

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

(Applicant)	AAA Case No.	17-20-1183-3711
	Applicant's File No.	N/A
- and -	Insurer's Claim File No.	NYA-0155356
Esurance Insurance Co. (Respondent)	NAIC No.	25712

ARBITRATION AWARD

I, Dinsmore Campbell, 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: claimant

1. Hearing(s) held on 07/16/2021
Declared closed by the arbitrator on 07/16/2021

Ian Besso, Esq. from The Sigalov Firm PLLC participated for the Applicant

Mike Rago, Esq. from Law Offices Of Karen L. Lawrence participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 9,058.42**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulate that the applicant established its prima facie case of entitlement to No-Fault benefits and that the respondent's NF-10/Denial of Claim forms were timely issued in accordance with 11 NYCRR 65-3.8(a)(1), and that the fee comports with the fee schedule.

3. Summary of Issues in Dispute

The claimant, a 28-year-old female, was involved in a motor vehicle accident on 8/10/18 as a restrained driver. Thereafter, the claimant sought medical attention for the injuries sustained in the accident. This dispute arises from a claim for medical services

performed on 8/11/20. The respondent denied the claim based on an IME conducted by Dorothy Scarpinato, M.D. on 10/18/18, with an effective cutoff date of 11/1/18. The issue to be determined is whether the respondent's lack of medical necessity defense can be sustained.

4. Findings, Conclusions, and Basis Therefor

This case was decided on the submissions of the parties as contained in the Electronic Case Folder maintained by the American Arbitration Association and the oral arguments of the parties' representatives. [redacted] testified for the applicant. I reviewed the documents contained in the ECF for both parties and make my decision in reliance thereon.

A denial premised on lack of medical necessity must be supported by competent evidence such as an independent medical examination, peer review or other proof which sets forth a factual basis and medical rationale for denying the claim. See, Healing Hands Chiropractic, P.C. v. Nationwide Assur. Co., 5 Misc. 3d 975 (2004).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co., 2009 NY Slip Op 00351 (App Div. 2d Dep't., Jan. 20, 2009); Channel Chiropractic, P.C. v. CountryWide Ins. Co., 2007 Slip Op 01973, 38 A.D.3d 294 (1st Dep't. 2007); Bronx Radiology, P.C. v. New York Cent. Mut. Fire Ins. Co., 2007 NY Slip Op 27427, 17 Misc. 3d 97 (App Term 1st Dep't., 2007), such as by a qualified expert performing an independent medical examination, conducting a peer review of the injured person's treatment, or reconstructing the accident. Id.

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 findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally, Nir v. Allstate Ins. Co., 7 Misc. 3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

In support of its contention that the services lack medical necessity, the respondent relies upon an IME by Dr. Scarpinato.

At the time of the examination, the claimant was presented with complaints of pain in the neck and back.

The records reflect that after evaluating the claimant, Dr. Scarpinato's diagnosis was resolved cervical and thoracolumbar strain.

She submits that despite complaints of tenderness, there were no positive objective findings. Therefore, there was no need for any further causally related orthopedic treatment including physical therapy, surgery, injections, diagnostic testing, durable medical equipment, household help or transportation services. She maintains that the claimant could perform activities of daily living without any restrictions or limitations.

The records reflect that apart from subjective complaints of midline tenderness in the cervical and thoracolumbar spines, the evaluation reveals no deficits. In fact, range of motion measurements were normal in the examination of the cervical spine, bilateral shoulders, bilateral wrist/hands, bilateral elbows, bilateral hips thoracolumbar spine, bilateral knees, and bilateral ankles/feet.

Where the IME report submitted by the insurer sets forth a factual basis and medical rationale for the conclusion that the assignor's injuries were resolved and that the treatment which is the subject of the claim lack of medical necessity, the report submitted in opposition must meaningfully refer to on rebut the IME findings. Premier Health Choice Chiropractic, P.C. v. Praetorian Ins. Co., 41 Misc. 3d 133(A), 981 N.Y.S 2d 638 (Table), 2013 N.Y. Slip Op 51802 (U), 2013 WL 5861532 (App. Term 1st Dept. Oct 30, 2013).

Accordingly, the burden now shifts to the applicant who has the ultimate burden of persuasion.

In response, the applicant relies upon an affidavit in opposition by Andrew _____, M.D. as well as its contemporaneous treatment reports dated 9/13/18, 9/24/18 and 12/18/18. Dr. _____ also testified on behalf of the applicant.

Because the undersigned finds that the affidavit in opposition does not particularly cite to any contemporaneous reports, and because Dr. _____'s first encounter with the claimant occurred on 7/13/20, almost 2 years after the IME, the undersigned finds both the affidavit and Dr. _____'s testimony insufficient to sustain the applicant's burden.

However, the contemporaneous reports relied upon reveal deficits indicating that the claimant remained symptomatic.

For instance, on the 9/13/18 follow-up evaluation, John McGee, M.D. one of the treating physicians, notes significant reductions in range of motion testing in the cervical and lumbar spines, with positive Spurling's and straight leg raising tests. The 12/18/18 follow-up evaluation also authored by Dr. McGee shows similar findings. Further, the 9/24/18 EMG/NCV report revealed left C6 radiculopathy.

Parenthetically, the respondent submits that several arbitrators previously found Dr. Scarpinato's IME sufficient to sustain its burden. One such award was written by Arbitrator Steven Celauro. See Excel Clinical Lab and Esurance Property and Casualty Insurance Company, AAA 17-20-1175-2641, (4/28/21). He concludes.

After reviewing the evidence relied upon by the Applicant, I find that it does not include records which were contemporaneous to the IME and is not sufficient to

rebut the IME report which provides a factual basis and medical rationale. The referenced evaluations were conducted either well before or well after the IME was conducted. The "IME Rebuttal", which referenced those evaluations as well as Dr. McGee's report were also not contemporaneous to the IME.

In this matter however, the undersigned finds that the reports relied upon are in fact contemporaneous, as these reports are dated 9/13/18, 9/24/18 and 12/18/18. The most contemporaneous record reviewed by Arbitrator Celauro is dated 8/14/18, over 2 months before Dr. Scarpinto evaluated the claimant.

Because the applicant's contemporaneous reports reveal sufficient deficits to negate the IME findings, the applicant's evidence is sufficient to sustain its burden of persuasion.

As such, the applicant's claim is granted.

Any further issues raised in the record are held to be moot and/or waived insofar as not raised at the time of the hearing.

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
		08/11/20 - 08/11/20	\$9,003.54	Awarded: \$9,003.54
		08/11/20 - 08/11/20	\$54.88	Awarded: \$54.88
Total			\$9,058.42	Awarded: \$9,058.42

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/30/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

The insurer shall compute interest and pay Applicant the amount of interest computed from the filing date as indicated above at the rate of 2% per month, simple, not compounded, calculated on a pro rata basis using a thirty day month and ending with the date of payment of the award.

- C. Attorney's Fees

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

Effective to filings on or after February 6, 2015, this case is subject to the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4(Insurance Regulation 68-D). As amended, 11 N.Y.C.R.R. §65-4.6(d) reads: "For all other disputes subject to arbitration or court proceedings, subject to the provisions of subdivision (a) of this section, the attorney's fee shall be limited as follows: 20 percent of the total amount of first-party benefits and any additional first-party benefits, plus interest thereon, for each applicant per arbitration or court proceeding, subject to a maximum fee of \$ 1360. If the nature of the dispute results in an attorney's fee that could be computed in accordance with the limitations prescribed in both subdivision (c) and this subdivision, the higher attorney's fee shall be payable."

- 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 New York
SS :
County of Nassau

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

07/23/2021
(Dated)

Dinsmore Campbell

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:
306cd3f1d2044160516978f78b92ed85

Electronically Signed

Your name: Dinsmore Campbell
Signed on: 07/23/2021