

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pain Medical, PLLC
(Applicant)

- and -

Allstate Insurance Company
(Respondent)

AAA Case No. 17-17-1071-8179

Applicant's File No. 217540

Insurer's Claim File No. 0265198035
SGP

NAIC No. 19232

ARBITRATION AWARD

I, Richard Kokel, 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 07/13/2018, 09/19/2018
Declared closed by the arbitrator on 09/19/2018

Kurt Lundgren from Thwaites, Lundgren & D'Arcy Esqs participated by telephone for the Applicant

Richard Montana from Morrison Mahoney, LLP participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 5,152.53**, 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 issue is whether the Applicant provider violated a condition precedent to coverage due to their failure to comply with additional verification requests that sought an Examination under Oath.

4. Findings, Conclusions, and Basis Therefor

The EIP (a 58 year old male) was involved in a motor vehicle accident on October 29, 2012, wherein he sustained personal injuries. The Applicant rendered medical

care/treatment to the EIP on April 10, 2013, to help treat said injuries. The services consisted of a lumbar spine discectomy at L5-S1, along with related discography and medical supplies.

The Applicant commenced this proceeding to recover the cost of said services since the Respondent denied reimbursement for the cost thereof. The basis of the denial was: *The claim is denied based on provider-applicants failure to comply with a request for additional verification in the form of an examination under oath ("EUO") and continued EUO which was scheduled for May 6, 2013 and May 21, 2013 respectively; breach of policy conditions and condition precedent to coverage with respect to provider applicant's failure to comply with the request for EUO.*

The Applicant and the Respondent each submitted evidence in support of their respective positions. All evidence submitted is contained within the Case management system maintained by the American Arbitration Association. The below noted decision is based upon my review of the submitted evidence, as well as the oral argument of the representatives present at the hearing.

The Applicant provider, by Dr. Reyfman, submitted to Examinations under Oath (also referred to as EUO) on January 10, 2013 and again on April 2, 2013 (the 2nd Examination was a continued exam). Subsequent to the April 2, 2013 Examination, the Respondent requested a further Examination under Oath of Dr. Reyfman on May 6, 2013 and May 21, 2013. The Applicant stipulated that the notices regarding these two Examinations were proper in all respects, and that Dr. Reyfman did not appear on either date (see 11 NYCRR 65-1.1, 11 NYCRR 65-3.5 & 11 NYCRR 65-3.6).

The Applicant argued, instead, that: the Respondent had no objective basis/rationale for the Examination under Oath; the Dr. Reyfman has already testified on two prior occasions; that the Respondent had ample opportunity to verify the corporate status of Pain Medical, PLLC; that the Respondent had ample opportunity to inquire into licensing; and, that the Respondent had ample opportunity to question aspects of the medical practice at Pain Medical, PLLC. The Applicant added that they have cooperated fully with respect to the Respondent's request for Examinations under Oath and that the Respondent's ongoing requests for further Examinations is an abuse of the verification process.

The Respondent, in response to the Applicant's position, stated that the continued Examination of Dr. Reyfman, as per No-Fault regulations, was warranted to determine if the Applicant provider was properly licensed in accordance with applicable New York State Law (see letter dated May 20, 2013 by Robert Stern, Esq.).

In terms of the evidence within the record, Dr. Reyfman, on January 10, 2013 appeared and testified at an Examination under Oath that went from 10:20AM to 5:45PM. The attorneys present at the Examination were Kurt Lundgren (for the Applicant) and Robin Pass (for the Respondent) and the stated purpose for the Examination was to verify the billed for services related to each of the claimants that are the subject of Allstate's request (for EUO's) as well as to verify whether Pain Medical, PLLC is licensed in accordance with New York State Law (see page 7 of the transcript).

Dr. Reyfman also appeared and testified on April 2, 2013 at an Examination under Oath that went from 10:12AM to 1:33PM. This Examination was ended as per a prior agreement between the parties so that Dr. Reyfman could attend to his scheduled afternoon patients. The stated purpose for the Examination was to verify the billed-for services related to each of the claimants that are the subject of Allstate's request for the EUO (see page 5&6 of the transcript).

Additionally, in terms of the purpose for the EUO, the Respondent submitted an affidavit by Kenneth Tejada, a Claims Service Adjuster in the Respondent's Special Investigations Unit (SIU). He stated that the EUO's were needed to: determine if the services were rendered as billed; if services were actually rendered; determine if the services were within the proper standard of medical care; determine whether services were billed in accordance with the applicable fee schedule; determine whether the services were medically necessary; determine whether the services were provided pursuant to a fraudulent scheme; determine if the Applicant 'unbundled' services; determine if EIP's signed consent forms for surgical procedures; and, to determine if the Applicant provider was properly licensed in accordance with applicable New York State Law.

The undersigned read, completely, each of the transcripts of the Examinations. With respect to the January 10, 2013 transcript I will note and briefly summarize as follows: Dr. Reyfman's qualifications were identified at length, including his education and training; his employment history was identified, including the dates/times he worked at Pain Medical, PLLC as well as other medical facilities, his teaching employment and posts were identified (materials used in teaching was also inquired about); his training/experience in pain management was identified; a response to the inquiry as to Dr. Reyfman's medical licenses in New York and New Jersey was provided; the addresses of Pain Medical, PLLC was provided along with the addresses of other medical facilities he worked at or owned; his ownership of JSL Anesthesia and Pain Management was acknowledged, as was the fact that it is an ambulatory surgical center; leases for the facilities were identified as per questioning; Dr. Elbaz, M.D. was identified as a partner in Pain Medical, PLLC; each employee of Pain Medical, PLLC was identified as were their respective licensing and credentials; employee contracts were discussed/questioned; the office manager was named as were her duties (prior to 2011, Dr. Reyfman managed the office); the in-house billing clerk was identified, i.e., it was noted that there was no outside billing company involved; it was also noted that Pain Medical, PLLC answered questions as to how bills were prepared and how CPT codes and modifiers were assigned; the corporate status of Pain Medical, PLLC was identified (first incorporated in 2008); services provided by Pain Medical, PLLC were discussed in response to questions; questions regarding the equipment used when providing pain management services were asked and all answered; equipment, leased or owned was identified as were model numbers and serial numbers; percentages of No-Fault, Workers Compensation, Medicare, Medicaid and HMO patients was discussed in response to questions; questions regarding patients assignment of benefits forms were answered; questions regarding patients consent for procedures/surgery forms were answered; drug test screening procedures were discussed; supervision of non-medical personnel as well as other physicians was discussed; examination services

were discussed, i.e., how the complexity of exams was determined with respect to the CPT code assigned; questions regarding office examination report templates were answered; questions regarding types of examination reports were answered; questions regarding some medical charts and range of motion testing and radiculopathy diagnoses were answered; and, one patient's chart, in particular, was discussed (Jacqueline Fernandez), but the questioning was limited to where her records are kept and whether or not paper versus electronic records are maintained. I note that no questions regarding the within EIP were put to Dr. Reyfman.

With respect to the April 2, 2013 transcript I will briefly summarize as follows: Dr. Reyfman was again questioned; Attorneys Kurt Lundgren and Robin Pass were again present; Questions regarding Dr. Reyfman's ownership of Pain Medical, PLLC and JSJ Anesthesia and Pain Management were again put to the witness as were questions regarding the addresses of the facilities and the fact that billing provided at both was done 'in-house'; Dr. Reyfman's work schedule was also inquired about as were the days he was physically at Pain Medical, PLLC and the days he took for vacation; Questions regarding JSJ Anesthesia and Pain Management's (JSJ) accreditation status and their compliance with AAAASF (the accreditation entity) were also put to the witness after a copy of AAAASF standards (version 13) for accreditation of ambulatory surgery facilities was marked as an exhibit; A lengthy set of questions regarding JSJ's facility class, their accreditation certificate, their medical records and the accuracy thereof were answered; The Respondent referenced a patient's chart (Maria Ahamed) and inquired about the accuracy of JSJ's records, which Dr. Reyfman stated were accurate with the exception of the consent form; [Apparently there was a mistake in the consent form for Ms. Ahamed. The form indicated that ESI was performed when, in fact, a discectomy was performed. Dr. Reyfman acknowledged that this was a mistake that was overlooked in the consent form, but that the patient was aware and informed that a discectomy was being performed.] Questions regarding anesthesia used during Ms. Ahamed's procedure were also put to Dr. Reyfman in regard to the safe use of propofol; and, questions regarding this drug and sedation in general were answered (an anesthesiologist is only needed when sedation is used).

I note that the questions regarding the within EIP were not put to Dr. Reyfman, but that charts regarding Clyde Wiggins and Jacqueline Fernandez were marked as exhibits. Questions regarding Clyde Wiggins and Jacqueline Fernandez were not asked however, and the questions regarding Ms. Ahamed were limited to her consent form, her anesthesia and what procedure was performed (questions regarding assignment of benefits forms were also asked). Other questions for Dr. Reyfman were in regard to his training and education and, in particular, in regard to percutaneous discectomies. His training with respect to cadaver discectomies was discussed as was the type of equipment used in discectomies. A significant number of questions were also put to Dr. Reyfman regarding Pain Medical, PLLC's daily revenue and their annual expenses. I must assume such information was requested so that Dr. Reyfman's fee for his appearance(s) at Examinations under Oath could be calculated, notwithstanding the fact that his accountant had previously supplied documentation of his fee. The Respondent also asked for tax returns for the years 2011 and 2012.

The foregoing is a fair abridgment of the questions and testimony provided on January 10 and April 2, 2013. I find that the two times that Dr. Reyfman appeared for and testified was sufficient for the Respondent to obtain information to verify the claim at issue and to determine if the Applicant was properly licensed in accordance with applicable New York State Law. Indicia of a lack of licensing credentials, a management company, the operation of a medical facility by a lay person, shared ownership, shared control or fraud was not identified.

I recognize that an insurer may inquire as to issues with respect to 'fraudulently incorporated' medical facilities and their ownership and control of a facility, i.e., a licensed physician must be the owner of a medical facility and a lay person cannot share ownership or control the medical facility. The cornerstone of this view is the fact that medical facilities cannot recover New York No-Fault benefits unless they comply with all state and local licensing requirements. A professional service corporation may not render professional services except through individuals that are authorized by law to do so, such as, a medical doctor. Physicians may not share ownership of a medical corporation with a non-physician and only properly licensed medical corporations are entitled to reimbursement by insurers (see New York BCL sections 1504 & 1507; and N.Y. Insurance Law section 1508). The matter was discussed pointedly in State Farm Mutual Auto Ins Co., v. Mallela, et al. (Mallela III), 4 NY 3d 313, 321, 794 N.Y.S. 2d 700 (2005), where the Court agreed that No-Fault payments to unlicensed or fraudulently licensed providers is not within the meaning of 'basic economic loss' as defined by New York Insurance Law section 5105 et seq., making such entities ineligible for reimbursement (id. at 320). This Court also (citing to 11 NYCRR 65-3.16(a)(12)) stated that insurance carriers may look beyond the face of licensing documents to identify willful and material failure to abide by state and local law (id.).

The Respondent had two opportunities to determine if Pain Medical, PLLC was properly licensed, and in compliance with all New York State laws (this was the basis of their request to examine the Applicant). They also had ample opportunity to 'look beyond' the face of their (the Applicant's) licensing documents. Herein, the Respondent did not suggest a credible basis to support their view that the Applicant medical facility was fraudulently incorporated, was operated/controlled by a lay person or that a further/continued Examination under Oath was warranted. The Respondent did not take advantage of the two Examinations under Oath attended by Dr. Reyfman to verify the claim of the within EIP.

It appears, to the undersigned, that the Respondent was 'fishing' for some evidence that the Applicant provider was not properly licensed in accordance with applicable New York State Law. The scope of the questioning, however, was not geared to verify the claim or to discern compliance with New York State laws.

Based on the foregoing, I find that the Respondent's requests, for verification by way of a further/continued Examination under Oath by Dr. Reyfman, were not reasonable with respect to the circumstances surrounding this claim.

The Applicant established their prima facie entitlement to recover the cost of the services at issue and they are thereby awarded reimbursement for the cost thereof, but with one caveat. The Applicant's billing claim form included a fee for medical supplies that were described with CPT code number 99070. This is a New York Workers Compensation Medical Fee Schedule, Medicine code, which refers to supplies and materials provided by physicians that are over and above those usually included with the service rendered. When billing for such supplies/materials, the specific items provided must be identified, and payment for such supplies/materials shall not exceed the invoice cost of the items (see General Ground Rule 4 in the New York Worker's Compensation Board Fee Schedule). Herein, the billing claim form did not identify the supplies/materials provided, nor was an invoice submitted in evidence. Reimbursement for the billed cost (\$1200.00) is thereby 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Pain Medical, PLLC	04/10/13 - 04/10/13	\$5,152.53	Awarded: \$3,952.53
Total			\$5,152.53	Awarded: \$3,952.53

- B. The insurer shall also compute and pay the applicant interest set forth below. 09/25/2017 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since a denial was timely served, interest shall be computed from September 25, 2017, the date the request for arbitration was filed with the American Arbitration Association, at a rate of 2% per month, calculated on a pro rata basis using a 30 day month, and ending with the date of payment of the award subject to the provisions of 11 NYCRR 65-3.9(e).

C. Attorney's Fees

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

The attorney's fee is calculated upon the amount awarded and the interest (as calculated in section "B" above) and in accordance with the provisions as to attorney fee promulgated in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D).

- 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 New York

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

11/06/2018
(Dated)

Richard Kokel

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:
8ea63b77d5121d78677432001e86ce6a

Electronically Signed

Your name: Richard Kokel
Signed on: 11/06/2018