

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Physical Medicine & Rehab Of NY PC
(Applicant)

- and -

Enterprise Rent A Car
(Respondent)

AAA Case No. 17-24-1351-8981

Applicant's File No. n/a

Insurer's Claim File No. 20134061

NAIC No. Self-Insured

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 11/14/2024
Declared closed by the arbitrator on 11/14/2024

Michael Galeno, Esq. from Dino R. DiRienzo Esq. participated virtually for the Applicant

Ayesha Syed, Esq. from McCormack, Mattei & Holler participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,489.82**, 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 25 year old EIP reported involvement in a motor vehicle accident on September 11, 2023; claimed related injury and underwent physical therapy treatment from January 10, 2024 and an office visit on February 2, 2024 and EMG/NCV studies provided by the applicant on February 22, 2024.

The applicant submitted a claim for these medical services, payment of which was timely denied by the respondent based on the IMEs of the EIP by Magda Fahmy, M.D. which was performed on December 27, 2023. The IME cut-off was effective on January 10, 2024 and Aruna Seneviratne which was performed on March 18, 2024. The IME cut-off was effective on March 21, 2024.

The applicant also raised the issue of the timeliness of the general denial for services rendered on January 10, 2024.

The issues to be determined at the hearing are:

Whether the respondent established that the medical services provided by the applicant were not medically necessary.

Whether the bill for services rendered on January 10, 2024 was timely denied.

4. Findings, Conclusions, and Basis Therefor

This hearing was held on Zoom and the decision is based upon the documents reviewed in 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.

Medical Necessity

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 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/her findings; and 3) the peer review report fails to provide 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 services provided to the EIP were not medically necessary, the respondent relied upon the report of the independent medical examinations of the EIP by Dr. Fahmy and Dr. Seneviratne.

IME Dr. Fahmy

The report of Dr. Fahmy documented limitations of range of motion in the cervical and lumbar spine. Range of motion was determined with the assistance of a goniometer. Dr. Fahmy performed a complete and comprehensive examination of the EIP and noted that there were objective findings in her examination of the cervical and lumbar spine. She noted that these injuries were resolving.

Although Dr. Fahmy determined that further physiatric treatment was not necessary for the EIP's thoracic spine and right shoulder and that there was no need for injections or prescription medication, she deferred comment on the need for physical therapy to "the appropriate specialty."

Based on the foregoing, I find that Dr. Fahmy did not address the positive findings in her own examination and those documented in the reports of the EIP's treating physicians and the treatment provided at their recommendation. Therefore, the respondent has not factually demonstrated that the medical services provided by the applicant from January 10, 2024 to March 13, 2024 were not medically necessary and the burden does not shift to the applicant. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

Under these circumstances, the respondent failed to establish its defense of a lack of medical necessity for the physical therapy treatment provided from January 10, 2024 to March 13, 2024 and the office visit on February 2, 2024 and EMG/NCV testing provided on February 22, 2024.

Therefore, the applicant is awarded \$3,263.88 in disposition of the claim for dates of service January 10, 2024 to March 13, 2024.

IME Dr. Seneviratne

The remaining two bills for dates of service March 21, 2024 and March 22, 2024 were denied on both the IMEs of Dr. Fahmy and Dr. Seneviratne. I have already determined that the respondent did not establish its lack of medical necessity defense, however, a determination must be made regarding the last two dates of service.

To support its contention that the services provided to the EIP on March 21, 2024 and March 22, 2024 were not medically necessary, the respondent relied upon the report of the independent medical examination of the EIP by Dr. Seneviratne which was objectively negative and unremarkable. Range of motion was

determined with the assistance of a goniometer. The report presents a factually sufficient, cogent medical rationale in support of respondent's lack of medical necessity defense. Dr. Seneviratne performed a complete and comprehensive examination of the EIP which did not identify any objective positive findings and determined that her injuries were resolved.

Based upon the physical examination and medical records reviewed, Dr. Seneviratne determined that despite her subjective complaints, the EIP was not disabled and that she could perform her activities of daily living and working without restrictions. It was Dr. Seneviratne's opinion that there was no medical necessity for further orthopedic treatment, physical therapy, massage therapy, surgery, diagnostic testing, durable medical equipment, household help or special transportation.

Respondent has factually demonstrated that the services provided by the applicant on March 21, 2023 and March 22, 2024 were not medically necessary. Accordingly, the burden now shifts to the applicant, who bears the ultimate burden of persuasion. See Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006.)

In response to the report of the physical examination of the EIP by Dr. Seneviratne, the applicant relied upon the submissions, including evaluations on February 2, 2024, February 7, 2024, February 2 an EMG note on February 23, 2024 which documented positive objective findings and recommended continue physical therapy and referrals to a spine surgeon and re-evaluation with an orthopedist to determine further treatment.

Also submitted were progress notes from February 27, 2024 to April 5, 2024.

Based on the foregoing, the applicant documented sufficient contemporaneous objective findings that warranted continued treatment after the IME cut-off date and has met the burden of persuasion in rebuttal. The medical records submitted meaningfully address the arguments that are raised in the IME report and are sufficient to overcome the burden of production established by the respondent.

Under these circumstances, the respondent has failed to establish that the services provided on March 21, 2024 and March 22, 2024 were not medically necessary.

Therefore, the applicant is awarded \$225.94 for these dates of service.

Accordingly, the applicant is awarded a total of \$3,489.82 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	Status
	Physical Medicine & Rehab Of NY PC	01/10/24 - 03/22/24	\$3,489.82	Awarded: \$3,489.82
Total			\$3,489.82	Awarded: \$3,489.82

- B. The insurer shall also compute and pay the applicant interest set forth below. 06/13/2024 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.

11/19/2024
(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:

1fc6beeed12c0f0bfbd22d615dca580c

Electronically Signed

Your name: Anne Malone
Signed on: 11/19/2024