

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Joseph A Raia MD PC
(Applicant)

- and -

Kemper/Lumbermans/Kemper A Unitrin
Business
(Respondent)

AAA Case No. 17-23-1321-4438

Applicant's File No. N/A

Insurer's Claim File No. 23123725525

NAIC No. 10914

ARBITRATION AWARD

I, Philip Wolf, 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 07/03/2024
Declared closed by the arbitrator on 07/03/2024

Robin Grumet, Esq. from Law Offices of Hillary Blumenthal LLC (Hoboken)
participated virtually for the Applicant

Christine Lee, Esq. from De Martini & Yi, LLP participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$1,605.08**, 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

Assignor, a 27-year-old female, was the driver of a motor vehicle which was involved in an accident on July 5, 2023. As a result of the accident Assignor sustained injuries to her neck and lower back. Applicant is seeking reimbursement for an exam and EMG/NCV testing performed on August 15, 2023. Respondent issued a timely denial predicated upon an August 31, 2023 peer review conducted by Kevin Portnoy, D.C.. The issue in dispute is whether Respondent has established its lack of medical necessity defense.

4. Findings, Conclusions, and Basis Therefor

Applicant is seeking a total of \$1,605.08 for an exam and EMG/NCV testing performed on July 5, 2023. This award is rendered upon the oral arguments of both parties and upon the documentary evidence submitted by both parties. The documentary evidence submitted by the parties consists of the documents contained within the ADR Center for this matter as of July 29, 2024.

Applicant's Prima Facie Case

Assignor was the driver of a motor vehicle which was involved in an accident on July 5, 2023. On August 15, 2023, Assignor presented to Applicant with complaints of headache, insomnia, anxiety, neck pain, and lower back pain. Neurological exam revealed normal deep tendon reflexes, and normal sensory exam. Physical exam yielded positive findings with respect to Assignor's cervical spine and lumbar spine. Doctor Gibbons recommended physical therapy and EMG/NCV testing of the upper and lower extremities. On August 15, 2023, Assignor underwent EMG/NCV testing of the upper and lower extremities which resulted in a normal study.

After reviewing the evidence submitted by Applicant, I find that Applicant has submitted sufficient credible evidence to establish a prima facie case with respect to the exam and EMG/NCV testing of the upper and lower extremities performed on August 15, 2023. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 N.Y.3d 498, 2015 NY Slip Op 04787, (2015).

Respondent's Peer Review Defense

Respondent issued a timely denial predicated upon an August 31, 2023 peer review conducted by Kevin Portnoy, D.C. Doctor Portnoy opined that exam and EMG/NCV testing were not medically necessary. In reaching his opinion, Dr. Portnoy does cite/reference to medical authority in compliance with the requirements set forth in Jacob Nir, M.D. a/a/o Josaphat Etienne v. Allstate Ins. Co., 7 Misc. 3d 544, 796 N.Y.S.2d 857 (Civ. Ct. Kings Co. 2005) and CityWide Social Work & Psychological Services, P.L.L.C. a/a/o Tremayne Brow v. Travelers Indemnity Company, 3 Misc. 3d 608, 777 N.Y.S.2d 241 (Civ. Ct. Kings Co. 2004).

Doctor Portnoy states that the records failed to indicate how the testing would aid in devising, altering, reducing the number of visits or enhancing clinical prognosis. "There were no signs of rapid neurological deterioration of the claimant throughout the treatment course or evidence of spinal instability that required immediate surgical assessment of the cervical spine and lumbar spine or the upper or lower extremities." "there was no description of any alternative invasive or surgical procedures under consideration to which the information obtained from the EMG/NCV of the upper and lower extremities would have been necessary to providing optimal chiropractic treatment to this claimant." "It must be noted that EMG/NCV studies does not provide the chiropractor with useful information regarding the detection and correction of the vertebral subluxation complex."

It is noted that Respondent submitted an addendum to Dr. Portnoy's peer review. In his addendum, Dr. Portnoy notes that Assignor is a medical doctor and not a chiropractor and therefore was not familiar with the chiropractic standard of care. Doctor Portnoy further reiterated his rationale set forth in his peer review.

Applicant's Rebuttal

Applicant has submitted a rebuttal by Leonid Shapiro, M.D. Doctor Shapiro states that "the test was essential and medically necessary in order to rule out radiculopathy in view of the patient's complaints, physical findings and working diagnosis; a) better predict prognosis for recovery and possible residual neurological deficit, b) administer appropriate therapy and c) if electro diagnostic study is positive for neurogenic injury, treatment can be extended to tens for neck, back, cervical and lumbar traction and paravertebral nerve block." Doctor Shapiro states that Assignor's complaints and the exam findings "clearly document a potential neurological deficit and are listed as indicators for both neurodiagnostic evaluation and testing according to the AANEM recommended policy for electrodiagnostic medicine." Doctor Shapiro further states that the test was performed "to differentiate between cervical/lumbar radiculopathy and neuropathy." "The patient exhibited all the aforementioned findings raising suspicion of cervical/lumbar radiculopathy and neuropathy." "The patient had non resolving radiating pain despite of receiving conservative treatment for more than 5 weeks. The New York State Workers Compensation Board Medical Treatment Guidance suggests that "EDS is recommended where there is a failure of suspected radicular pain to resolve or plateau after waiting 4 to 6 weeks."

Determination

Where Respondent has presented sufficient evidence to establish a defense based on lack of medical necessity, the burden shifts to the Applicant, which must present its own evidence of medical necessity and/or rebuttal to Respondent's peer review. *See, A. Khodadadi Radiology, P.C. v. Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342U, 16 Misc. 3d 131A (2nd Dept. 2007).

Olga Gibbons, a medical doctor, performed the August 15, 2023 exam that contained the recommendation for the EMG/NCV testing. Therefore, I find Dr. Portnoy's (a chiropractor) argument regarding the chiropractic standard of care to be without merit. In his rebuttal Dr. Shapiro provided a diagnostic dilemma between radiculopathy and neuropathy. Doctor Shapiro further established that Assignor's symptoms and exam findings persisted despite a course of conservative treatment. Doctor Shapiro further set forth the manner in which the testing could impact Assignor's subsequent treatment. In addition, it is noted that Dr. Portnoy failed to provide a medical rationale for why the August 15, 2023 exam was not medically necessary.

Based upon the foregoing, and after reviewing the evidence, I find that Applicant has submitted sufficient credible evidence to rebut the peer review of Dr. Portnoy. I am persuaded by the opinion of Dr. Shapiro, and his rationale as set forth herein and find that Applicant has established the medical necessity for the exam and EMG/NCV testing

of the upper and lower extremities performed on August 15, 2023. Accordingly, Applicant's claim is granted in its entirety.

DECISION: Based upon the foregoing, Applicant's claim is granted in its entirety. This award is in full disposition of all No-Fault benefit claims submitted to 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
	Joseph A Raia MD PC	08/15/23 - 08/15/23	\$1,605.08	Awarded: \$1,605.08
Total			\$1,605.08	Awarded: \$1,605.08

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/17/2023 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the applicant the amount of interest at the rate

of 2% per month, simple, and ending with the date of payment of the award. Respondent timely denied the subject bill and arbitration was not commenced within 30 days after receipt of denial. Accordingly, interest shall begin to accrue as of the date adjudication was commenced by the claimant, i.e., the date the claim was received by the AAA (**10/17/2023**). *See, LMK Psychological Services, P.C. v. State Farm Mut. Auto. Ins. Co., 2009 NY Slip Op 02481 (2009).*

C. Attorney's Fees

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

The insurer shall pay the applicant an attorney's fee in accordance with 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 NY

SS :

County of Suffolk

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

07/29/2024
(Dated)

Philip Wolf

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:
cbff2e282996802010b6cb2f39d23173

Electronically Signed

Your name: Philip Wolf
Signed on: 07/29/2024