

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New York Heights Medical PC
(Applicant)

- and -

MVAIC
(Respondent)

AAA Case No. 17-24-1357-6907

Applicant's File No. N/A

Insurer's Claim File No. 698444

NAIC No. Self-Insured

ARBITRATION AWARD

I, Frank Marotta, 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: Assignor-BP

1. Hearing(s) held on 01/14/2025
Declared closed by the arbitrator on 01/14/2025

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

Jeffrey Kadushin, Esq. from Marshall & Marshall, Esqs. participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$2,269.62**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$2,212.32.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate and agree that the Applicant established its prima facie burden, the Respondent timely denied the claims in question and the amended amount in dispute does not exceed the permissible fee allowable under the New York State Workers' Compensation Fee Schedule (WCFS) for the services provided.

3. Summary of Issues in Dispute

The record reveals that the Assignor-BP, a 37-year-old-female, sustained injuries in a motor vehicle accident on 3/21/24.

The Applicant seeks reimbursement for physical therapy between 3/7/24 and 5/21/24.

The Respondent provides a general denial dated 2/23/24 noting "*All pain management medical benefits are fully denied effective 3/1/24 based upon the results of the independent medical examination conducted by Gary J. Florio, M.D. on 2/16/24. see IME report attached to this denial. Additionally, as per examination there is no disability, and no further need for physical therapy, massage therapy, diagnostic testing, household help, ambulatory services, durable medical equipment/supplies, or special transportation.*" and thereafter claim specific denials for the claims in issue.

The issue is whether the post-IME services were medically necessary.

4. Findings, Conclusions, and Basis Therefor

The Applicant filed this arbitration in the amount of \$2,269.62, amended to \$2,212.32, for disputed fees in connection with healthcare services between 3/7/24 and 5/21/24.

This hearing was conducted using the documents contained in the Electronic Case Folder (ECF) maintained by the American Arbitration Association. All documents contained in the ECF are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECF as well as the arguments presented by the parties during the hearing. In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that the arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations. The parties appeared and the hearing was conducted virtually via zoom.

The Respondent denied reimbursement, asserting that post-IME healthcare services were not medically necessary. To deny a claim based on a lack of medical necessity the insurer must present medical evidence which sets forth with sufficient particularity the factual basis and medical rationale underlying that determination. Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 12 Misc. 3d 133(A), 2006 NY Slip Op 51185(U) (App Term 2d Dept. 9th and 10th Jud. Dist. June 8, 2006). See also A. B. Med. Servs. PLLC v Liberty Mut. Ins. Co., 10 Misc 3d 128(A), 2005 NY Slip Op 51902 (U) (App Term, 2d & 11th Jud Dists); Amaze Med. Supply v Allstate Ins. Co., 2004 NY Slip Op 24119, 3 Misc3d 43, 44 [App Term, 2d & 11th Jud Dists 2004]. Such evidence can take the form of a "*peer review or any other proof, such as an independent medical*

examination, setting forth a sufficiently detailed factual basis and medical rationale for the claim's rejection, e.g. Choicenet Chiropractic P.C. v Allstate Ins. Co., NYLJ, Mar. 7, 2003 (App Term, 2d & 11th Jud Dists)" Amaze Med. Supply, Inc. v. Eagle Ins. Co., 2003 NY Slip Op 51701(U) (NY App. Term 2003); see also Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

In support of its defense Respondent relies on an IME by Gary J. Florio, M.D. on 2/16/24. Dr. Florio provides a history of the Assignor as a 37-year-old female who was involved in a motor vehicle accident on 3/21/23 as a seat belted passenger of an automobile who sustained injuries to the lower back and right knee. The Assignor was taken to a local hospital on 3/21/23 via ambulance, where she underwent radiology testing, was treated, and released the same day. Subsequently, the claimant was treated with physical therapy and injections. Currently, she states she is receiving physical therapy 2 times per week. She does not report if she received medical supplies. The Assignor verbally reported pain in the lumbar spine and right knee. She feels better now, compared to when she started treatments. On a pain scale from 0 to 10 (10 being the worst) her pain is a 6. She indicated she did not take pain medication today. She describes her pain as sharp. She can walk 3 city blocks before being in too much pain. She has difficulty with stairs. Walking and sleeping make the pain worse. She reports she did not drive to today's appointment. When asked regarding activities that she is no longer able to perform due to this injury, she reports "no". She reports she needs assistance with cleaning.

On examination the claimant exhibited a normal appearance and posture with no limp or antalgic gait observed. The cervical range of motion was decreased in all directions. Examination of the cervical spine revealed no spasms. There was no tenderness upon gentle palpation. Deep tendon reflexes of the biceps, triceps and brachioradialis were 1+ and equal bilaterally. Spurling's sign was negative. Examination of the thoracic spine revealed no paraspinal spasms and no tenderness upon gentle palpation, again with decreased range of motion in all directions. On examination of the lumbar spine there was no paraspinal spasms or tenderness upon gentle palpation. Patellar and Achilles reflexes were 1+ and equal bilaterally. Straight leg raise test was negative. The claimant was able to rise on heels and toes. Lumbar range of motion was decreased in all directions. On examination of the extremities Dr. Florio notes there was no increased heat, redness, swelling, effusion, crepitation, ligamentous laxity or dislocation. Upper extremities strength testing demonstrated muscle strength to be 5/5 throughout. Sensory responses were intact throughout the upper extremities. Lower extremities strength testing demonstrated muscle strength to be 5/5 throughout. Sensory responses were intact throughout the lower extremities. On examination of the knee there was no tenderness upon gentle palpation. There was no swelling. There was no atrophy. McMurray's test was negative. Anterior/posterior drawer signs were negative. There was no crepitus. Range of motion testing of the right knee revealed decreased flexion.

According to Dr. Florio, the claimant presented with a diagnoses of lumbar spine sprain/strain, resolved and right knee sprain/strain, resolved. As to treatment, Dr. Florio reports that

"Gentle palpation of the lumbar spine resulted in complaints of tenderness; however, there was no objective evidence of pathology to correlate with these complaints including no evidence of muscular or subcutaneous nodularity, increased muscle tone, frank muscle spasm, or bony derangement.

The above limitations in spinal range of motion were observed and measured in response to my direct request for demonstration, however, at other points in the encounter (including transfers and ambulation), the claimant's spinal range of motion and spinal dynamics revealed no evidence of dysfunction or restriction. The demonstrated range of motion deficits were found to be unassociated with objective evidence of pathology including no evidence of spasm or contracture and were related to the claimant's stated subjective concerns regarding the potential provocation of pain.

The range of motion of the right knee was unassociated with objective evidence of pathology, including no evidence of spasm, contracture, or bony derangement. These deficits were related to the claimant's subjective concerns regarding the potential provocation of pain.

No further physical therapy or pain medicine treatment would be reasonable or necessary for the accident of record.

From the viewpoint of my specialty, there is no objective evidence to indicate the need for massage therapy, diagnostic testing, household help, ambulatory services, durable medical equipment/supplies, or special transportation.

Comment regarding need for surgery is deferred to the appropriate specialty."

According to Dr. Florio, the decreased range of motion noted was based on a suboptimal effort by the Assignor and not supported by evidence of objective findings such as objective evidence of pathology including no evidence of spasm or contracture and were related to the claimant's stated subjective concerns regarding the potential provocation of pain. Given Dr. Florio's assertion that he based his opinion regarding the deficits in range of motion based on the lack of objective findings, I find that the Respondent met its prima facie burden establishing that the post-IME services were medically unnecessary with his IME as it sets forth a factual basis and medical rationale to support its belief that no further treatment is necessary. Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 873 N.Y.S.2d 238 (Table), 2008 N.Y. Slip Op. 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008).

When a Respondent presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the Applicant who must then present its own evidence of medical necessity. Friedman v. Allstate Ins. Co., 2016 NY Slip Op 50390(U) (App Term 2d, 11th & 13th Jud Dists. March 18, 2016); Lynbrook Medical of New York, PC v Praetorian Ins. Co., 48 Misc. 3d 139(A); 2015 NY Slip Op 51226(U) (App. Term, 2d, 11th and 13th Jud Dists 2015); Alfa Medical Supplies v. Geico General Ins. Co., 2013 NY Slip Op 50064(U), 38 Misc. 3d 134(A) (App. Term, 2d, 11th and 13th Jud Dists 2013); West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 51871(U) at 2 (App. Term 2d & 11th Dists. Sept. 29, 2006).

After a review of the documents contained in the ECF and in consideration of the arguments made by the parties at the hearing, I find the records submitted by the Applicant sufficiently establishing, by a preponderance of the evidence, that the service in issue was medically necessary. The Applicant submits reports between their initial evaluation of 7/13/23 and 5/21/24 when the Assignor was discharged from active treatment. The Applicant also provided physical therapy SOAP notes and diagnostic testing, in particular the 8/1/23 electrodiagnostic studies of the lower extremities revealing right side S1 radiculopathy. The Assignor also was noted to have received a right knee injection by Dr. Wasserman, an orthopedic surgeon on 9/28/23.

The most contemporaneous report is the 3/19/24 follow-up evaluation noting that the Assignor presented with complaints of lower back pain that comes and goes reporting both good and bad days. Pain is aggravated with activities of daily living such as bending, going up and down stairs, as well as walking, lifting and carrying. A lumbar spine examination revealed evidence of tender to palpation in the lumbosacral spine and paraspinal muscles. Active range of motion was noted to be decreased in flexion, extension, and right and left lateral bending with pain during range of motion testing. Straight leg raise test was negative bilaterally. Motor strength was reported as 5/5 in both lower extremities. Reflexes were 1+ and symmetric. Sensation was intact to light touch. On this day the Assignor was advised to continue physical therapy 2 days a week for 4-5 weeks. She was advised to follow up with a pain management specialist, continue her home exercise program and continue to take her medication on as on needed basis. She was also advised to follow up in 4-5 weeks.

The Applicant's 5/21/24 evaluation report notes continued to have complaints but reported that her low back pain is better. Some tingling sensation and sometimes pain during walking; otherwise, she reported feeling better. The Applicant's report notes that in general the patient is a well-developed feml in no acute distress. Her gait is nonantalgic. She uses no assistive device. A musculoskeletal examination revealed continued decreased lumbar range of motion which was non tender to palpation in the paraspinal muscles. Straight leg raise test was negative bilaterally. Motor strength was reported as 5/5 in both lower extremities. Reflexes were 1+ and symmetric. Sensation was intact to light touch. The Applicant's record at this point notes *"At this point in time the patient will be discharged since she has reached her maximum medical improvement with physical therapy. She was advised that she may suffer from periodic exacerbations in her pains and limitations in her abilities. She was advised that if she has an exacerbation of her pain that she should continue with her home exercise and take over-the-counter medication on an as-needed basis. She was advised that if these measures do not adequately control the pain she could contact the office for the office for the possibility of a reevaluation and the possibility of a reinstitution of a formal physical therapy program."*

While Dr. Florio reported no objective findings to support the decreased range of motion, there was evidence of a tenderness to palpation of the lumbar spine which appears to mirror the subjective complaints the Assignor reported in the lumbar spine which, along with the right knee appears to have steady improvement with the treatment until her discharge from active treatment on 5/21/24. As such, I find the assessment of

the Applicant sufficiently demonstrates the Assignor's continued symptomatic condition and need for further treatment through 5/21/24. As such, the Respondent's lack of medical necessity defense cannot be sustained.

For the reasons noted above the Applicant is awarded its claim in the amount of \$2,212.32.

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	Amount Amended	Status
	New York Heights Medical PC	03/07/24 - 05/21/24	\$2,269.62	\$2,212.32	Awarded: \$2,212.32
Total			\$2,269.62		Awarded: \$2,212.32

- B. The insurer shall also compute and pay the applicant interest set forth below. 07/23/2024 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The Respondent shall pay interest at a rate of 2% per month, calculated on a pro rata basis using 30-day month and in compliance with 11 NYCRR §65-3.9. Interest shall begin to accrue from the date of filing with the American Arbitration Association and end on the date the award is paid.

C. Attorney's Fees

The insurer shall also pay the applicant for attorney's fees as set forth below

The insurer shall also pay the applicant for attorney's fees as set forth below Applicant is awarded statutory attorney fees pursuant to the no-fault regulations. See, 11 NYCRR §65-4.5(s)(2). The award of attorney fees shall be paid by the insurer. 11 NYCRR §65-4.5(e). Accordingly, "the attorney's fee shall be limited as follows: 20 percent of the amount of first-party benefits, plus interest thereon, awarded by the arbitrator or the court, subject to a maximum fee of \$850." Id. The minimum attorney fee that shall be awarded is \$60. 11 NYCRR §65-4.5(c). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR §65-4.6 (i). For claims that fall under the Sixth Amendment to the regulation the following shall apply: "If the claim is resolved by the designated organization at any time prior to transmittal to an arbitrator and it was initially denied by the insurer or overdue, the payment of the applicant's attorney's fee by the insurer shall be limited to 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant with whom the respective parties have agreed and resolved disputes, subject to a maximum fee of \$1,360." 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 NY

SS :

County of Suffolk

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

01/26/2025

(Dated)

Frank Marotta

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:
0febb3be274fccf4021f64539b52ad41

Electronically Signed

Your name: Frank Marotta
Signed on: 01/26/2025