American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

H Levitan Medical PC (Applicant)	AAA Case No.	17-23-1298-5786
	Applicant's File No.	DK23-361460
- and -	Insurer's Claim File No.	20220706A17
	NAIC No.	Self-Insured
Electric 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 06/27/2024
   Declared closed by the arbitrator on 06/27/2024

   Allen Tsirelman, Esq. from Tsirelman Law Firm PLLC 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, **$1,139.19**, 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 miscellaneous diagnostic testing provided by the applicant on August 17, 2022.

   The applicant submitted a claim for the technical component for these medical services, payment of which was timely denied by the respondent based upon a peer review by Stuart Stauber, M.D. dated October 7, 2022.

   The respondent also asserted a fee schedule defense.

The issues to be determined at the hearing are:

Whether the respondent established that the medical services at issue were not medically necessary.

Whether the respondent established its fee schedule defense.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed from 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.

Medical Necessity

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, 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 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 caloric vestibular test, nystagmus tests, oscillating tracking test, sinusoidal tests, computerized dynamic posturography, testing of the autonomic nervous system and transcranial doppler studies provided by the applicant were not medically necessary, respondent relies upon the report of the peer review by Dr. Stauber who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to him. Dr.

Stauber 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.

He specifically noted that the EIP was initially examined on July 11, 2022, six days post- accident and complained of injury to his lower back and bilateral knees, with positive findings and an impression of sprain injuries and internal derangement of the knees. He started a course of physical therapy.

Dr. Stauber discussed the standard of care for all of the testing provided and the reasons that each of the tests were not medically necessary for this particular EIP at the time they were provided.

Dr. Stauber supported, with relevant medical literature, his opinion that the testing at issue provided to the EIP was not medically necessary.

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the medical services at issue were not indicated for this EIP at the time they were provided. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, which bears the ultimate burden of persuasion to establish that the medical services at issue were medically necessary.

In opposition to the peer review, the applicant did not submit a formal rebuttal, but relied upon the submissions, including the initial physical therapy evaluation dated July 14, 2024 and follow-up evaluations which documented and SOAP notes from July 14, 2022 which documented positive subjective and objective findings.

Included was the report of the ultrasounds of the knee, shoulder, right elbow, lumbar spine which stated that there was no obvious abnormality.

Since the applicant did not provide a rebuttal to the peer review it did not respond to the respondent's argument that the medical services at issue provided to the EIP were a deviation from a reasonable medical standard of care. The medical records alone are not sufficient to rebut the conclusions of Dr. Stauber. In addition, the respondent did not provide any citations to refute the medical literature relied upon by him.

Based on the foregoing, I find that the respondent has established that the medical services at issue were not medically necessary.

Under these circumstances, the fee schedule issue is moot.

Accordingly, 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 claim is DENIED in its entirety

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.

07/25/2024
(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:
931a16b1fec5ed73a1facfff9fb49799

Electronically Signed

Your name: Anne Malone
Signed on: 07/25/2024