden of persuasion, pursuant to Bronx Expert Radiology, P.C., supra.

In opposition to the peer review, the applicant presented a rebuttal by Dr. Vasserman who reviewed the EIP's medical records and disagreed with the conclusions reached by Dr. Kao regarding the lack of medical necessity for the ALM&T provided on July 20, 2022.

Dr. Vasserman concluded based on the EIP's medical records and the severity of his injuries that it was necessary to perform this testing to diagnose his functional disability and to develop a treatment program.

Dr. Vasserman supported, with relevant medical literature, his opinion that the ALM&T was necessary to accurately determine a patient's ability to perform meaningful tasks safely. with relevant medical literature.

In response to the rebuttal, Dr. Kao submitted an addendum in which he discussed the conclusions reached by Dr. Vasserman in the rebuttal but determined that computerized range of motion testing was not medical necessary and that a standard physical examination would note any impairment that the EIP might have and his response to treatment. He also noted that Dr. Vasserman did not support, with specific relevant medical citations, his opinion that the ALM&T was medically necessary for this particular EIP.

After a review of all of the evidence submitted an issue of fact remains as to whether the services rendered are medically necessary. Conflicting opinions have been presented in the peer review and addendum by Dr. Kao and the rebuttal of Dr. Vasserman on behalf of the applicant. I find that the submissions of Dr. Kao were more persuasive in this instance.

Based on the foregoing, I find that the respondent has established that the ALM&T provided on July 20, 2022 was not medically necessary.

**Therefore, the claim for services rendered on July 20, 2022 is dismissed with prejudice.**

**Accordingly, the applicant is awarded \$614.00 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	Status
	BV Physical Therapy PC	07/20/22 - 07/20/22	\$614.00	Denied
	BV Physical Therapy PC	08/24/22 - 08/24/22	\$614.00	Awarded: \$614.00
Total			\$1,228.00	Awarded: \$614.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 03/08/2023 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 30<sup>th</sup> 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.

07/21/2024  
(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:**  
ad189f711b433c51a07b6f6322cdaf2b

### Electronically Signed

Your name: Anne Malone  
Signed on: 07/21/2024