

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Opaque NY Inc.
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-23-1305-8253

Applicant's File No. DK23-376888

Insurer's Claim File No. 1126021-01

NAIC No. 16616

ARBITRATION AWARD

I, Vincent Gerardi, 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: Injured Party

1. Hearing(s) held on 12/09/2024
Declared closed by the arbitrator on 12/09/2024

Arthur Finkel, Esq. from Korsunskiy Legal Group, P.C. participated virtually for the Applicant

Erisa Ahmedi, Esq. from American Transit Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,009.14**, 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 case arises from a motor vehicle accident that occurred on 2/10/23. The eligible injured party was a passenger in a motor vehicle. The issue in dispute is the denial of claim for testing based upon the Peer Review report of Dr. Peter Chiu, M.D. concluding the lack of medical necessity. The applicant has offered the rebuttal of Dr. Drora Hirsch, M.D. The respondent's denials were timely denied.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the documents contained in the ADR Center as of the date of the Hearing and entered in to the ADR Center, and have considered the oral arguments of the parties. Initially, according to the First Amendment to Regulation 68-D 11NYCRR 65-4.5, the Arbitrator shall be the judge of the relevance and materiality of the evidence offered that the Arbitrator deems relevant to making an Award that is consistent with Insurance Law and Insurance Department Regulations.

This case arises from a motor vehicle accident that occurred on 2/10/23. The eligible injured party was a fifty-five-year-old female. The injured party was taken via ambulance to Interfaith Medical Center, evaluated, treated, and released. The injured party's initial chief complaints were injuries to the neck, right-shoulder, and lower-back. There were decreased ranges-of-motion in the cervical, and lumbar, spines as well as the right-shoulder. The Cervical-Compression, Shoulder-Depression, Soto-Hall (on the right), Straight-Leg-Raise, Kemp (on the right), and Impingement (on the right), Tests were positive. The injured party started a treatment plan. The injured party was referred for VNG testing, SSR testing, carotid ultrasound, and transcranial doppler studies. A review of the medical records reflects that the injured party to date has received right-shoulder surgery (4/13/23), emergency services, physical therapy, chiropractic care, examinations, evaluations, consultations; neurological/ osteopathic/ orthopedic/ pain management, EMG-NCV studies, MRI studies; cervical/ lumbar/ right-shoulder, ultrasounds; carotid/ lumbar/ right-shoulder/ left-shoulder/ right-elbow/ right-knee/ left-knee, ECG study, VNG report, TCD report, SSR report, extracorporeal shockwave therapy, pharmaceuticals, and durable medical equipment. The issue before me is the medical necessity, and reimbursement, of the VNG testing, SSR testing, carotid ultrasound, and transcranial doppler (TCD) studies performed on 2/23/23.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursement for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

It is well settled that an applicant for no-fault benefits establishes its prima facie entitlement to payment by proving that it submitted a claim, set forth the fact and the amount of the loss sustained, and that payment of no-fault benefits were overdue (see Insurance Law 5106(a), *Mary Immaculate Hosp. v. Allstate Ins. Co.*, 5 A.D. 3d 742, 774 N.Y.S. 2d 564, 2004 N.Y. App. Div. LEXIS 3597 (2nd Dept. 2004), *Amaze Med. Supply v. Eagle Ins. Co.*, 2 Misc. 3d 128(A), 2003 N.Y. Slip Op. 51701(U) (App Term 2nd & 11th Jud Dists). A "facially valid claim" is presented where it sets forth the name of the patient, date of accident, date of services, description of services rendered and the charges for those services (see *Vinings Spinal Diagnostic P.C. v. Liberty Mutual Insurance Company*, 186 Misc. 2d 287, 717 N.Y.S. 2d 466 (1st Dist. Ct. Nass. Co.).

Proof that the benefits were "medically necessary" is not an element of the prima facie case. The defense that the benefits were not "medically necessary" is an affirmative defense borne by the insurer. The weight of judicial authority is now well established that the burden of proof is upon the insurer to prove that the medical treatment was not medically necessary (see *AB Medical Services PLLC v. Geico Insurance Co.*, 2 Misc. 3d 26 (App. Term, 2nd & 11th Jud. Dists. 2003), *Kings Medical Supply Inc. v. Country Wide Insurance Co.*, 783 N.Y.S. 2d 448 (N.Y. City Civ Ct., 2004). A denial premised on

a lack of medical necessity must be supported by other proof which sets forth a factual basis and a medical rationale for denying the claim (see *Amaze Medical Supply Inc. v. Eagle Insurance Co.*, 2 Misc. 3d 1284, 784 N.Y.S. 2d 918 (Sup Ct App Term 2003)). Respondent submitted its Peer Review report as evidence that the within medical services were not medically necessary.

The respondent has offered the Peer Review report, dated 3/30/23, of Dr. Peter Chiu, M.D. in support of their denials of claim. The doctor reviewed the injured-party's medical records and history, and stated, as to the TCD testing, that the standard of care for mild traumatic headache was conservative treatment. The doctor went on to state that if there were red flags such as weakness, slurred speech, or worsening headache, the injured-party should be referred to an emergency room for imaging studies. The standard of care would not include transcranial doppler testing for this kind of mild traumatic headache. As to the VNG testing, the doctor stated that the standard of care does not involve routine prescribing of vestibular / nystagmus testing for nonspecific headache or dizziness as a comprehensive history and physical exam would suffice. As to the SSR testing, the doctor stated that there was no indication the injured-party had autonomic dysfunction or small nerve fiber neuropathy. As to the carotid ultrasound, the standard of care for a carotid artery doppler would include a history of transient ischemic attacks or medical conditions that increase the risk of stroke. The VNG testing, SSR testing, carotid ultrasound, and transcranial doppler (TCD) studies were deemed medically unnecessary.

Upon a showing of a lack-of-medical-necessity through a Peer Review, an applicant is required to rebut same (see, *Khodadadi Radiology P.C. v. N.Y. Central Mutual Fire Ins. Co.*, 16 Misc. 3d 131(A) 841 N.Y.S. 2d 824 (Table) 2007 N.Y. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007)). When an insurer, through a Peer Review, presents sufficient evidence establishing a lack of medical necessity, the burden then shifts back to the applicant to present its own evidence of medical necessity (see, *West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A) (App. Term, 2nd Dept., 2006), *Alfa Medical Supplies v. Geico General Ins. Co.*, 38 Misc. 3d 134(A) (App. Term, 2nd Dept., 2013)).

The applicant has offered the rebuttal of Dr. Drora Hirsch, M.D. dated 10/19/24. The doctor stated that the injured-party sustained injuries to the neck, lower-back, and right-shoulder. The injured-party had complaints of neck pain (at 5/10), lower-back pain (at 5/10), and right-shoulder pain (at 5/10). An examination of the cervical-spine revealed decreased range-of-motion with tenderness. An examination of the lumbar-spine revealed decreased range-of-motion with tenderness. An examination of the right-shoulder revealed decreased range-of-motion and a positive Impingement Sign. The doctor went on to state, as to the VNG testing, that the most common cause of blunt traumatic injury to the carotid vasculature is motor vehicle accidents. VNG was used to help determine why the injured-party was dizzy and off balance. As to the carotid ultrasound, the doctor stated that the same is ideal for screening and diagnosing atherosclerotic plaque. As to the TCD testing, the doctor stated that the same is an essential tool in clinical diagnosis of cerebrovascular disorders. As to the SSR testing,

the doctor stated that SSR provides an objective measurement of the presence and severity of peripheral nerve dysfunction. The VNG testing, SSR testing, carotid ultrasound, and transcranial doppler (TCD) studies were deemed medically necessary.

"For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence and must be reasonable in light of the subjective and objective evidence of the patient's complaints." (see, *Nir v. Progressive Ins. Co.*, 7 Misc. 3d 1006(A) 801 N.Y.S. 2d 237 (Table) 2005 N.Y. Slip Op. 50466(U) 2005 WL 782806 (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

I am not persuaded by the applicant's rebuttal as to the medical necessity for the VNG testing, SSR testing, carotid ultrasound, and transcranial doppler (TCD) studies. The rebuttal was vague as to the clinical history connecting the testing and the actual trauma attributed to the accident. I have examined the medical reporting of the applicant, and I see nothing that would support the testing in question. There is no evidence of a severe head injury or dizziness. There is no letter of medical necessity or is there any supporting document which comments on the actual testing (other than the results themselves which are not proof of necessity). I did not see the nexus and medical necessity set out for the carotid ultrasound clearly, so that the same may be deemed medically necessary. I do not see anything in the records of the applicant which answers the Peer Reviewer's report.

The Peer Review report of Dr. Peter Chiu, M.D. provides a factual basis and medical rationale for his determination and establish prima facie, the services rendered by the applicant were not medically necessary (see, *St. Vincent Medical Care, P.C. v. Mercury Cas. Co.*, 23 Misc. 3d 135(A) 2009 WL 1138106 (App. Term 2d Dept. 2009) *Advanced Medical, P.C. v. Geico Ins. Co.*, 26 Misc. 3d 145(A) 2010 WL 963471 (App. Term 2d Dept. 2010). Further, the applicant has failed to establish that the services were in fact necessary. In *West Tremont Med. Diagnostic, P.C. v. Geico Ins. Co.*, 13 Misc. 3d 131(A), 2006 WL 2829826, the Court held that "where the defendant insurer presents sufficient evidence to establish a defense based upon the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity..." (see, *James M. Ligouri Physician P.C. v. State Farm Mut. Auto Ins. Co.*, 15 Misc. 3d 1103(A) 2007, N.Y. Slip Op. 50465(U), 2007 WL 755417, *Nir v. Allstate Ins. Co.*, 7 Misc. 3d 544, 796 N.Y.S. 2d 857). New York case law holds that plaintiff's opposing expert proof will not be sufficient to defeat the defendant's motion unless the proof meaningfully refers to, and rebuts, the opinion of defendant's doctor (see, *Total Equipment LLC v. State Farm Fire and Cas. Co.*, 939 N.Y.S. 2d 821 N.Y. Dist. Ct. 2012 (February 22, 2012). I accept the conclusions of the Peer Review doctor and find that medical necessity was lacking for the provided services.

Accordingly, the applicant's claim is denied 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, Vincent Gerardi, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

01/08/2025

(Dated)

Vincent Gerardi

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:
ee125ec5a0ea76ba648a3462afd149ae

Electronically Signed

Your name: Vincent Gerardi
Signed on: 01/08/2025