

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Exoskeletal Technologies, LLC
(Applicant)

- and -

Allstate Fire & Casualty Insurance Company
(Respondent)

AAA Case No. 17-23-1330-2518

Applicant's File No. FDNY23-71526

Insurer's Claim File No. 0704014018 2CI

NAIC No. 29688

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 08/12/2024
Declared closed by the arbitrator on 08/12/2024

Melissa Pirillo, Esq. from Fass & D'Agostino, P.C. 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, **\$1,004.13**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount in dispute is amended by the applicant to conform to the appropriate fee schedule.

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

3. Summary of Issues in Dispute

The 44 year old EIP reported involvement in a motor vehicle accident on February 22, 2023 ; claimed related injury and received LSO, and TENS unit provided by the applicant on October 9, 2023.

The applicant submitted a claim for this durable medical equipment (DME), payment of which was timely denied by the respondent based upon a peer review by Albert Claps, D.C. dated November 7, 2023. In response, the applicant submitted a rebuttal and record review dated February 26, 2024 by Nestor Nicolaides, D.C. who was not one of the EIP's treating medical providers.

The issue to be determined at the hearing is whether the respondent established that the DME provided by the applicant was not medically necessary.

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.

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.)

To support its contention that the durable medical equipment provided by the applicant was not medically necessary, respondent relies upon the peer review by Dr. Claps, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to her. Dr. Claps considered possible arguments and justification for the need for the durable medical equipment at issue and determined that it was not warranted under these circumstances.

Dr. Claps submitted a cogent and comprehensive report in which he discussed both items of equipment provided and his reasons for determining that each one was not medically necessary for this EIP. He discussed the standard of care for the LSO and the TENS unit and determined that the EIP did not meet these criteria.

Dr. Claps supported, with relevant medical literature, his opinion that the DME provided EIP was not medically necessary for this particular EIP.

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

In opposition to the peer review, the applicant presented a rebuttal by Dr. Nicolaides, who disagreed with the conclusions reached by Dr. Claps and explained the rationale for his determination that both items of durable medical equipment were necessary. He described in detail the injuries claimed by the EIP and the treatment rendered to her and cited relevant medical literature to support the general benefits for each item of durable medical equipment.

Dr. Nicolaides specifically determined that in general the DME at issue can prevent secondary aggravation to injured areas, increase healing and expedite improvement of patient symptoms and function and quality of life.

He noted that this particular EIP was initially evaluated on March 25, 2023, one month post-accident and referenced the report which documented subjective complaints of pain and objective testing. He determined that these findings indicated the need for support which was provided by the LSO at issue.

Dr. Nicolaides also described the reasons that the TENS unit was necessary for this EIP based on the history of her injury and the long-term use at home would be beneficial for intractable pain and would provide her with significant therapeutic benefits with continuous use over a long period of time.

Dr. Nicolaides supported, with relevant medical citations, his opinion that the durable medical equipment provided to the EIP was medically necessary.

The submissions also included a letter of medical necessity from Dr. Gozinsky, the EIP's treating medical provider. He noted the injuries sustained by the EIP and the treatment rendered to her and the benefits of use of the DME at issue at home to support the treatment she receives in office.

After a review of all the evidence submitted an issue of fact remains as to whether the durable medical equipment at issue was medically necessary.

Conflicting opinions have been presented in the peer review by Dr. Claps and the report letter of medical necessity by Dr. Gozinsky and the rebuttal by Dr. Nicolaides on behalf of the applicant.

In this instance, the letter of medical necessity and rebuttal meaningfully refer to and rebut the findings of Dr. Claps and the medical records submitted are sufficient to establish the medical necessity for the durable medical equipment at issue.

Based on the foregoing, I find that the respondent has failed to establish that the DME at issue was not medically necessary.

Accordingly, the applicant is awarded \$877.84 in disposition of this claim.

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	Amount Amended	Status
	Exoskeletal				

	Technologies, LLC	10/09/23 - 10/09/23	\$1,004.13	\$877.84	Awarded: \$877.84
Total			\$1,004.13		Awarded: \$877.84

- B. The insurer shall also compute and pay the applicant interest set forth below. 12/26/2023 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 30th 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.

09/02/2024

(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:

179da8a1adef33942e3632a8002172b

Electronically Signed

Your name: Anne Malone
Signed on: 09/02/2024