American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Bryan M Elzholz, M.D., P.C. (Applicant)	AAA Case No.	17-23-1324-1031
	Applicant's File No.	23-007165
- and -	Insurer's Claim File No.	230597008-002
	NAIC No.	12130
New South Insurance Company (Respondent)		

ARBITRATION AWARD

I, Theresa A. Kelly, 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, NO

1. Hearing(s) held on 06/18/2024
   Declared closed by the arbitrator on 07/03/2024

   Jared Mallimo, Esq. from The Licatesi Law Group, LLP participated virtually for the Applicant

   Angela Venetsanos, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **$1,027.65**, was AMENDED and permitted by the arbitrator at the oral hearing.

   Applicant amended its claim to $974.51 in accordance with the applicable provisions of the workers' compensation fee schedule.

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

3. Summary of Issues in Dispute

   The Assignor NO, a 36-year-old male, was injured as the driver of an automobile involved in an accident on 7/13/2023. In dispute is the Applicant's claim for EMG/NCV diagnostic testing provided to the Assignor on 8/22/2023. Respondent denied the claims on the ground that the services were not medically necessary of Sammy Dean.

The issue is whether the EMG/NCV diagnostic testing was medically necessary.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives. There were no witnesses. I reviewed the documents contained in MODRIA for both parties and make my decision in reliance thereon.

To receive payment of a claim, Applicant "need only file a 'proof of claim' (11 NYCRR 65.11(k)(3)), and the insurers are obliged to honor it promptly or suffer the statutory penalties." Dermatossian v. New York City Transit Authority, 67 N.Y.2d 219, 224, 501 N.Y.S.2d 784, 787 (1986). Furthermore, the No-Fault law requires a carrier to either pay or deny a claim for No-Fault benefits within thirty (30) days from the date an applicant supplies proof of claim. See, Insurance Law §5106 (a) and 11 NYCRR 65-3.8.

Once Applicant established its prima facie case, the burden of proof shifts to Respondent to come forward with admissible evidence demonstrating the existence of a material issue of fact. Amaze Medical Supply Inc. v. Allstate Insurance Co. 3 Misc3d at 133.

In support of its position, Applicant submitted a claim for $974.51 for the EMG/NCV diagnostic testing, an assignment of benefits form and contemporaneous medical documentation. Thus, a review of the competent evidence in the record reveals that Applicant established a prima facie case of entitlement to reimbursement of its claim, by submitting evidence that the prescribed statutory billing form was mailed and received, and that the Respondent failed to either pay or deny the claim within the requisite 30-day period. Mary Immaculate Hospital v. Allstate Insurance Co., 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004).

Upon proof of a prima facie case by the applicant, the burden shifts to the insurer to prove that the services were not medically necessary. A.B. Medical Services, PLLC v. Lumbermens Mutual Casualty Company, 4 Misc.3d 86, 2004 N.Y. Slip Op. 24194 (App.Term 2nd and 11th Jud. Dists. 2004); Kings Medical Supply, Inc. v. Country-Wide Insurance Company, 5 Misc.3d 767, 2004 N.Y. Slip Op. 24394 (N.Y. Civ. Ct. Kings Co. 2004); Amaze Medical Supply, Inc. v. Eagle Insurance Company, 2 Misc.3d 128(A), 2003 N.Y. Slip Op. 51701(U) (App Term 2nd and 11th Jud. Dists. 2003).

Respondent's evidence established that the claim was timely denied on a peer review by Dr. Sammy Dean dated 10/10/2023. Dr. Dean found that based upon the medical records he reviewed, there was no medical necessity for the nerve testing. He opined that the standard of care for spinal and joint pain following motor vehicle injuries includes evaluation by a physician followed by conservative care modalities such as physical therapy for a period of 8 weeks… If conservative treatment modalities fail to ameliorate the patient's symptoms, or if there is a deterioration in the condition, MRI of the area and/or further interventional treatment may be indicated at that point.

He further stated that An EMG is not necessary as there is no clear indication of a diagnostic dilemma and no indication for the need for such testing with prior ordered bu unperformed imaging of the cervical spine. There is limited indication of progression and/or abnormal upper extremity complaints. There is no indication of differential diagnosis for which electrodiagnostic testing would be a necessity prior to imaging.

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in Jacob Nir, M.D. v. Allstate Insurance Co., 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co., 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

Where the Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden then shifts to the Applicant which must then present its own evidence of medical necessity. [see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed]), Andrew Carothers, M.D., P.C. v. GEICO Indemnity Company, 2008 NY Slip Op 50456U, 18 Misc. 3d 1147A, 2008 N.Y. Misc. LEXIS 1121, West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co. 13 Misc.3d 131, 824 N.Y.S.2d 759, 2006 NY Slip Op51871(U) (Sup. Ct. App. T. 2d Dep't 2006)]. I find the peer review of Dr. Dean provided a factual basis and a medical rationale to support the finding that the services were not medically necessary.

Applicant submits a rebuttal from Dr. Brian Elzholz. Respondent objected to the late upload of the rebuttal and argued it should not be permitted as evidence. I permitted the Respondent two weeks to provide an addendum, and held the matter open for two weeks. No addendum is in evidence.

Dr. Elzholz disagreed with Dr. Dean's opinion. He stated that the patient was recommended EMG/NCV testing to evaluate the neurological symptoms such as tingling, numbness and/or weakness of the spine and upper extremities; office visit and follow up in 4 wecks. The exam findings on 8/22/2023 did reflect significant findings. Dr. Elzholz indicated that based on his exam findings, both which indicate neuropathy or radiculopathy, he wanted to confirm radiculopathy and rule out peripheral neuropathy. The patient had over six weeks of treatment. Applicant pointed out that the treatment actually began on 7/21/2023, not 8/3/2023.

In reviewing all of the medical records as well as the peer review and the rebuttal, I find that the rebuttal specifically refuted the opinion of Dr. Dean. Dr. Elzholz set forth the differential diagnosis and demonstrated the need for the upper extremity EMG/NCV. I note that the tingling and burning was a concern of the doctor, who indicated in his notes that the EMG/NCV would rule out the differential diagnosis.

In light of the above, I find Dr. Elzholz rebuttal and the medical records supplied refute the findings of lack of medical necessity of the upper EMG/NCV diagnostic testing for the Assignor. 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**

	Bryan M Elzholz, M.D., P.C.	**08/22/23 - 08/22/23**	**$939.85**	**$886.71**	**Awarded: $886.71**
	Bryan M Elzholz, M.D., P.C.	**08/22/23 - 08/22/23**	**$87.80**	**$87.80**	**Awarded: $87.80**
Total			**$1,027.65**		**Awarded: $974.51**

B. The insurer shall also compute and pay the applicant interest set forth below. 11/06/2023 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." 11 NYCRR §65-3.9(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." 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 at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co. 12.N.Y.3d 217 (2009).

C. Attorney's Fees

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

After calculating the sum total of the first-party benefits awarded in this arbitration plus the interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20% of that sum total, subject to a maximum fee of $1,360. 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 NY
SS :
County of Suffolk

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

08/02/2024
(Dated)

Theresa A. Kelly

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:
50f9abfb96fd55e7cdb99e08e436b71d

Electronically Signed

Your name: Theresa A. Kelly
Signed on: 08/02/2024