

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Pain Physicians NY PLLC
(Applicant)

- and -

American Transit Insurance Company
(Respondent)

AAA Case No. 17-18-1103-5652

Applicant's File No. 225377

Insurer's Claim File No. 1023143-02

NAIC No. 16616

ARBITRATION AWARD

I, Michael Resko, 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: Claimant

1. Hearing(s) held on 09/18/2019
Declared closed by the arbitrator on 09/18/2019

Kurt Lundgren, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated in person for the Applicant

Michael Fritz Esq. from American Transit Insurance Company participated in person for the Respondent

2. The amount claimed in the Arbitration Request, \$ 2,632.29, was NOT AMENDED at the oral hearing.
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its *prima facie* burden by submitting evidence that payment of no-fault benefits are overdue, and proof of its claim was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the amount claimed do not exceed the maximum permissible charges under the fee schedule applicable to the disputed services.

3. Summary of Issues in Dispute

This case is one (1) of three (3) "linked" cases heard together on 09/18/19. All 3 cases involve the same Applicant provider and the same EIP Claimant. The case numbers of the 3 cases are 17-18-1103-5652, 17-18-1109-2361, and 17-18-114-5787.

In this case Applicant seeks payment of a single claim for an office examination of the Claimant, left knee injection under echo guidance, and urine drug testing (UDT) on date of service 06/04/18.

Respondent denied this claim on the grounds that the services were not medically necessary. The denial is based on a peer review report by Peter Chiu, MD dated 06/29/18.

Applicant has submitted a rebuttal of the peer review report by Tamer Elbaz, MD (dated 12/17/18).

The following evidence was submitted, reviewed, and considered:

All documents contained in the ADR Center for all 3 cases as of the date the hearings were declared closed.

4. Findings, Conclusions, and Basis Therefor

Claimant is a 65-year old female passenger injured in a motor vehicle accident on 03/21/18. The claims and services at issue are set forth in section "3" above.

Applicant (Tamer Elbaz, MD) first examined Claimant on 06/04/18 for complaints including low back pain (rated 8/10) and Claimant "denie[d] any lower extremity radiculopathy, tingling or numbness"; and "sharp" left knee pain (rated 9/10). Examination of Claimant's lumbar spine revealed decreased ranges of motion (ROM) in all planes; "diffuse tenderness" and muscle spasms; positive Straight Leg Raising (SLR) on the right side at 30 degrees; and positive facet loading bilaterally. Left knee examination revealed decreased ROM in flexion, and positive Apley's Compression, Bounce Home, McMurray, and Patella Grindings tests. Neurological exam revealed normal sensory function and deep tendon reflexes (DTR), and 4/5 weakness in the biceps, triceps, wrist flexion, extension, hand grip, knee extensors, hip flexors, plantar and dorsiflexion bilaterally.

The diagnoses were "intervertebral disc disorders with radiculopathy" and "radiculopathy, lumbar region - notwithstanding that Claimant "denie[d] any lower extremity radiculopathy, tingling or numbness"; "other long term (current) drug therapy" - notwithstanding there was nothing in Claimant's history to support this diagnosis; and "unilateral post-traumatic osteoarthritis".

Dr. Elbaz ordered and performed a UDT and administered an injection to Claimant's left knee under echo guidance following the clinical examination on 06/04/18. The issues to be decided are whether those services - or any part(s) of them - were medically necessary.

Submission of a properly completed claim form is all that is required to establish, *prima facie*, that the services at issue were medically necessary. *Park Slope Medical and Surgical Supply, Inc. v. Travelers Ins. Co.*, 37 Misc.3d 19, 952 N.Y.S.2d 372 (App. Term 2d, 11th & 13th Dists. 2012).

Respondent must overcome the presumption of medical necessity by submitting competent evidence sufficient to "establish a factual basis and medical rationale for the lack of medical necessity of [Applicant's] services. *Nir v. Allstate*, 7 Misc.3d 544, 546-47, 796 N.Y.S.2d 857, 860 (Civil Court, Kings Cty. 2005).

If Respondent's denial is based on a peer review, the peer review will be found "insufficient if it is unsupported by or controverted by evidence of medical standards" or "if it fails to provide specifics of the claim, is conclusory, or otherwise lacks a basis in the facts of the claim." *Nir*, supra, citing, *Amaze Medical Supply v. Allstate*, 3 Misc.3d 43, 779 N.Y.S.2d 715 (App Term 2d and 11th Jud Dists 2004).

Only if Respondent can establish a *prima facie* defense does the burden of proof shift to Applicant to rebut the defense. See, *A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co.*, 16 Misc.3d 131(A), 841 N.Y.S.2d 824 (Table), 2007 N.Y. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007). "A claimant, aided by the presumption of medical necessity, need not produce a single bit of evidence until the insurer meets its considerable burden under *Nir v. Allstate Ins. Co.*" *Elmont Open MRI & Diagnostic Radiology, P.C. v. State Farm Mutual Automobile Ins. Co.*, 26 Misc.3d 1221(A), 907 N.Y.S.2d 99 (Table), 2010 N.Y. Slip Op. 50202(U) at 1, 2010 WL 457304 (Dist. Ct. Nassau Co., Michael A. Ciaffa, J., Jan. 27, 2010). However, once and if the Respondent meets its initial burden, "it is ultimately plaintiff who must prove, by a preponderance of the evidence, that the services or supplies were medically necessary." *Park Slope Medical*, supra.

Applicant does not need a formal "rebuttal" in the form of an affidavit or other statement specifically created in response to the peer review report; Applicant may rely on the existing medical records and reports already in evidence to counter Respondent's defense and demonstrate medical necessity for the disputed services.

In his peer review, Dr. Chiu states regarding the UDT "[t]here was no history of illegal drug abuse, no history or narcotic use at the time the toxicology screen was performed and she was not being prescribed narcotic medication; hence, it would not be medically

necessary or causally related to the accident to perform a toxicology screen". Given the contents of Applicant's own examination report there was no basis and no medical necessity for the UDT. I have reviewed and considered Applicant's rebuttal arguments and find them unpersuasive. This part of the subject claim is denied.

Regarding the knee injection, Dr. Chiu argues:

There was no medical necessity for the left knee injection performed on 06/04/18. "The use of peripheral joint, soft tissue and spinal injections must always be a part of a comprehensive treatment program. The decision to perform an injection is determined only after assessing the results of a thorough history and physical examination, laboratory data, electrodiagnostic studies, and imaging studies, as well as the goals of the physician and patient. Therapeutic joint injection provides pain relief and functional improvement in symptomatic pathologic condition. There are limited data regarding intraarticular injections of joints other than the knee." Physical Medicine and Rehabilitation, Braddom, R., et al. Saunders Elsevier 2007, Third Edition, p. 541-546. There was no indication this person required this type of injection based on the available medical notes for review.

The authority quoted by Dr. Chiu identifies the categories or types of clinical and diagnostic information that is relevant to a decision to administer a knee injection, but it does not specify what symptoms or injuries identified clinically or through diagnostic testing would warrant an injection. Further, Dr. Chiu's ultimate statement that the injection was not medically necessary for this Claimant contains no meaningful consideration or discussion of any clinical or diagnostic evidence in the record. Therefore, I find the peer review report factually and legally *insufficient* to establish a *prima facie* medical necessity defense as to the injection, echo guidance, and the injected medication.

Similarly, Dr. Chiu simply states that the office examination was not medically necessary because the UDT and injection services were not medically necessary. This argument does not carry the day because Claimant was symptomatic and there were other parts of Claimant's body affected as well.

Based on the totality of the evidence before me I find the office examination, left knee injection and related services were medically necessary.

Applicant is awarded **\$454.24**. The balance of the claim is denied. This Award is in full disposition of all claims and issues before me in this proceeding.

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	Total	Status
	Pain Physicians NY PLLC	06/04/18 - 06/04/18	\$2,632.29	\$ 454.24	Awarded: \$454.24
Total			\$2,632.29	Awarded: \$454.24	

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/13/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Pursuant to the Court of Appeals decision in LMK Psychological Services P.C. v. State Farm, 12 N.Y.3d 217, 879 N.Y.S.2d 14 (2009), interest is tolled until the filing date where the Applicant "does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Insurance Department regulations" (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

The insurer shall pay the applicant an attorney's fee in accordance with 11 NYCRR 65-4.6(e). However, if the benefits and interest awarded thereon is equal to or less than the respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

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

10/14/2019

(Dated)

Michael Resko

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:

4e26831be535d6e64e34e556e1a6c772

Electronically Signed

Your name: Michael Resko
Signed on: 10/14/2019