

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

North American Partners IN Anesthesia LLP (Applicant)	AAA Case No.	17-16-1034-3861
- and -	Applicant's File No.	91684
Geico Insurance Company (Respondent)	Insurer's Claim File No.	0148636550101038
	NAIC No.	35882

**ARBITRATION AWARD**

I, Donna Ferrara, 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 "DJ."

1. Hearing(s) held on 09/12/2017  
Declared closed by the arbitrator on 09/12/2017

Michael Spector, Esq. from The Odierno Law Firm P.C. participated in person for the Applicant

Kevin Smith, Esq. from Geico Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,995.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the amount in dispute to \$605.29, pursuant to the Fee schedule.

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

3. Summary of Issues in Dispute

Whether Applicant established entitlement to No Fault compensation for anesthesia for a lumbar facet block injection performed on Assignor on March 27, 2015.

Whether Respondent properly denied payment based on the peer review report.

#### 4. Findings, Conclusions, and Basis Therefor

I have reviewed the file with regard to this matter contained in the ADR Center record of the case maintained by the American Arbitration Association. This decision is based on my review of that file, as well as the arguments of the parties at the hearing.

The dispute arises from the underlying motor vehicle accident of November 4, 2014, wherein Assignor, a 44 year old female, was injured. She was a pedestrian struck by a vehicle and she was taken by ambulance to St. Barnabas Hospital, where she was evaluated, treated and released that day. Assignor began a course of physical therapy, chiropractic care, and massage therapy.

There is 1 bill in dispute. Applicant submitted the bill to Respondent and Respondent denied payment of the bill based on the peer review report of Gary Florio, MD, dated June 9, 2015, due to lack of medical necessity.

Applicant establishes a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received by Respondent and that payment of no-fault benefits were overdue." Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D. 3d 742, 774 N.Y.S.2d 564 (2<sup>nd</sup> Dept. 2004).

Applicant's counsel argued at the hearing that Dr. Gamburg's examination of January 30, 2015, showed no radiation which indicates facet pain and there was decreased range of motion. Counsel further argued that there was a diagnosis of facet injury and this injection was recommended and Assignor had failed conservative modalities.

Respondent's counsel argued that Assignor was administered a facet nerve block injection, but the MRI indicated that was not a facet joint problem and that there was no facet injury.

Dr. Florio reviewed Assignor's medical records including treatment reports and diagnostic tests. He opined that the facet injections and associated anesthesia services were used in a manner outside the standard of care; that medical literature does not support the use of lumbar facet nerve block injections with or without associated anesthesia services in the absence of lumbar facet dysfunction with lower back pain of facet etiology as performed in this case. He further opined that the records do not establish Assignor as having developed any causally related lumbar facet dysfunction or lower back pain of facet etiology because the physical exams dated January 14, 2015, and January 21, 2015, reflect that Assignor did not have complaints or findings consistent with lumbar facet dysfunction and was not rendered a diagnosis of lumbar facets. Dr. Florio refers to the lumbar spine MRI on December 1, 2014, which specifically notes that the zygapophyseal joints appear well maintained at all levels and reveal no pathology consistent with lumbar facet dysfunction. He cites to medical literature which he believes supports his findings.

A peer reviewer must establish a factual basis and medical rationale for his asserted lack of medical necessity of the health care provider's services. See Prime Psychological Services, P.C. v. Progressive Casualty Ins. Co., 2009 N.Y. Slip Op. 51868(U) at 3, 2009 WL 2780152 (Civ. Ct. Richmond Co., Katherine A. Levine, J., Aug. 5, 2009); A.M. Medical Services, P.C. v. Deerbrook Ins. Co., 18 Misc.3d 1139(A), 2008 WL 518022 (Civ. Ct. Kings Co., Sylvia G. Ash, J., Feb. 25, 2008). Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 WL 1936346 at 3 (Civ. Battaglia, J., Aug. 12, 2005). I find that Dr. Florio's peer review reports established a factual basis and medical rationale.

Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff who must then present its own evidence of medical necessity (see Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11th ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 824 N.Y.S.2d 759 (Table), 2006 N.Y. Slip Op. 51871(U) at 2, 2006 WL 2829826 (App. Term 2d & 11th Dists. Sept. 29, 2006). Thus, although Respondent must come forward with prima facie proof of lack of medical necessity, the burden will shift to Applicant to prove medical necessity by a preponderance of the credible evidence if Respondent meets its burden.

Respondent having made out a prima facie case of lack of medical necessity through Dr. Florio's peer reviews, the burden shifted to Applicant to rebut and overcome it.

Applicant submits the anesthesia report dated March 27, 2015, which is illegible. In Respondent's submission is the brief January 30, 2015, medical examination report by David Gamburg, MD, to which Applicant's counsel refers. Examination revealed range of motion impaired, negative straight leg, and significant tenderness along the L3, L4, and L5 levels. He states that, "based on diagnosis of facet syndrome and back injury, we will plan right lumbosacral facet block for diagnosis of facet syndrome. The patient has failed to respond to conservative modalities up [sic] today and treatment of the area."

For an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the subjective and objective evidence of the patient's complaints." Nir v. Progressive Insurance Co., 7 Misc.3d 1006(A), 801 N.Y.S.2d 237 (Table), 2005 N.Y. Slip Op. 50466(U), 2005 WL 782806 (Civ. Ct. Kings Co., Nadelson, J., Apr. 7, 2005).

Based on a review of all the evidence, Respondent has established the lack of medical necessity for the disputed anesthesia for the lumbar facet block injection by a preponderance of the credible evidence, and the claim is denied. Applicant did not rebut the assertion made by the peer doctor that the records do not establish Assignor as having developed any causally related lumbar facet dysfunction or lower back pain of

facet etiology. Notwithstanding Dr. Gamburg's diagnosis of facet syndrome, there is nothing in the examination reports of January 14, 2015, and January 21, 2015, or any other examination report by Dr. Gamburg which mentions facet syndrome or how he arrived at this diagnosis.

Based on a review of the evidence herein, I am persuaded by Dr. Florio. I find that the anesthesia for the lumbar facet block injection was not medically necessary. Applicant has not sustained its burden of proof and has not rebutted the lack of medical necessity established in the peer report.

The within arbitration 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 Suffolk

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

10/08/2017  
(Dated)

Donna Ferrara

## **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:**  
8cd54994a5a16277df28c7f8982410fc

### **Electronically Signed**

Your name: Donna Ferrara  
Signed on: 10/08/2017