

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Medcare Medical Supply Corp.
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-23-1328-5600

Applicant's File No. OS-78161

Insurer's Claim File No. 0540008250002

NAIC No. 36447

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 02/03/2025
Declared closed by the arbitrator on 02/03/2025

Olga Sklyut, Esq. from Law Office of Olga Sklyut P.C. participated virtually for the Applicant

Lisa Castle from LM General Insurance Company participated virtually for the Respondent

2. The amount claimed in the Arbitration Request, **\$3,301.10**, 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 46 year old EIP reported involvement in a motor vehicle accident on June 26, 2023 ; claimed related injury and received an electrical osteogenesis stimulator provided by the applicant on September 26, 2023.

The applicant submitted a claim for this durable medical equipment (DME), payment of which was timely denied by the respondent based upon a peer review by Neil Patel, M.D. dated November 16, 2023. In response, the applicant submitted a rebuttal dated March 26, 2024 by Lubov Klimova, M.D. who was not one of the EIP's treating medical providers and Dr. Patel submitted an addendum dated December 11, 2024.

The issue to be determined at the hearing is whether the respondent established that the DME provided by the applicant was not medically necessary.

4. Findings, Conclusions, and Basis Therefor

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

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 report of medical examination must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review or medical examination 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 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 durable medical equipment provided by the applicant was not medically necessary, respondent relies upon the peer review by Dr. Patel, who reviewed the medical records of the EIP, noted the injuries claimed and the treatment rendered to her. Dr. Patel considered possible arguments and justification for the need for the durable medical equipment at issue and determined that it was not warranted under these circumstances.

Dr. Patel submitted a cogent and comprehensive report in which he discussed the durable medical equipment provided and his reasons for determining that it was not medically necessary for this EIP.

Dr. Patel discussed the standard of care for the sprain/strain injuries sustained by this particular EIP, which would be supervised modalities such as a course of

chiropractic treatment, acupuncture and physical therapy. He determined that this EIP did not meet the criteria for electromagnetic therapy and his treating physician did not provide any justification for this equipment.

Dr. Patel further noted that the prescription for the particular durable medical equipment provided to this EIP failed to provide accompanying clinical documentation including evaluation, measurements or test results or statements outlining modifications, if any made to the device provided to her.

He supported, with relevant medical literature, his opinion that the DME provided was not medically necessary for this particular EIP.

Respondent has met its evidentiary burden. The peer review adequately sets forth the factual basis and medical rationale to support the conclusion that the durable medical equipment was not indicated for this EIP at the time it was provided. Therefore, pursuant to Bronx Expert Radiology, *supra* the burden shifts to the applicant, who bears the ultimate burden of persuasion to establish that the durable medical equipment at issue was medically necessary.

In opposition to the peer review, the applicant presented a rebuttal by Dr. Klimova, who reviewed the medical records discussed in the peer review and disagreed with the conclusions reached by Dr. Patel.

Dr. Klimova noted that in general an electrical osteogenesis stimulator helps to reduce a patient's pain and aid in his/her recovery without prescription pain medication and would have a positive impact on his/her quality of life.

He discussed in detail the general uses and benefits of this device for bone healing and non-fusion or failed fusion. He did not relate these issues to this particular EIP.

Dr. Klimova concluded that this DME was medically necessary and is not a deviation from any standard of medical care.

He cited relevant medical literature to support the general benefits for the use of electrical osteogenesis stimulator for home use.

In response, Dr. Patel submitted an addendum in which he emphasized the specific diagnosis for this particular EIP which were cervical and lumbar sprain/strain and left shoulder and knee contusions.

Based on his own treating physicians diagnoses Dr. Patel determined that Dr. Klimova failed to set forth an adequate factual basis and medical rationale for the need for the electrical osteogenesis stimulator for this particular EIP.

After a review of all the evidence submitted an issue of fact remains as to whether the durable medical equipment at issue was medically necessary. Conflicting opinions have been presented in the peer review and addendum by Dr. Patel and the rebuttal by Dr. Klimova submitted on behalf of the applicant.

In this instance, Dr. Klimova did not submit a rebuttal which meaningfully refers to and rebuts the findings of Dr. Patel and the medical records submitted do not contradict his assertions.

Based on the foregoing, I find that the respondent has established that the electrical osteogenesis stimulator at issue was not medically necessary for this particular EIP.

Accordingly, the claim is dismissed with prejudice.

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 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, 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.

02/11/2025
(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:
15eca293edeb5eb96d44a016d26eb243

Electronically Signed

Your name: Anne Malone
Signed on: 02/11/2025