

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Roxbury Anesthesia LLC
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-17-1078-9246
Applicant's File No.	TM-17-0251
Insurer's Claim File No.	0493062430101026
NAIC No.	22055

ARBITRATION AWARD

I, Charles Blattberg, 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: Eligible injured person

1. Hearing(s) held on 11/21/2018
Declared closed by the arbitrator on 01/03/2019

Naomie Jean-Philippe, Esq. from Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone LLP participated in person for the Applicant

Jesse Brush, Esq. from Law Office of Goldstein & Flecker participated in person for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,100.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant reduced the total amount in dispute to \$605.29 pursuant to fee schedule. It is noted that Respondent submitted a techsource fee audit which set forth \$562.06 as the fee schedule amount.

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

3. Summary of Issues in Dispute

The claimant was the 38 year-old female restrained driver of a motor vehicle that was involved in an accident on 3/19/17. Following the accident the claimant suffered injuries

which resulted in the claimant seeking treatment. On 7/19/17 Nasar Shahid, M.D. conducted a follow-up examination and performed bilateral L3-L4, L4-L5, and L5-S1 lumbar facet joint injections under fluoroscopic guidance; the associated anesthesia is at issue here that Respondent timely denied reimbursement for based on the 8/23/17 peer review by Ayman Hadhoud, M.D.

4. Findings, Conclusions, and Basis Therefor

THIS HEARING WAS CONDUCTED USING THE ELECTRONIC CASE FOLDER MAINTAINED BY THE AMERICAN ARBITRATION ASSOCIATION. ALL DOCUMENTS CONTAINED IN THAT FOLDER ARE MADE PART OF THE RECORD OF THIS HEARING.

THE ARBITRATOR SHALL BE THE JUDGE OF THE RELEVANCE AND MATERIALITY OF THE EVIDENCE OFFERED.

Based on a review of the documentary evidence, this claim is decided as follows:

An applicant establishes a prima facie case of entitlement to reimbursement of its claim by the submission of a completed NF-3 form or similar document documenting the facts and amounts of the losses sustained and by submitting evidentiary proof that the prescribed statutory billing forms [setting forth the fact and the amount of the loss sustained] had been mailed and received and that payment of no-fault benefits were overdue. See, *Mary Immaculate Hospital v. Allstate Insurance Company*, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept. 2004). I find that Applicant established a prima facie case for reimbursement.

The hearing was held open for both sides "to submit court decisions/arbitration awards in support of their respective positions as to whether anesthesia services may be billed (by any entity) when a facility fee is charged pursuant to the New Jersey fee schedule." Both sides made post hearing submissions.

The claimant was the 38 year-old female restrained driver of a motor vehicle that was involved in an accident on 3/19/17. The claimant reportedly injured her neck, bilateral shoulders, upper back, mid back, low back, right hip, pelvis, and left leg. There was no reported loss of consciousness. There were no reported lacerations or fractures. There was no reported emergency treatment sought or received. On or around 3/20/17 the claimant presented to Joseph Louis, M.D. of Nassau Health Medical, P.C. who supervised Outcome Assessment Testing (OAT) and the claimant was initiated on physical therapy. On 3/21/17 the claimant presents to Southwell Acupuncture, P.C. and was initiated on acupuncture and cupping. On 4/4/17 the claimant underwent computerized range of motion and manual muscle testing (ROM/MMT). On 4/9/17 the claimant presented to Charles H. Bagley, M.D. for an initial comprehensive neurological examination and the treatment plan included consider EMG testing. On 4/23/17 the claimant underwent physical capacity (NIOSH) testing. On 4/30/17 the claimant underwent ROM/MMT. On 5/1/17 Dr. Bagley conducted a follow-up examination and

upper extremities and lower extremities EMG/NCV were recommended. During the 5/2/17 follow-up examination by Emerth Lance Coburn, M.D. of Nassau Health Medical, P.C. it was noted that pain in the right shoulder and pelvis had resolved. The 5/12/17 lumbar spine MRI interpreted by Sydney Yoon, M.D. produced an impression of L4-5 demonstrates mild disc degeneration with a 3-4 mm central disc herniation with anterior thecal sac flattening is present, at L4, anterior epidural fluid collection is identified measuring 3 mm in AP dimension and 1.5 cm in vertical dimension, compatible with either seroma or hematoma, posterior subcutaneous edema from L1 through L4, and otherwise unremarkable MRI of the lumbar spine. On 5/22/17 the claimant presented to Nasar Shahid, M.D. and upper extremities EMG/NCV testing was conducted that suggested evidence of left C5-C6 cervical radiculopathy and bilateral carpal tunnel syndrome. On 5/30/17 the claimant repeated OAT. On 6/8/17 the claimant underwent ROM/MMT. On 6/12/17 Dr. Shahid conducted a follow-up examination and performed trigger point injections. On 6/25/17 the claimant underwent physical capacity (NIOSH) testing. On 6/25/17 the claimant presented to Jason R. Baynes, M.D. for an orthopedic consultation producing an assessment of left shoulder rotator cuff tear. On 6/26/17 Dr. Shahid conducted a follow-up examination and performed trigger point injections. The 6/26/17 report contains "lumbar facet joint injection is a medical necessity based on the following facts: Patient's subjective complaint of constant axial low back pain which is minimally responsive to conservative care; Sub-optimal relief from pain medications; Painful limitation of lumbar extension as well as tenderness to palpation over the lumbar facet joints; This diagnosis of facetogenic pain cannot be established by any other imaging modality or nerve test; [and] The only valid test for facetogenic pain is diagnostic facet block injection under fluoroscopic guidance." On 7/19/17 Dr. Shahid conducted a follow-up examination and performed bilateral L3-L4, L4-L5, and L5-S1 lumbar facet joint injections under fluoroscopic guidance; the associated anesthesia is at issue here.

The burden has shifted to the Respondent as they have raised a medical necessity defense. In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, *Provvedere, Inc. v. Republic Western Ins. Co.*, 2014 NY Slip Op. 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 20140. Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, *Bronx Expert Radiology, P.C. v. Travelers Ins. Co.*, 2006 NY Slip Op. 52116 (App. Term 1st Dept. 2006). As a general rule, reliance on rebuttal documentation will be weighed in light of the documentary proofs and the arguments presented at the arbitration. Moreover, the case law is clear that a provider must rebut the conclusions and determinations of the IME/peer doctor with his own facts. *Park Slope Medical and Surgical Supply, Inc. v. Travelers*, 37 Misc.3d 19 (2012).

Respondent timely denied the 7/19/17 therapeutic injections and associated services based on an 8/23/17 peer review by Ayman Hadhoud, M.D. After reviewing the claimant's history, treatment, medical records (including a very detailed recitation of the 6/26/17 examination by Dr. Shahid); Dr. Hadhoud opines "the lumbar paravertebral nerve blocks with fluoroscopy on 7/19/17 are deemed not medically necessary. The standard of care is to start the patient on physical therapy and rehabilitation program.

The rehabilitation program should focus on maximizing the functional ability and managing the actual etiology that causes the symptoms with basic physical therapy and exercise program. Pain relief can easily be achieved by using oral analgesics for pain and there are numerous medications that were proven to be successful not only in relieving the pain but also in aiding in reducing the inflammation of the muscles and the structures causing the pain symptoms. In this claimant's case, the nerve block was applied just to treat the symptoms for very short period of time without persuasive documentation that justify its necessity. I do not see a reason to perform this procedure as it would provide temporary relief of the symptoms without any correction of the musculoskeletal dysfunction, which does not justify the application of this modality."

Dr. Hadhoud explains "according to (New York State Workers' Compensation Board New York Mid and Low Back Injury Medical Treatment Guidelines, Second Edition, January 14, 2013, page 31) :D.6.e "Diagnostic Facet Joint Injections (Intra-articular and Nerve Blocks) Recommendations: D.6.e.i One fluoroscopically guided (except in cases where radiation exposure is contraindicated and ultrasound evaluation of needle placement may be used) diagnostic facet joint injection, except in cases where radiation exposure is contraindicated (e.g. pregnancy) ultrasound evaluation of needle placement may be used, per side per level may be recommended for patients with chronic back pain that is significantly exacerbated by extension and rotation or associated with lumbar rigidity, and not alleviated with other conservative treatments (e.g., medication, aerobic exercise, other exercise, manipulation) in order to determine whether specific interventions targeting the facet joint are recommended. Repeated diagnostic injections in the same level(s) are not recommended. Maximum Duration: One diagnostic facet joint injection per side per level, not to exceed two levels." None of the above mentioned criteria was met in this claimant's clinical presentation. The physician renewed the physical therapy which shows that the therapy was effective. There was no presentation suggestive of facet lesion. Please note that the procedure note shows that nerve block over the transverse process was performed. This procedure is done to enervate the facet joint and eliminate the facetogenic pain." Dr. Hadhoud continues "nevertheless, facet joints lesions are typically included in the arthritic process and are not the reason for the claimant's pain in this clinical context. Therefore, this facet joint injection or blocking its innervations (medial branch block) is totally irrelevant to this claimant in this clinical context. The physician did not document any diagnosis that pertains to the facet joints that could be related to the motor vehicle accident. According to (Physiatric procedures in clinical practice, Ted Lennard, MD, Chapter 22, page 206-207 by Paul Dreyfuss, MD, Francis Lagattuta, MD, Bryan Kaplansky, MD and Barbara Heller, DO): "Prior to any Zygapophyseal (facet) joint injection, a patient should have a thorough regional spine/extremity physical examination that focuses on the painful spinal segments and associated secondary sites of dysfunction in the kinetic chain. Plain films should be considered prior to z-joint (facet joint) injections to rule out fractures, infection or neoplasm." None of the above was documented. No diagnosis pertaining to the facet joints that is causally related to the accident was mentioned in the report of the physician on the day of the procedure. In light of the reasons noted above, it is clear that there was no medical necessity to perform this procedure on this claimant in relation to the motor vehicle accident." Dr. Hadhoud concludes "the physical therapy notes do not show that the therapy was directed to treat the facet joints or their innervations (medial branch). The procedure is deemed not medically necessary and not causally related to the motor vehicle accident. Overall, the rehabilitation program should

focus on maximizing the functional ability and managing the actual etiology that causes the symptoms with basic physical therapy and exercise program. In this claimant's case, the nerve block was applied just to treat the symptoms for very short period of time without persuasive documentation that justify its necessity. Since the above mentioned procedure is deemed not medically necessary, any associated procedure such as fluoroscopic or ultrasound guidance is subsequently deemed medically unnecessary."

There are no medical records in evidence which plainly show factual mistakes in Dr. Hadhoud's reporting or are otherwise susceptible to analysis by a layperson so as to support Applicant's position. Here, Applicant's medical records alone do not adequately establish that Dr. Hadhoud's standards of care were either incorrect, inapplicable, or had been sufficiently fulfilled in this case. Where Respondent's peer review report or report of an independent medical examination establishes prima facie that there was no medical necessity for the claimed for treatment, testing or durable medical equipment, and there is no rebuttal by the applicant, applicant's claim is properly denied. See, *A. Khodadadi Radiology, P.C. v. N. Y. Cent. Mut. Fire Ins. Co.*, 16 Misc. 3d 131 [A], 2007 NY Slip Op. 51341[U] [App Term, 2d & 11th Jud Dists 2007]. See also, *Yklik, Inc. v. GEICO Ins. Co.*, 2010 NY Slip Op. 51336(U) [28 Misc 3d 133(A)](decided July 22, 2010); *Bongiorno v. State Farm Ins. Co.*, 2009 NY Slip Op. 50860(U) [23 Misc 3d 137 (A)] [App Term 2d Dept.] (decided April 28, 2009); *Bronze Acupuncture, P.C. v. Mercury Ins. Co.*, 2009 NY Slip Op. 51219 [U] (decided June 12, 2009).

Accordingly, the claim is denied in its entirety.

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

02/12/2019
(Dated)

Charles Blattberg

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:
8dd440d17ec355cb317c40927cb73772

Electronically Signed

Your name: Charles Blattberg
Signed on: 02/12/2019