

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Total Anesthesia Provider, P.C. f/k/a
Advanced Anesthesiology of NY, PC
(Applicant)

- and -

Country-Wide Insurance Company
(Respondent)

AAA Case No.	17-18-1094-3368
Applicant's File No.	None
Insurer's Claim File No.	000325297 001
NAIC No.	10839

ARBITRATION AWARD

I, Kihyun Kim, 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 Assignor

1. Hearing(s) held on 04/11/2019, 05/08/2019
Declared closed by the arbitrator on 05/16/2019

David Jakubowitz, Esq. from Jakubowitz Law Firm PC participated by telephone for the Applicant

Jason Rubinfeld, Esq. from Jaffe & Velazquez, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,600.00**, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to Applicant's prima facie case and to Respondent's timely denial.

The parties also stipulated that Applicant's billing is consistent with fee schedule.

3. Summary of Issues in Dispute

The issue presented is whether the percutaneous lumbar discectomy was medically necessary.

The Assignor (KH) is a 44-year-old male who was the driver of an automobile that was involved in an accident on March 13, 2017. Applicant seeks reimbursement in the amount of \$2,600.00 for the percutaneous lumbar discectomy conducted on August 4, 2017. The discectomy was denied based on the peer review of Jason S. Lipetz, MD.

4. Findings, Conclusions, and Basis Therefor

This arbitration was conducted using the documentary submissions of the parties contained in the ADR Center, maintained by the American Arbitration Association. I have reviewed the documents contained therein as of the close of the hearing and such documents are hereby incorporated into the record of this hearing. Both parties appeared at the hearing by counsel, who presented oral argument and relied upon their documentary submissions. There were no witnesses.

At the hearing, Respondent acknowledged receipt of Applicant's bill in this matter and the parties stipulated to Applicant's prima facie case and to Respondent's timely denial. The parties also stipulated that Applicant's billing is consistent with fee schedule.

The Assignor is a 44-year-old male who was injured in an automobile accident on March 13, 2017. Following the accident, the Assignor sought treatment from various providers, who started him on a course of conservative treatment including physical therapy and chiropractic care.

On August 4, 2017, the Assignor underwent a percutaneous lumbar discectomy at the L4-L5 level performed by David Shabtian, D.O. Applicant billed Respondent for the procedure and Respondent timely denied Applicant's claim based on a peer review, dated August 31, 2017, by Jason S. Lipetz, M.D., who found the discectomy to be medically unnecessary.

Applicant now seeks reimbursement in the amount of \$2,600.00 for the percutaneous lumbar discectomy conducted on August 4, 2017.

Legal Framework - Medical Necessity

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment (*Kingsbrook Jewish Medical Center v. Allstate Ins. Co.*, 61 A.D.3d 13 [2d Dept. 2009]), such as by a qualified expert performing an independent medical examination or conducting a peer review of the injured person's treatment. *See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp.*, 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003).

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 W. Ins. Co.*, 42 Misc 3d 141(A), 2014 NY Slip Op 50219(U) (App. Term 2d, 11th and 13th Jud.

Dists. 2014). 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.*, 13 Misc 3d 136(A), 2006 NY Slip Op 52116 (App Term 1st Dept. 2006). The Appellate Courts have not clearly defined what satisfies this standard except to the extent that "bald assertions" are insufficient. *Amherst Med. Supply, LLC v. A. Cent. Ins. Co.*, 41 Misc 3d 133(A), 2013 NY Slip Op 51800(U) (App. Term 1st Dept. 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity.

The civil courts have held that a defendant's peer review or medical evidence must set forth more than just a basic recitation of the expert's opinion. The trial courts have held that a peer review report's medical rationale will be insufficient to meet Respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. *See generally Nir v. Allstate Ins. Co.*, 7 Misc.3d 544, 547 (Civ. Ct. Kings Co. 2005). "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Id.*, at 547 (*citing City Wide Social Work & Psychological Servs. v. Travelers Indem. Co.*, 3 Misc. 3d 608, 612 [Civ. Ct., Kings County 2004]).

To meet the burden of persuasion regarding medical necessity - in the absence of factually contradictory records - the applicant must submit a rebuttal which meaningfully refers to and rebuts the assertions set forth in the peer review report. *See generally, Pan Chiropractic, P.C. v Mercury Ins. Co.*, 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] (App Term, 2d, 11th & 13th Jud Dists 2009).

Peer Review - Jason S. Lipetz, M.D., dated August 31, 2017

Respondent relies upon the peer review report of Jason S. Lipetz, M.D., dated August 31, 2017, in asserting a lack of medical necessity for the percutaneous lumbar discectomy conducted on August 4, 2017. The peer review report lists the various medical records that Dr. Lipetz reviewed and provides a brief discussion of the accident and the Assignor's medical history. Based on a review of the available documentation and consideration the pertinent medical literature, Dr. Lipetz opined that the medical necessity was not established for the discectomy procedure provided on August 4, 2017 by Dr. David Shabtian.

Dr. Lipetz noted that, in this case, the discectomy procedure was performed at the level of a disc bulge. He indicated that disc bulges are considered to be benign and incidental finding. He explained:

On MRI examination of the lumbar spine, many people without back pain have disc bulges or protrusions but not extrusions. Given the high prevalence of these findings and of back pain, the discovery by MRI of bulges or protrusions in people with low back pain may frequently be coincidental.

He further noted that "[i]maging findings of spine degeneration are present in high proportions of asymptomatic individuals, increasing with age. Many imaging-based degenerative features are likely part of normal aging and unassociated with pain."

Dr. Lipetz found that there was no description of a lateralizing disc herniation with associated nerve root compression. He asserted that, without such findings, there would be no role for consideration of a decompressive procedural approach.

Dr. Lipetz indicated that, in this case, the Assignor was described as presenting in a neurologically intact fashion. He noted that there was no clinical history or findings to suggest an acute L4 or L5 radiculopathy through a dermatomal pain distribution, dermatomal sensory deficit, myotomal strength deficit, or reflex abnormality. He also noted that identical radiographic findings were described in the form of disc bulging extending from L3-L4 through L5-S1 in this case.

Dr. Lipetz also asserted that the literature is not supportive of percutaneous discectomy in terms of anticipated therapeutic outcome. Dr Lipetz cited to two articles to support his assertion.

I find that Dr. Lipetz's peer report has adequately demonstrated a medical rationale and factual basis to support its defense that the percutaneous lumbar discectomy conducted on August 4, 2017 was not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. *See, Bronx Expert, supra.*

Rebuttal - David Shabtian, D.O., dated February 22, 2018

To refute the peer review, Applicant relies principally upon a rebuttal letter from David Shabtian, D.O., dated February 22, 2018. The rebuttal initially reviews the Assignor's medical history and then concludes that, based on a complete and accurate synopsis of the condition as portrayed in the records, there was obvious medical necessity for the discectomy.

Dr. Shabtian noted that there were radicular symptoms, a clinical diagnosis of radiculopathy and response to epidural steroid injections that was recalcitrant to conservative measures of medication and therapy over 5 months. He asserted that the proper algorithmic approach was followed here for radicular pain with receipt of rest, medication, therapies and 3 steroid injections followed by percutaneous disc decompression. Dr. Shabtian further explained:

Disc herniation causing axial and/or radicular pain is a very common pathology with huge social and economic consequences. Initial conservative treatment relies on rest and oral medication with analgesics or NSAIDs. If

conservative treatment fails to control pain, selective periradicular steroid injection should be considered... If 6 weeks of conservative therapy including steroid infiltration has failed, the percutaneous disc decompression should be considered. Several techniques are available, all based on removing part of the nucleus pulposus to achieve decompression... induce modifications in the disc biochemistry and innervations. These decompression techniques are much less invasive than open surgery... Excellent pain relief is achieved in 75%-80% of patients with stable long term effects.

Dr. Shabtian asserted that the current movement of surgical treatments for the spine is this type of a minimally invasive percutaneous approach which boasts significant advantages. He noted that the advantages of minimally invasive procedures include less postoperative pain, faster recovery, and decreased surgical morbidity, mortality, and long-term sequelae. Dr. Shabtian asserted that minimally invasive treatments aimed at removing nuclear materials and lowering intradiscal pressure through devices inserted percutaneously into intervertebral disc space have been showed to be safe and effective.

Dr. Shabtian noted that the indications for percutaneous decompression are radicular pain from a disc deformity shown by diagnosis studies that continues despite conservative measures for 6-12 weeks. Dr Shabtian found that a percutaneous disc decompression provides effective pain relief for back and radicular pain for assessment periods ranging from 2 weeks to 12 months. He maintained that percutaneous decompression has been shown effective in relieving radicular pain and to a lesser extent axial pain from contained disc protrusion.

Dr. Shabtian asserted that the discectomy was medically necessary and conformed to various standards of care. He further asserted that Dr. Lipetz did not "debunk basic medical principles underlying performance of percutaneous discectomy in these official authorities. He merely referred to two speculative articles reporting on 4 studies."

Finally, Dr. Shabtian disagreed with the Dr. Lipetz arguments focusing on the disc bulge. He indicated that disc bulges are not automatically considered benign and incidental. He noted that they can put pressure on the nerves and surrounding structures, and this can be painful and debilitating. Dr. Shabtian asserted that the disc bulge was not benign and incidental in this case and was causing symptoms. He noted that the medical reports document the radicular pain pattern down the right lower extremity with the motor function deficits that correlated with acute radiculopathy from the disc abnormality at the level of the discectomy.

Dr. Shabtian also noted that, contrary to Dr. Lipetz's assertion, the MRI findings were not "identical for disc deformities from L3-L4 to L5-S1. He further indicated that the MRI report noted the disc deformity was indenting the thecal sac containment of the nerve roots with foraminal stenosis and "impinging the exiting nerves" at L4-L5. Dr. Shabtian asserted that Dr. Lipetz did not carefully review the records and offered a false synopsis leading to this defective peer review assessment.

Analysis - Medical Necessity - Lumbar Discectomy - DOS 8/4/17

After reviewing all of the submissions and taking into account the oral arguments of the parties, I find that Applicant established, by a preponderance of credible evidence, that the lumbar discectomy provided to Assignor on August 4, 2017 was medically necessary. I find that Dr. Shabtian adequately addressed the issues raised by the peer review and explained the necessity of the disputed procedure. Dr. Shabtian's rebuttal explained the progression in treating the Assignor's radicular lower back pain that was recalcitrant to months of conservative measures, including medication and therapy. Further, though there is an apparent typographical error in the MRI report, MRI does appear to reveal a "circumferential disc bulge indenting the ventral thecal sac" with "moderate to severe bilateral neural foramina stenosis impinging the exiting nerves" at the level treated. Giving some deference to the treating physician, who actually performed examinations, established treatment and diagnostic plans, made diagnoses and performed medical services for the Assignor, I find the rebuttal and Applicant's supporting medical records and arguments to be more credible and persuasive than the peer review. I find Applicant has sustained its burden of persuasion and demonstrated the medical necessity of the procedure. Applicant is entitled to reimbursement in the amount of \$2,600.00 for the percutaneous lumbar discectomy conducted on August 4, 2017.

Conclusion

For the reasons set forth herein, Applicant is awarded reimbursement in the total amount of \$2,600.00, with attorney's fees, interest and the arbitration filing fee as set forth below. This decision is in full disposition of all claims for no-fault benefits presently before this Arbitrator. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

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
	Total Anesthesia Provider, P.C. f/k/a Advanced Anesthesiologist of NY, PC	08/04/17 - 08/04/17	\$2,600.00	Awarded: \$2,600.00
Total			\$2,600.00	Awarded: \$2,600.00

B. The insurer shall also compute and pay the applicant interest set forth below. 05/07/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall be computed from May 7, 2018, the AR-1 filing date, at the rate of 2% per month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9 (c).

C. Attorney's Fees

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

Respondent shall pay the Applicant's attorney's fees, in accordance with 11 NYCRR 65-4.6(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 Nassau

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

06/17/2019
(Dated)

Kihyun Kim

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:
f31d8c6aa844207d0a2822b7a1ff9231

Electronically Signed

Your name: Kihyun Kim
Signed on: 06/17/2019