

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Sonia Martinez
(Applicant)

AAA Case No. 17-15-1021-8871
Applicant's File No.

- and -

State Farm Mutual Automobile Insurance
Company
(Respondent)

Insurer's Claim File No. 32-0W85-668
NAIC No. 25143

ARBITRATION AWARD

I, Susan Mandiberg, 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: The EIP

1. Hearing(s) held on 11/23/2016
Declared closed by the arbitrator on 02/07/2017

Ronald S. Zimmer, Esq. from Law Office of Ronald S. Zimmer participated in person for the Applicant

Mark Zemcik, Esq. from Picciano & Scahill, P.C. participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ 66,690.00, was AMENDED and permitted by the arbitrator at the oral hearing.

At the time of the final Arbitration Hearing, Applicant's counsel amended the total amount in dispute to the sum of \$37,934.32

Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

Applicant contends that the Injured Party is entitled to lost earnings, which Respondent contests.

4. Findings, Conclusions, and Basis Therefor

This case was decided after due consideration of the arguments of counsel, the testimony of the EIP, and after a thorough review of the submissions and the documents contained in the electronic case folder maintained by the American Arbitration Association, which are incorporated by reference herein. This case - as amended by Applicant's counsel at the time of the initial Hearing - involves a claim for loss of earnings covering dates of service 11/13/12 through 4/13/15, respectively. At the time of the final Arbitration Hearing, the evidence was discussed in detail with counsel, as well as their legal arguments in support of the respective claims. As a procedural matter, I note that this case was adjourned - at Applicant's counsel's request - two times before the final Hearing was conducted. Approximately one week before this final Hearing date, Applicant's counsel submitted 490 pages of additional documents into evidence. After the final Hearing, this Arbitrator directed Applicant to submit the Injured Party's tax returns for the years 2011, 2012, 2013, 2014 and 2015. Thereafter, Respondent was also afforded an opportunity to submit additional evidence. Both parties were also given an opportunity to extend the time to submit such documentation, if deemed necessary.

Pursuant to 11 NYCRR 65-4 (Regulation 68-D), §65-4.5, an Arbitrator shall be the judge of the relevance and materiality of the evidence offered...The Arbitrator may question any witness or party and independently raise any issue that the Arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department Regulations. In addition, Master Arbitrator Peter J. Merani, in the case of Sports Medicine & Orthopedic Rehabilitation a/a/o "I.B." v. Country-Wide Insurance Co., AAA Case No. 17-R-991-14272- 3, stated, in relevant part, that "the Arbitrator below is the trier of facts and must evaluate and weigh the evidence presented at the hearing in arrive at his decision. The Arbitrator, in weighing the evidence, has broad powers and discretion in determining what evidence is relevant and material. The Arbitrator is in the best position to evaluate the evidence and decide on the credibility of the submitted documents".

At the time of the final Hearing, the evidence was discussed in detail with counsel and the EIP testified under oath. It is undisputed that Respondent terminated No-Fault benefits effective 11/13/12 pursuant to an IME examination performed on 10/31/12 by Alan Wolf, M.D. Also in evidence is an addendum report generated by Dr. Wolf, dated 8/8/13, which confirms his prior opinion that the EIP did not require any further medical care. There was no rebuttal report to this IME report generated by any of the EIP's treating providers. This case arises from a motor vehicle accident that occurred on 4/16/12. The EIP was a forty-seven year old female passenger who had initial complaints of injuries to the neck, lower back, right shoulder, and right leg. The EIP did not receive emergent treatment following the accident. However, the EIP came under the care of Dr. Perry on 4/25/12 and thereafter pursued a course of conservative treatment. MRI studies were performed and follow-up evaluations were conducted. The EIP had arthroscopic surgery of the right shoulder performed and continued to see her treating orthopedist, Dr. Katzman, until he performed knee surgery

on 6/25/15. There was over a year gap in treatment (between 5/9/14 and 5/8/15) for reasons unknown.

Applicant's evidence indicates that the EIP received prior settlements in the amount of \$10,000 from GEICO Insurance Company and an underinsured motorist claim in the amount of \$86,500 from State Farm Insurance Company. However, there was no indication that these settlements did not include reimbursement for loss of earnings, which is claimed herein. Additionally, as noted by Respondent, Applicant's counsel claims that the EIP "earned \$19,671.25 in the 52 weeks prior to the incident. The numbers being presented in the tax returns do not support this figure". Respondent also noted that the tax return submitted for the year of 2012 was a joint return that purportedly reflected the joint income for the EIP and her husband, thereby making it nearly impossible to determine the portion of the income derived from the EIP herein. Respondent further asserts that Applicant's AR-1 states that the EIP "earned \$1,838.25 per month" and "we can calculate that this would translate to \$459.57 per week (\$1,838.25 divided by 4 weeks in a month). Since [the EIP] apparently worked 14 weeks in 2012, her yearly earnings for 2012 would be \$6,438.98 (\$459.57 per week times 14 weeks)." However, Respondent further contends that in 2012, the EIP and her husband "claimed a \$15,000 'standard deduction'. This would bring their annual income for 2012 to NEGATIVE \$4,661.00. Since there was no supporting documentation attached to this tax return, we do not know if [the EIP] disclosed to the government the \$6,004.70 she received from State Farm as wage reimbursement for that year. In addition, we do not know if [the EIP] disclosed the State Disability payments that are indicated on the fax from Taco Bell on the 'Yum!' letterhead that relate that [the EIP] was on leave since 7/18/12 and being paid by State Disability." Respondent's counsel discussed the other tax returns submitted into evidence and concluded that "it seems somewhat incredible that this couple survived on a negative income for 2012, 2014, and 2015. These numbers do not make sense when you take into account the large settlements received by this couple that the Applicant refers to in their supplemental submission." I concur with this position and also note that Applicant failed to submit the EIP's 2013 income tax return, despite being directed to do so by this Arbitrator.

Irrespective of the foregoing, Respondent terminated No-Fault benefits and timely denied reimbursement for the instant loss of earnings claim based upon the findings of the IME examination conducted on 10/31/12 by Alan Wolf, M.D. It is conceded by counsel that the denials were timely generated. At the time of the IME examination, the EIP was reportedly receiving physical therapy and chiropractic treatment. The EIP complained of pain in the neck, back, right shoulder and right knee. The examination revealed normal objective findings, including full ranges of motion (via use of a goniometer), no tenderness to palpation, negative findings of the objective tests performed, full motor strength and no spasm noted. Based upon the findings upon exam, Dr. Wolf diagnosed the EIP with resolved cervical and lumbosacral strains and a resolved right shoulder and knee contusions. Dr. Wolf further opined that there was "no evidence of disability" and that the EIP could "return to work without restrictions". Thus, based upon this examination, Respondent terminated further No-Fault benefits - including further reimbursement for lost earnings - effective 11/13/12.

The burden is on the insurer to prove that the medical services were unnecessary. *See: Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc. 3d 246, 776 N.Y.S.2d 178, 2004 Slip Op. 24041 (Civ. Ct. Kings County 2004); *A.B. Medical Services v. Geico Ins.*, 2 Misc. 3d 26, 773 N.Y.S.2d 773, 2003 Slip Op 23949 (App Term, 2d Dept 2003). *See also: Elm Medical P.C. v. American Home Assurance Co.*, 2003 Slip Op. 51357U 2003 N.Y. Misc. LEXIS 1337 (Civ. Ct., Kings Co., 2003); *Fifth Ave. Pain Control Ctr. v. Allstate Ins. Co.*, 196 Misc. 2d 801, 766 NYS2d 748 (Civ. Ct., Queens Co., 2003). In the instant matter, after a review of the totality of the evidence, I find that the medical necessity of the services in dispute has been credibly refuted by the IME report submitted herein, which is unrefuted by any contemporaneous chiropractic evaluation reports (aside from SOAP notes that reflect tenderness on palpation). Indeed, a denial claiming lack of medical necessity must be supported by a peer review, IME report or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. *See: Healing Hands Chiropractic, P.C. v. National Assurance Co.*, 5 Misc3d 975; *See also: Citywide Social Work, et al. v. Travelers Indemnity Co.*, 3 Misc3d 608; *Amaze Medical Supply, Inc. v. Eagle Insurance Co.*, 2 Misc3d 128(A).

After a thorough review of the totality of the credible evidence, together with the testimony of the witness at the time of the final Hearing, it is determined that Applicant has failed to meet its burden proof for the claim in dispute. I therefore find that Respondent's denials for the instant claim should be sustained.

Accordingly, this claim is denied.

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 New York
SS :
County of Nassau

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

02/07/2017
(Dated)



Susan Mandiberg

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
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Electronically Signed

Your name: Susan Mandiberg
Signed on: 02/07/2017 3:19:26 PM