

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Shemesh Med Pro Corp.
(Applicant)

- and -

Progressive Casualty Insurance Company
(Respondent)

AAA Case No. 17-24-1358-1954

Applicant's File No. GM24-825415

Insurer's Claim File No. 24-6703323

NAIC No. 11851

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 02/10/2025
Declared closed by the arbitrator on 02/10/2025

John Fagan, Esq. from Law Offices of Gabriel & Moroff, P.C. participated virtually for the Applicant

Grace Halligan from Progressive Casualty 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 25 year old EIP reported involvement in a motor vehicle accident on January 12, 2024; claimed related injury and received an electric osteogenesis stimulator provided by the applicant on March 14, 2024.

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 Shruti Patel, M.D. dated April 30, 2024. In response, the applicant submitted a rebuttal dated August 6, 2024 by Erica David-Park, M.D. who was not one of the EIP's treating medical providers and Dr. Patel submitted an addendum dated August 30, 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 him. 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 standard of care for use of the electric osteogenesis stimulator provided to the EIP and determined that he did not meet these criteria. Dr. Patel specifically noted that the EIP had been prescribed physical therapy on January 13, 2024 and at the last evaluation of the EIP by Dr. Zakaria on February 22, 2024 he documented pain in the neck and lower back with unspecified restricted range of

motion and tenderness and diagnosed low back pain and sprain of the ligaments of the cervical and lumbar spine. At that time, he prescribed topical and oral pain medication, an electrical osteogenesis Stimulator for home use and continued physical therapy.

Dr. Patel specifically discussed the uses of the electrical osteogenesis stimulator which was commonly used to promote bone healing resulting from fractures and post-spinal fusion surgery. The standard of care included certain risk factors including: one of more previous failed spinal fusions; Grade III or worse spondylolisthesis, fusion performed at more than one level; significant osteoporosis and some diseases.

Based on the submission, including the evaluations by Dr. Zakaria the EIP did not present with any indication of a non-union fracture or failed spinal fusion, Dr. Patel determined that he did not require this particular DME at the time it was prescribed or any repeat refills.

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 ordered. 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. David-Park reviewed the medical reviewed the claim form and denial, the February 22, 2024 report of the evaluation and prescription by Dr. Zakaria, the delivery receipt for the DME at issue and the peer review by Dr. Patel and concluded that in accordance with the generally accepted standards of care that the electric osteogenesis stimulator was not medically necessary.

She noted that the EIP was diagnosed with tenderness, aching pain muscle spasm and moderately restricted and painful range of motion six weeks post-accident. David-Park stated that this DME is used to treat musculoskeletal pain and tends to accelerate recovery and minimize rehabilitation time. She also noted that it has been used successfully for acute and chronic conditions for pain therapy associated with trauma from accidents, sports injuries, surgery and burns, disease and degeneration. This discussion was not supported by relevant medical literature.

She described in detail the use of the DME for bone healing injuries and cited medical literature to support the use of electro-magnetic field therapy and its helpfulness during drug therapy for chronic and acute pain in musculoskeletal disease. Dr. David-Park also stated that it seems to be able to relieve pain intensity and improve functionality in individuals with low back pain conditions. Therefore, she concluded that the electrical osteogenesis stimulator was medically necessary in this case.

In response, Dr. Patel submitted an addendum in which he responded specifically to the rebuttal and repeated his discussion of the medical necessity for the electrical osteogenesis stimulator as adjunctive treatment for lumbar spine fusion in patients with certain risk factors and stated specifically that in this clinical case, based on the medical records regarding the injuries sustained and treatment provided to this particular EIP, his medical condition does not meet the criteria for use of the DME at issue.

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. David-Park on behalf of the applicant.

In this instance, Dr. David-Park 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.

A review of the applicant's submissions reveals that it has failed to meet the burden of persuasion in rebuttal and is insufficient to overcome the burden of production established by respondent.

Based on the foregoing, I find that the respondent has established that the DME issue was not medically necessary.

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.

02/12/2025

(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:
6e4f37b04c4c5863946b98de593f6d2a

Electronically Signed

Your name: Anne Malone
Signed on: 02/12/2025