

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

True Recovery Supply Inc.
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-23-1312-5851

Applicant's File No. LIP-29612

Insurer's Claim File No. 0708718804
ZRP

NAIC No. 19232

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 08/26/2024
Declared closed by the arbitrator on 08/26/2024

Lee-Ann Trupia, Esq. from Law Offices of Ilya E Parnas P.C. participated virtually for the Applicant

Stephanie Vitiello, Esq. from Law Offices of John Trop participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$5,400.00**, 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 22 year old EIP reported involvement in a motor vehicle accident on March 31, 2023; claimed related injury and received GENESYS heat system provided by the applicant on June 6, 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 Isandr Dumesh, M.D. dated July 25, 2023. In response, the applicant submitted a rebuttal dated August 16, 2024 by Nick Nicoloff, PA one of the EIP's treating medical providers. The respondent submitted an addendum by Dr. Dumesh dated September 18, 2023.

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 and addendum by Dr. Dumesh, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to her. Dr. Dumesh 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. Dumesh submitted a comprehensive report in which he discussed the PEMF unit (portable physiotherapeutic equipment) provided and his reasons for determining that it was not medically necessary for this EIP. He discussed in general the clinical trials for this particular therapy device which provided preliminary evidence of its effectiveness for patients with non-specific LBP.

However, he determined that in this particular case there was no indication for use of the PEMF unit for lower back and hip pain. He noted that there was no evidence that the EIP was failing on a physical therapy regimen and it was his opinion that this device would not shorten the duration of this therapy or otherwise benefit the particular EIP.

He supported, with relevant medical literature, his opinion that the DME provided to the EIP was not medically necessary at the time it was provided.

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 Nick Nicoloff, PA who disagreed with the conclusions reached by Dr. Dumesh and explained the rationale for his determination that the PEMF provided to her was medically necessary. He described in detail the injuries claimed by the EIP and the treatment rendered to her.

Nick Nicoloff, PA concluded, based on the EIP's response to the office-based treatment, her complaints and MRI results that this device was medically necessary in accordance with generally accepted standards of care to provide pain control, prevent further injury and allow her to return to her activities of daily living sooner.

He discussed in detail the general uses and benefits of the PEMF system and concluded that this device together with supervised therapy are an effective method for treating pain.

Although he cited relevant medical literature to support the general benefits for the PEMF system, he did not sufficiently explain the specific conditions related to this particular EIP which made this particular equipment necessary for her.

Dr. Dumesh submitted an addendum after reviewing the rebuttal by Nick Nicoloff, PA. It was his opinion that the rebuttal did not provide sufficient arguments to refute the arguments in the peer review.

He determined that it was evident from the description by Nick Nicoloff, PA of the subject accident, injuries sustained the EIP and results of objective tests, that she sustained typical whiplash and contusion injuries which are best treated with conservative treatment including acupuncture, physical therapy and chiropractic treatment. It was his opinion that there was no need to supplement the in-office treatment provided to the EIP with the DME at issue.

Dr. Dumesh also determined that although Nick Nicoloff, PA cited various medical literature he did not provide comprehensive arguments to support the need for this DME or how its use would change the treatment or outcome in this particular case.

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 and addendum by Dr. Dumesh and the report of Nick Nicoloff, PA who submitted a rebuttal on behalf of the applicant.

In this instance, Nick Nicoloff, PA did not submit a rebuttal which meaningfully refers to and rebuts the findings of Dr. Dumesh and the medical records submitted do not contradict his assertions.

Based on the foregoing, I find that the respondent has established that the DME issue was not medically necessary.

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.

09/04/2024
(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:
eb2d6e6e3ae86875d60290169fb093fd

Electronically Signed

Your name: Anne Malone
Signed on: 09/04/2024