

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Kpaul NP, Inc.
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-23-1306-1133

Applicant's File No. 160578

Insurer's Claim File No. 9XINY04146-02

NAIC No. 29742

ARBITRATION AWARD

I, Teresa Girolamo, Esq., 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: H.Jr. G.

1. Hearing(s) held on 08/26/2024, 08/29/2024, 10/11/2024
Declared closed by the arbitrator on 10/11/2024

Dimitry Jaffe, Esq. from The Law Offices of John Gallagher, PLLC participated virtually for the Applicant

Lauren Hirschfeld, Esq. from Law Offices of Eric Fendt participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,801.56**, was AMENDED and permitted by the arbitrator at the oral hearing.

At the time of the Arbitration Applicant Amended the amount in dispute to \$1,120.62.

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

3. Summary of Issues in Dispute

Whether Applicant claim for Extracorporeal shockwave therapeutic procedure(s)ESWT performed on 5/11/2023 was medically necessary as these

services were timely denied based upon a peer report of Stuart Stauber, M.D. 6/21/2023?

Assuming *arguendo* that the services were medically necessary Respondent contends that as per fee schedule the maximum recoverable is \$560.31.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the Electronic Case Folder as of the date of the hearing. Both Applicant and Respondent each submitted evidence in support of their contentions. This decision is based on my review of that file, as well as the arguments of the parties at the hearing. Each of the parties appeared via ZOOM.

Medical Necessity:

With respect to the question of medical necessity, Respondent has the burden to rebut the claim with proof that the health care services were not medically necessary or with some other viable defense (See *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3rd 128[A] 2003).

Lack of medical necessity is an affirmative defense that is the Respondent's burden to prove. See, *Alliance Medical Office, P.C. v. Allstate*, 196 Misc.2d 268, 269, 764 N.Y.S.2d 341, 342 (Civil Ct., Kings Cty. 2003); *Choicenet Chiropractic P.C. v. Allstate*, 2003 WL 1904296, 2003 N.Y. Slip Op. 50672U (App.Term 2nd Dept. 2003). "At a minimum, [Respondent] must establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005).

Once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, "plaintiff must rebut it or succumb", *Bedford Park Medical Practice P.C. v. American Transit Ins. Co.* 8 Misc. 3d 1025 (A) 806 N.Y.S. 2d 443 (Table), 2005 N.Y. Slip Op. 51282 (U) at 3, 2005, WL 193646 (Civ. Ct. Kings Co. Jack M. Battaglia, J. August 12, 2005). The burden is on the insurer to show lack of medical necessity. See, *Expo Med. Supplies, Inc. v. Clarendon Ins. Co.*, 2006 N.Y. Slip Op. 50892U, 12 Misc. 3d 1154A, 2006 N.Y. Misc. LEXIS 1169 [Civ. Ct., Kings Co., 2006]. See, also, *A.R. Med. Art., P.C. v. State Farm Mut. Auto Ins. Co.*, 2006 N.Y. Slip Op. 50260U, 11 Misc. 3d 1057A, 815 NYS2d 493, 2006 N.Y. Misc. LEXIS 348 [Civ. Ct., Kings Co., 2006]; *Citywide Social Work & Psy. Serv. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 777 NYS2d 241 [Civ. Ct. Kings Co., 2004]; *Elm Medical P.C. v. American Home Assurance Co.*, 2003 N.Y. Slip Op. 51357U, 2003 N.Y. Misc. LEXIS 1337 [Civ. Ct., Kings Co., 2003];

A treatment or service is medically necessary if it is "appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatment or services, but treatment or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain, and the goals of evaluating and treating the patient." *Fifth Avenue Pain Control Center v. Allstate*, 196 Misc. 2d 801, 807-808 (Civ. Ct. Queens Cty. 2003). Medically necessary treatment or services must be "consistent with the patient's condition, circumstances and best interest of the patient with regard to the type of treatment or services rendered, the amount of treatment or services rendered, and the duration of the treatment or services rendered." *Id.*

Medical services are compensable where they serve a valid medical purpose. *Sunrise Medical Imaging PC v. Lumbermans Mutual* 2001 N.Y. Slip Op. 4009.

"A peer review report's medical rationale is insufficient if it is unsupported by or controverted by evidence of medical standards." *Id.* Similarly, "[a] peer review report's factual basis may be insufficient if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." *Id.*, citing, *Amaze Medical Supply v. Allstate*, 3 Misc.3d 43, 779 N.Y.S.2d 715 (App Term 2d and 11th Jud Dists 2004).

In order for Respondent to meet its burden of establishing the lack of medical necessity, a peer review should (1) set forth applicable accepted medical standards relevant to the services at issue; and (2) comment on whether the Applicant had followed or deviated from those standards in providing the disputed services. This does not necessarily require that the peer review quote or cite medical literature. The *Nir* decision clearly contemplates that a peer may cite "medical authority, standard, or generally accepted practice as a medical rationale for his findings". *Nir*, 7 Misc.3d at 548.

Only if Respondent can establish a *prima facie* defense does the burden of proof shift to Applicant to rebut the defense. See, *A. Khodadadi Radiology PC v. NY Central Mutual Fire Ins. Co.*, 2007 NY Slip Op 51342(U). In general, Applicant's "rebuttal" need not be in the form of an affidavit or other statement specifically created in response to the peer review; Applicant may rely on the existing medical records and reports already in evidence to counter the peer's arguments.

Facts:

In this case on 4/12/2023 H.Jr. G. was involved in a motor vehicle accident. According to H.Jr. G's NF-2 dated 4/13/2023 on 4/12/2023 H.Jr. G. was a driver of a vehicle that was struck on the driver's side door. For injuries, H.Jr. G. lists "*back, neck, shoulder, etc.*" ER treatment is not listed. For section 12, same asks as to whether or not there was any medical services furnished, and the box, no, is

checked. This report also states that he has returned to work and did not miss any time from work.

On 4/17/2023 H.Jr. G. presented to Medelstar Medical Services and saw Su Jung Lee, FNP-C. A copy of this initial evaluation is dated 4/17/2023 and is located at Respondent's original submissions page 77/126. According to this report, H.Jr. G. presented with neck pain, mid and low back pain and right wrist pain. Here there were no complaints of knee or shoulder pain. A physical examination of the cervical spine as well as the lumbar spine documented reduced ranges of motion. For the cervical spine Spurling's sign was positive, there was spinal point tenderness noted on palpation, there is paraspinal muscle spasm and tenderness noted on palpation. For the thoracic spine, there was bilateral spinal point and paraspinal muscle tenderness noted on palpation. For the lumbar spine there were reduced ranges of motion, straight leg raise test was positive bilaterally, and there was bilateral paralumbar spasm and tenderness noted on palpation. There was a shoulder examination for the left and right shoulder, that documented reduced ranges of motion even though there were no shoulder complaints. The diagnostic impression was cervical spine, and lumbar spine sprain/strain radicular pain; thoracic spine sprain/strain, right and left shoulder sprain/strain and right wrist sprain/strain. The treatment plan was to undergo physical therapy, the receipt of medications, and referral for MRI with a follow up. For medication H.Jr. G. was provided with a script for Lidocaine 5% ointment, Diclofenac Sodium 3% External Gel; CeleBrex 200mg and Cyclobenzaprine.

On 4/18/2023 H.Jr. G. presented to New Sense Acupuncture PC for an initial Acupuncture Examination. A copy of this report is at page 63/126 of Respondent's full submissions. The complaints listed are dizziness, headaches, and a state of shock. H.G. lists insomnia, and depression. The pain scales is listed as an 8-9/10. Following the initial evaluation the treatment plan was to undergo acupuncture treatment 3 times a week for 4 weeks with a re-evaluation. The records document acupuncture records at pages 61-62/126 for dates of service of 4/18/2023, 4/19/2023, 4/20/2023, 4/24/2023; 4/25/2023 and 4/26/2023.

Respondent's submissions offers the initial physical therapy evaluation by Seongeun Kim Physical Therapy, PC. The initial evaluation was 4/18/2023 with complaints of neck, upper back mid back, lower back and right shoulder pain. Following the initial evaluation physical therapy was to start 3 times per week for 4 weeks.

The physical therapy SOAP notes document treatment to the mid and low back starting on 4/18/2023 and continuing for 4/19/2023, 4/20/2023, 4/24/2023, 4/25/2023 and 4/26/2023. For the last PT session of 4/26/2023 the only complaint was pain only to the lower back. There were no physical therapy sessions for the neck or for the shoulder.

Prior Linked Award:

At the time of the Arbitration the prior linked matter of AAA **17-23-1303-0055** Kpaul NP *N. Hanley Jr Gomez v. Itogon National Ins. Co.* was discussed that came before me on 5/13/2024.

At the time of the prior Arbitration I noted that at page 70/126 starts the ultrasound records, for the left elbow; the left knee; the left shoulder. (I noted that there were no left shoulder complaints) ; right elbow ultrasound; a right knee ultrasound (again no complaints of knee pain) right shoulder ultrasound; ultrasound for paraspinal muscles of the lumbar spine; all performed on 4/18/2023 ending at page 76/126 of Respondent's original submissions.

There is no mention in any of these reports of the recommendation for ESWT nor a referral for same.

In the linked matter the dates of service at issue were 4/25/2023 and 5/2/2023. In the linked matter as herein, the services were denied based upon a peer report of Stuart Stauber, M.D. In the linked matter the report relied upon by Stuart Stauber, M.D. is dated 5/26/2023. In the instant case the peer report is also by Stuart Stauber, M.D., however the report is dated 6/21/2023. As the report is not the same report, the Doctrine of Collateral Estoppel would not apply.

Peer Report: Stuart Stauber, M.D. dated 5/26/2023

In looking at the peer report of Stuart Stauber, M.D dated 6/21/2023, the peer reviewer was asked to consider whether or not ESWT performed on 5/11/2023 was medically necessary.

The peer reviewer notes the accident date of 4/12/2023 and discusses the initial evaluation by Medelstar Medical Services on 4/17/2023.

Having reviewed the medical records Stuart Stauber, M.D., opines that H.G. sustained soft tissue sprains and sprains. As such, for the standard of care, Stuart Stauber, M.D. states *"the standard of care for these types of injuries would be evaluation by a physician, prescribing of medications such as anti-inflammatory medications, rest and/or conservative physiotherapy for a period of 6-8 weeks with a follow-up. The standard of care does not involve the referral for the services provided after the accident and injury such as that described in the records for this claimant."*

Referencing medical authority, Stuart Stauber, M.D., stated that ESWT *"may be used for calcific tendinosis or rotator cuff muscles, which was not evidence in this case. ESWT is indicated in chronic tendinopathies in which conventional conservative treatment is considered unsatisfactory after a prolonged and comprehensive management or as an alternative to surgery in patients with nonunion..."*

Stuart Stauber, M.D., therefore stated that he was unable to recommend the ESWT as *"there is no evidence of noncalcic tendinopathy of the shoulder, or any diagnosis based on the lack of compelling evidence, there was no medical necessity for the extracorporeal shock wave procedure related to the diagnoses documented regarding the injury complaints in reference to the muscular pain, cervical, thoracic and lumbar radiculopathy and right shoulder injuries."*

Decision:

Having considered the arguments of the parties and having carefully reviewed the record now before me, I find that the peer report is sufficient to establish Respondent's affirmative defense of lack of medical necessity. As such, Applicant has the burden to rebut same. In this case there is no formal rebuttal, as such, I find that Applicant's evidence is unpersuasive. Therefore, Applicant's claim is denied.

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

10/11/2024
(Dated)

Teresa Girolamo, Esq.

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:
a5a8bf68aec5e7d3ac6eb13c172ed006

Electronically Signed

Your name: Teresa Girolamo, Esq.
Signed on: 10/11/2024