American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Metropolitan Medical and Surgical, P.C. (Applicant)	AAA Case No.	17-18-1084-8256
	Applicant's File No.	None
- and -	Insurer's Claim File No.	0446284283-01
	NAIC No.	17230
Allstate Property and Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Debbie Thomas, 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

1. Hearing(s) held on 07/03/2018
   Declared closed by the arbitrator on 07/03/2018

   John Faris from Broadway Legal Associates, P.C. participated in person for the Applicant

   Steven Miranda from Allstate Property and Casualty Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **$ 441.87**, 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

   Whether the right side lumbar medial branch block injections and trigger point injections performed on August 8, 2017, were medically necessary.

4. Findings, Conclusions, and Basis Therefor

   The within award is based upon this arbitrator's review of the record as well as oral argument at the time of the hearing of this matter. Applicant seeks $309.03 reimbursement for right side lumbar medial branch block injections and trigger point

injections performed on August 8, 2017 on Assignor, a then 61-year old male who was involved in a motor vehicle accident on February 1, 2017.

Relying on the peer review of Jason R. Cohen, M.D., Respondent timely denied the claim on the basis that the right side lumbar medial branch block injections and trigger point injections performed on August 8, 2017were not medically necessary.

Under Sec. 5102 of the New York Insurance Law (McKinney 1985), No-Fault first party benefits are reimbursement for all medically necessary expenses on account of personal injuries arising out of the use or operation of a motor vehicle.

A health care provider establishes its *prima facie* entitlement to first party no-fault benefits under Article 51 of the Insurance Law, by submitting evidentiary proof that the prescribed statutory billing forms were mailed to and received by the insurer and that payment of no-fault benefits are overdue. *See, Viviane Etienne Med. Care v. Country-Wide Ins. Co*., 25 NY3d 498 (2015); *Westchester Med. Ctr. v. Progressive Cas. Ins. Co*., 89 AD3d 1081, 933 NYS2d 719, 2011 NY Slip Op 8747 (N.Y. App. Div. 2d Dep't 2011; *New York Hosp. Med. Ctr. Of Queens v. QBE Ins. Corp*., 114 AD3d 648, 979 NYS2d 694, 2014 NY Slip Op 639 (NY App. Div. 2d Dep't 2014).

Herein, Applicant established its *prima facie* entitlement to first party no-fault benefits as proof of claim was mailed to and received by the insurer and payment of No-Fault benefits are overdue. *See, Viviane Etienne Med. Care v. Country-Wide, supra; Westchester Med. Ctr. v. Progressive, supra; New York Hosp. Med. Ctr. of Queens v. QBE Ins. Co., supra.* The burden then shifted to the insurer to come forward with sufficient evidence to rebut the presumption of medical necessity which attached to the provider's claim forms. *See, West Tremont Med. Diagnostic, PC v. Geico Ins. Co*., 13 Misc.3d 131(A) (N.Y. App. Term 2006).

When an insurer relies upon a peer review report to demonstrate that a particular service was not medically necessary, the peer reviewer's opinion must be supported by sufficient factual evidence or proof and cannot simply be conclusory. As per the holding in *Jacob Nir, M.D. v. Allstate Insurance Co.*, 7 Misc.3d 544 (2005), the peer reviewer must establish a factual basis and medical rationale to support a finding that the services were not medically necessary, including setting forth generally accepted standards in the medical community. The opinion of the insurer's expert, standing alone, is insufficient to carry the insurer's burden to prove that the services were not medically necessary. *See CityWide Social Work & Psychological Services, PLLC v. Travelers Indemnity Co.,* 3 Misc.3d 608, 777 N.Y.S.2d 241 (N.Y.Civ. Ct. Kings Co. 2004).

Once Respondent meets this burden of proof then the burden shifts back to Applicant to present competent medical proof as to the medical necessity for the disputed billing by a preponderance of the credible evidence. *West Tremont Medical Diagnostic, P.C. v. GEICO,* 13 Misc.3d 131[A], 824 N.Y.S.2d 759 (Table), 2006 WL 2829826 (App. Term 2d & 11th Jud. Dists. 9/29/06); *A. Khodadadi Radiology, P.C. v. N.Y. Central Fire Mutual Insurance Company,* 16 Misc. 3d 131[A], 841 N.Y.S.2d 824, 2007 WL 1989432 (App. Term 2d & 11th Dists. 7/3/08). Ultimately, the burden of proof rests with the Applicant (See: Insurance Law §5102). *See Be Well Medical Supply, Inc. v. New York*

Cent. Mut. Fire Ins. Co., 18 Misc3d 139(A) (App. Term 2d & 11th Dists. Feb. 21, 2008).

In support of its contention that the right side lumbar medial branch block injections and trigger point injections performed on August 8, 2017 were not medically necessary, Respondent relies upon the peer review report of Dr. Jason R. Cohen. Dr. Cohen notes that Assignor is a 61-year-old male involved in a motor vehicle accident on February 1, 2017.

MRI testing of the lumbar spine performed April 18, 2017, documents disc herniations at L3-4, L4-5 and L5-S1. There is no evidence or identification of facet joint arthropathy and pathology. An initial consultation by Dr. Xia on July 31, 2017, documents subjective complaints of lower back pain with radiation into the right lower extremity. The pain is rated 6-7/10 VAS described as intermittent in nature. On physical examination of the lumbar spine, there is moderate tenderness along the lumbar spine with paraspinal muscle spasm noted. There is restricted range of motion without degrees of measure noted on range of motion testing. Straight leg raise testing is negative. There is pain on lumbar flexion and extension. There is positive facet loading. There is tenderness to palpation at the lumbar facet joints. On neurological examination, sensation, motor strength and deep tendon reflexes are normal in the bilateral lower extremities. A follow-up evaluation by Dr. Gladstein on August 8, 2017, documents subjective complaints of lower back pain rated 6-7/10 VAS. On physical examination of the lumbar spine, there is pain with lumbar flexion and extension. Straight leg raise testing is negative bilaterally. There is restricted range of motion in the lumbar spine without degrees of measure noted on range of motion testing. There is tenderness to palpation with trigger points. Facet loading is positive on the right side. There is tenderness to palpation of the lumbar facet joints, especially at L4-5 and L5-S1. There is no neurological examination for the lower extremities performed or documented, including sensation, motor strength and deep tendon reflexes. On August 8, 2017, Assignor underwent right-sided lumbar medial branch block injections and trigger point injections performed by Dr. Mark Gladstein.

Based on his review of the medical records, including the radiological studies of the lumbar spine, Dr. Cohen opines that the right-sided lumbar medial branch block injections and trigger point injections performed August 8, 2017 were not medically necessary.

Dr. Cohen cites to the 2014 NIA Standard Clinical Guidelines, which state, "Intermittent or continuous pain with average pain levels of 6 on a scale of 0 to 10 or functional disability AND duration of pain of at least 2 months AND failure to respond to conservative non-operative therapy management. The indications for medial branch nerve blocks are meant to confirm disabling non-radicular low back (lumbosacral) or neck (cervical) pain, suggestive of facet joint origin as documented in the medical record based upon history, consisting of mainly axial or non-radicular pain, and physical examination, with positive provocative signs of facet disease (pain exacerbated by extension and rotation, or associated with lumbar rigidity)."

There is no documentation of positive provocative signs of lumbar facet disease with pain exacerbation on extension and rotational maneuvers by Dr. Gladstein.

Facet syndrome pain is usually a diagnosis of exclusion that is arrived at, after excluding mimics like nerve entrapment syndrome, discogenic pain, spinal stenosis and osseous abnormalities. Here, there is no evidence or documentation of facet joint arthropathy or pathology on MRI testing of the lumbar spine.

Dr. Cohen cites to literature stating there is limited evidence of long-term relief of chronic low back pain with intra-articular injections of local anaesthetics and steroids. With regard to test validity criteria, a single intraarticular facet block with local anesthetics is not useful to prove a FJS (Facet Joint Syndrome) and has to be abandoned from preoperative testing and indication finding. Although several studies have been performed in the last decades, evaluation of FJI (Facet Joint Injection) remains difficult due to lack of reliable clinical and radiological predictors. Comparative FJ blocks with local anesthetics and placebo-controls give no proper diagnosis on FJ being main pain generator. Facet joint medial branch blocks do not provide proper diagnosis for the facet joint being the main pain generator.

Trigger-point injection is indicated for patients who have symptomatic active trigger points that produce a twitch response to pressure and create a pattern of referred pain. There is no documentation of twitch response or referred pain pattern on palpation of identified trigger points.

For trigger points in the acute stage of formation, effective treatment may be delivered through physical therapy. There is no documentation of failed conservative treatment including physical therapy.

With regard to the effectiveness of trigger point injection, Dr. Cohen cites to literature staing the following: there is so far no strong evidence for the effectiveness of trigger point injections, and many physicians consider trigger point injections a little more than, if not equivalent to, placebo effects; strong evidence is lacking as to the efficacy of trigger point injections; there is no proven efficacy to trigger point injections; orthoses, transcutaneous electrical nerve stimulation, electromyographic biofeedback, traction, acupuncture, magnet therapy, injections into trigger points, and hydrotherapy are no more effective than sham therapy.

In the event there are subjective complaints referable to the lumbar spine, the standard of care would include physical therapy, appropriate oral pharmacotherapy, and appropriate imaging studies to rule out a surgical lesion. The accepted standard of practice has not been met to support the medical necessity of the lumbar medial branch block injections and trigger point injections in that there is no documentation of positive provocative signs of lumbar facet disease with pain exacerbation on extension and rotational maneuvers by Dr. Gladstein. Additionally, there is no evidence or documentation of facet joint arthropathy or pathology on MRI testing of the lumbar spine. Finally, there is no documentation of twitch response or referred pain pattern on palpation of identified trigger points.

Applicant submits a rebuttal to the peer review report by Mark Gladstein, M.D. Dr. Gladstein notes that Assignor was involved in a motor vehicle accident as the driver of a vehicle that was rear-ended. Assignor originally presented on July 31, 2017 with complaints of intermittent pain in the neck that radiated to the left shoulder with numbness and tingling in the left hand and fingers. He also complained of pain in the low back that radiation to the right knee. He also reported pain in the left shoulder.

Lumbar examination revealed pain on lumbar flexion and extension. Straight leg raise was positive on the left side at a 55 degree angle. TTP with trigger points identified in the lumbar and gluteal regions bilaterally. Cervical Examination revealed pain with cervical flexion and extension. Spurling test was positive on bilateral sides. There was tenderness present at the cervical spine. Restricted ROM. Trigger points were identified in the cervical and trapezius regions bilaterally.

MRI of the lumbar spine performed on April 17, 2017 revealed straightening of lordotic curvature. Disc herniations at L3-4, L4-5, and L5-S l levels, and central spinal canal stenosis at L3-4, and L4-5 with borderline canal at L5-S l levels.

Assignor was advised to start physical therapy, chiropractic and acupuncturist treatment and additional therapeutic equipment for home use was prescribed, He started receiving conservative therapy and treatment immediately and he was evaluated and tested regularly. Unfortunately his condition continued to worsen and therefore more intensive treatment methods were discussed and prescribed. Upon presenting to Dr. Gladstein's office for an initial consultation on July 31, 2017, he discussed his pain and symptoms and was referred for a lumbar medial branch nerve block. On August 8, 20 I 7, Assignor underwent right side lumbar medial branch block injections and trigger point injections. He reported lasting relief following this injection which allowed him to resume his usual activities and greatly improved his quality of life.

Dr. Gladstein cites to an article that lists multiple studies demonstrating the lack of correlation between imaging studies and a diagnosis of facet syndrome. The largest study found no relation between radiographic evidence of 1-z joint degeneration and response to single, intraarticular facet injections in 390 patients. This particular study reviewed lumbar facet syndrome, but the same can be said for cervical facet syndrome. It is simply not diagnosable on imaging alone.

The appropriate plan once a diagnosis of facet syndrome is suspected, after conservative methods have failed to relieve the neck pain, is medial branch nerve blocks. This was indicated and initially performed on August 8, 2017 in the low back region. The New York Workers· Compensation guidelines allow for diagnostic medial branch block injections where there is neck pain. There are no evidence based conclusive exams or radiological findings that would definitively lead to a diagnosis of facet syndrome without this procedure. Studies that have suggested otherwise have not been able to be repeated. Most consider the diagnostic medial branch block to be the most reliable test. In his practice, Dr. Gladstein frequently sees a therapeutic response to this procedure. It is not only a diagnostic tool.

Assignor was also diagnosed with fibromyositis, also known as myofascial pain syndrome. On each visit, trigger points were identified and treated, as is appropriate Dr. Gladstein cites to literature stating that trigger point injections are recommended for myofascial pain syndrome. Trigger point injection has been shown to be one of the most effective treatment modalities to inactivate trigger points and provide prompt relief of symptoms. Palpation of a hypersensitive bundle or nodule of muscle fiber of harder than normal consistency is the physical finding typically associated with a trigger point. Trigger points were conclusively identified, and treatment was medically necessary and effective.

It is Dr. Gladstein's opinion that Assignor was in need of lumbar medial branch nerve blocks and trigger point injections for treatment of the ongoing severe pain in his low back. Therefore he required the fluoroscopy for appropriate guidance and anesthesia for patient comfort and to maintain optimal conditions for a safe procedure, as well.

After careful consideration of the documents submitted and the parties' oral arguments at the hearing, I find in favor of Applicant. I find that Dr. Gladstein's rebuttal sufficiently addresses and rebuts the points raised by Dr. Cohen's peer review report. Given Assignors complaints of intermittent pain in the neck that radiated to the left shoulder with numbness and tingling in the left hand and fingers, positive lumbar MRI, his failure to respond to conservative treatment, and identified trigger points in the cervical and trapezius regions bilaterally, I will defer to the treating physician's determination to perform these injections. I find the rebuttal and medical records submitted by Applicant are persuasive and establish medical necessity for the right side lumbar medial branch block injections and trigger point injections performed on August 8, 2017 Accordingly, an award will be entered in favor of Applicant.

As regards the fees for the services rendered, Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. *See Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co*., 2006 NY Slip Op 26240, 12 Misc.3d 172, 822 N.Y.S.2d 378, 2006 N.Y. Misc. LEXIS 1519 (Civil Ct, Kings Co. 2006). If Respondent fails to demonstrate by competent evidentiary proof that an Applicant's claims were in excess of the appropriate fee schedule, Respondent's defense of noncompliance with the appropriate fee schedule cannot be sustained. *See, Continental Medical PC v. Travelers Indemnity Co*., 11 Misc.3d 145A, 819 N.Y.S.2d 847, 2006 NY Slip Op 50841U, 2006 N.Y.Misc. LEXIS 1109 (App. Term, 1 Dep't, per curiam, 2006).

Counsel for Respondent submits a copy of Surgical Fee Schedule Ground Rule 5 and contends that Applicant is entitled to reimbursement in the amount of $309.03, which includes $50.22 for CPT Code 99212, $125.97 for CPT Code 64493, $36.65 for CPT Code 64494 (subject to the multiple procedure reduction rule), $36.65 for CPT Code 64495 (subject to the multiple procedure reduction rule), and $59.55 for CPT Code 20553 (subject to the multiple procedure reduction rule). Counsel for Applicant argues that the fee audit alone is insufficient to establish Respondent's burden.

Surgical Fee Schedule Ground Rule 5 provides, in relevant part:

Multiple or Bilateral Procedures

When multiple procedures, unrelated to the major procedure and adding significant time or complexity, are provided at the same operative session, payment is for the procedure with the highest allowance plus half of the lesser procedures. The same rule applies for bilateral procedures when such are not specifically identified in the schedule.

Based of Surgical Fee Schedule Ground Rule 5, I find that Respondent has met its burden and sufficiently established the proper amount of reimbursement. Accordingly, Applicant is awarded reimbursement in the amount of $309.03.

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**
	Metropolitan Medical and Surgical, P.C.	**08/08/17 - 08/08/17**	**$441.87**	**Awarded: $309.03**
Total			**$441.87**	**Awarded: $309.03**

B. The insurer shall also compute and pay the applicant interest set forth below. 02/12/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In accordance with 11 NYCRR 65-3.9(c) interest shall be paid on the claim awarded in the amount of $309.03 from February 12, 2018, the date the arbitration was commenced.

C. Attorney's Fees

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

In accordance with 11 NYCRR 65-4.6(d) the insurer shall pay Applicant an attorney's fee on the claim awarded in the amount of $309.03.

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

07/16/2018
(Dated)

Debbie Thomas

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:
8353c140933eb60df6eae99749ae29ff

Electronically Signed

Your name: Debbie Thomas
Signed on: 07/16/2018