

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Longevity Medical Supply, Inc.
(Applicant)

- and -

Integon National Insurance Company
(Respondent)

AAA Case No. 17-24-1333-9856

Applicant's File No. 9013242

Insurer's Claim File No. 9XINY06372-03

NAIC No. 29742

ARBITRATION AWARD

I, Marcie Glasser, 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: Claimant

1. Hearing(s) held on 10/07/2024
Declared closed by the arbitrator on 10/07/2024

Melissa Betancourt, Esq. from Law Offices of Melissa Betancourt, PC 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, **\$1,652.63**, 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

This arbitration stems from treatment of a 60 year-old female who sustained injuries in a motor vehicle accident on June 30, 2023. The issue is the medical necessity for items of durable medical equipment (DME) including cervical traction unit (CTU) and lumbosacral orthosis (LSO) provided on October 17, 2023. Denial is timely based on the Peer Review Report of Jay Weiss, M.D. dated December 17, 2023.

4. Findings, Conclusions, and Basis Therefor

This case was decided based upon 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. I reviewed the documents contained in the electronic file for both parties and make a decision in reliance thereon.

Applicant has established its prima facie entitlement to reimbursement based on submission of a properly completed claim form setting forth the amounts of the losses sustained and establishing that No-Fault payment is overdue. *Ave. T MPC Corp. v. Auto One Ins. Co.*, 32 Misc. 3d 128 (A), 934 N.Y.S. 2d 32 (Table), 2011 N.Y.S Slip Op. 41292(U), 2011 WL2712964 (App Term 2d, 11th & 13th Dists., 7/5/2011); *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D. 3d 782, 774 N.Y.S. 2d 564 (2nd Dep't., 2004); *Vista Surgical Supplies, Inc. v. Metropolitan Property and Casualty Ins. Co.*, 2005-1328 K.C., 2006 N.Y. Slip Op. 51047 (U), June 2, 2006.

The defense of medical necessity is premised on a Peer Review Report of. Applicant submitted a Rebuttal Report Jay Weiss, M.D dated December 17, 2023. Applicant submitted a Rebuttal Report of Roland Rose, D.C. dated April 12, 2024.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. *See, Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co.*, 5 Misc3d 975 (2004). The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, *Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 NY Slip Op 00351 (App Div. 2d Dept., Jan. 20, 2009); *Channel Chiropractic, P.C. v. Countrywide Ins. Co.*, 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dept. 2007); *Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 NY Slip Op 27427, 17 Misc.3d 97 (App Term 1st Dept., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review 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 medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally, Jacob Nir, M.D. v. Allstate*, 7 Misc.3d 544, 796 N.Y.S 2d 857 (Civ. Ct Kings Co. 2005) 7; *All Boro Psychological Servs. P.C. v. GEICO*, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Nir, supra*.

An insurance carrier must, at a minimum, establish a detailed factual basis and a sufficient medical rationale for its asserted lack of medical necessity. *Vladimir Zlatnick, M.D., P.C. v. Travelers Indem. Co.*, 2006 NY Slip Op 50963(U) (App. Term, 1st Dep't

2006); *accord Delta Diagnostic Radiology, P.C. v. Progressive Cas. Ins. Co.*, 21 Misc.3d 142(A), 2008 NY Slip Op 52450(U) (App. Term, 2d Dep't, 2nd & 11th Jud. Dists. 2008).

Respondent's Peer Review Report

Dr. Weiss concluded that CTU and LSO were not medically necessary. On July 5, 2023, the Claimant presented for initial examination with Dr. Bannerman. She complained of neck, back, left hip and shoulder pain. There was decreased range of motion and tenderness of the cervical and lumbar spine. Shoulder examination revealed decreased range of motion. On July 6, 2023 the Claimant presented for initial chiropractic examination with Dr. Rose. The plan was for chiropractic care. Numerous items of durable medical equipment were ordered. On October 5, 2023, LSO and CTU were prescribed. This was the second LSO order by Dr. Rose. There was no report of adequacy of the previously provided LSO nor evidence of instability that would explain why a second LSO, limiting movement, would be ordered. The MRI performed the day before did not show evidence of instability that may warrant bracing of the lumbar spine. LSO that restricts movement is used for instability or after spinal surgery, which was not the case. With regard to CTU, there was no evidence of therapeutic trial of traction that demonstrated sufficient efficacy to warrant the purchase of CTU for home use. Where there is significant improvement in cervical radiculopathy with traction at physical therapy, a home unit can be considered.

Applicant's Rebuttal Report.

Dr. Rose disagreed with the Peer Review Report. On July 6, 2023 the Claimant to Dr. Rose for chiropractic examination. She had complaint of neck pain radiating to the upper extremities and lower back pain radiating to the lower extremities. Examination of the cervical spine revealed decreased range of motion, tenderness, positive shoulder depression test, cervical distraction test and Jackson test. Examination of the lumbar spine revealed decreased range of motion, tenderness and positive straight leg raise test. MRI on October 4, 2023 revealed cervical disc herniation and lumbar disc bulge with thecal sac impingement. On October 5, 2023 Dr. Rose ordered CTU and LSO, sagittal control. The LSO was to serve as a reminder to avoid excessive low back motion and encourage good posture. Rigid brace provides more support than soft brace. It does not totally immobilize the spine. It will limit painful ranges of motion during the healing process and facilitate healing. With regard to CTU, the course of treatment should be left to the treating provider. The patient was diagnosed with other cervical disc displacement, unspecified cervical region, with findings of positive cervical distraction test and shoulder depression test. Based on these findings, the patient was prescribed CTU.

Legal Analysis

As noted above, Applicant has established its *prima facie* entitlement to reimbursement. The burden then shifts to Respondent to establish lack of medical necessity for the items of DME which warrants competent, expert proof in admissible form. *Citywide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d 608, 777 N.Y.S. 2d 241, 2004 N.Y. Slip Op. 24034 (Civ Ct., Kings Co., 2004), *aff'd*, 8 Misc. 3d 1025 (2005).

I find that Respondent's Peer Review Report is sufficient to meet its burden of proof of lack of medical necessity. Therefore, the burden shifts back to Applicant to present competent medical proof as to the medical necessity by a preponderance of credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO*, 13 Misc. 3d 131 [A], 824 N.Y.S. 2d 759 (Table), 2006 N.Y. Slip Op. 51871(U), 2006 WL 2829826 (App. Term 2d 11th Jud. Dists. 9/29/06), *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company*, 16 Misc. 3d 131 [A], 841 N.Y.S. 2d 824, 2007 WL 1989432 (App Term 2d & 11th Dists. 7/3/09). Ultimately, the burden of proof rests with the Applicant (*See*, Insurance Law Section 5102).

I find that Applicant's burden has not been met by the medical records, Rebuttal Report or evidence collectively. With regard to LSO, the Peer Review Report of Dr. Weiss has not been adequately refuted and suffices to sustain the defense. I am convinced that the absence of documentation or sufficient explanation as to the reason that this LSO was prescribed after the previous prescription for LSO is critical to Applicant's claim. Of note, the previously prescribed LSO was provided on July 25, 2023, and there is no documentation of follow-up subsequent to July 6, 2023 evaluation. Based on the totality of evidence, I find that the LSO was not medically necessary. With regard to CTU, Dr. Rose stated that based on the Claimant's complaints and findings, that on October 5, 2023 he prescribed CTU to use at home. While MRI was performed on October 4, 2023 revealing cervical disc herniation, there is no evidence that Dr. Rose had re-evaluated the Claimant to ascertain his progress in treatment. Notably, Dr. Rose only discussed the contents of the initial report dated July 6, 2023. There are no reports in the evidentiary record documenting that the Claimant continued to report pain despite undergoing a course of conservative treatment utilizing multiple therapeutic modalities as well as medications. Therefore, there is no documented basis the prescription for CTU. Applicant has not presented competent medical proof as to the issue of medical necessity by a preponderance of credible evidence.

Accordingly, in light of the foregoing, based on arguments of counsel and after thorough review and consideration of all submissions, I find in favor of Respondent and deny the claim in its entirety.

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 NY

SS :

County of Nassau

I, Marcie Glasser, 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)

Marcie Glasser

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:
b7f89463f54015aef198d40c3f6e8489

Electronically Signed

Your name: Marcie Glasser
Signed on: 10/11/2024