

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Northeastern Pain Management Of NJ
(Applicant)

- and -

Geico Insurance Company
(Respondent)

AAA Case No.	17-18-1103-5293
Applicant's File No.	N/A
Insurer's Claim File No.	0561434040101018
NAIC No.	22055

ARBITRATION AWARD

I, Neal S. Dobshinsky, 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: J Doe

1. Hearing(s) held on 05/07/2020
Declared closed by the arbitrator on 05/07/2020

Dino R. DiRienzo from Dino R. DiRienzo Esq. participated by telephone for the Applicant

Robert Barnes from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 4,125.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

The amount claimed was amended to \$2,162.29 to conform to the fee schedule.

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

3. Summary of Issues in Dispute

On two dates, Applicant administered lumbar epidural steroid injections to Doe at a facility in northern New Jersey. Applicant seeks payment for the physician's services. Insurer denied payment for lack of medical necessity based on the reports of its peer reviewer.

Were the injections medically necessary?

4. Findings, Conclusions, and Basis Therefor

I have read and considered the materials in the American Arbitration Association's ADR Center case file and heard and considered the parties' oral arguments. I find as follows:

Background

On 2/10/17, J Doe, a female, then 45 years old, was a passenger in a motor vehicle that was in an accident. Doe claims to have been injured. She then sought medical care and treatment from a number of providers.

Doe came under the care of a chiropractor, physical therapist, acupuncturist, and other providers.

On 3/30/17, MRIs of Doe's cervical and lumbosacral spines were performed at All County radiology on referral from Bilal Shah, DC. The lumbosacral MRI showed bulging disc at L3-4 without stenosis; right foraminal herniation at L4-5 with impingement upon the exiting L4 root; and right paramedian herniation at L5-S1 with epidural fat indentation.

On 4/17/17, Doe saw Neil Patel, MD, on referral from Dr. Shah. Doe complained that her neck and back hurt. The pain was constant, sharp, aggravated by movement, alleviated with physical therapy and NSAIDs, and radiating to both legs. The record notes the MRI findings of disc herniations. Dr. Patel examined Doe. Her cervical spine was painful; there was a positive Spurling Sign. He examined Doe's lumbar spine. The spine was painful; there were paraspinal spasms on the left; axial loading of the back, left, was painful; Doe had iliotibial band tenderness; straight leg raise was positive on the left; heel and toe walking were unsteady.

Dr. Patel diagnosed Doe with cervical disc displacement at C4-C5 and C5-C6 levels; and intervertebral disc displacements in the lumbar and lumbosacral regions. The treatment plan was for Doe to have left L4-L5 and L5-S1 TESI under fluoroscopy.

On 4/24/17, Dr. Patel administered left L4-L5 and left L5-S1 transforaminal epidural steroid injections to Doe under fluoroscopic guidance at a facility in Montvale, New Jersey. The pre and postoperative diagnoses were left L4-L5 and left L5-S1 disc herniation. The operative note states, as an indication for the procedure, that Doe had back pain with left lower extremity radicular features secondary to left L4-L5 and L5-S1 disc herniation.

On 6/5/17, Dr. Patel administered bilateral L4-L5 transforaminal epidural steroid injections to Doe under fluoroscopic guidance at the same facility. The pre and postoperative diagnoses were both left L4-L5 disc herniation. The operative note states that Doe had back pain with lumbar radiculopathy secondary to L4-L5 disc herniation.

Applicant's Claims and Insurer's Denials

Applicant, as Doe's assignee, timely submitted its claims to Insurer for no-fault benefits for payment for injection procedures on the two dates.

Insurer timely denied the claims as not medically necessary based on its peer reviewer's reports.

The only issue argued and submitted for decision at the oral hearing was the medical necessity for the injection procedures performed by Dr. Patel. All other issues were waived.

Medical Necessity and the Burden of Proof Under No-Fault

Medical necessity for services or supplies is established by proof of an applicant's properly submitted claim form. *All County Open MRI & Diagn. Radiology P.C. v Travelers Ins. Co.*, 11 Misc3d 131(A), 2006 N.Y. Slip Op. 50318[U] [App Term, 2d Dept 9th & 10th Jud Dists 2006]. Here, Applicant's submission of its claims establishes the medical necessity for the injection procedures.

The insurer "bears both the burden of production and persuasion" as to its defense of lack of medical necessity. *Nir v Allstate Ins. Co.*, 7 Misc3d 544, 546 [Civ Ct, Kings County 2005]. The defense must be supported by a peer review report or other evidence, such as an independent medical examination report. The report must set forth a sufficiently detailed factual basis and medical rationale for the denial. *Amaze Med. Supply v Eagle Ins. Co.*, 2 Misc3d 128(A), 2003 NY Slip Op 51701[U] [App Term, 2d Dept, 2d & 11th Jud Dists 2003].

"[H]owever, it is the [applicant] who has the ultimate burden of proving, by a preponderance of the evidence, that the services at issue were medically necessary" (citations omitted). *Radiology Today, P.C. v Geico Ins. Co.*, 58 Misc3d 132(A) n1, 2017 NY Slip Op 51768[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017].

The Peer Reviews and Insurer's Lack of Medical Necessity Defense

Insurer based its denials of Applicant's claims on the affirmed peer reviews of Jason R. Cohen, MD, a physician board certified in anesthesiology and in pain management. In the two similar, but not identical reports, one dated 5/19/17 and the other dated 6/29/17, the doctor states his reasons and opinions why the injections were not medically necessary.

In each report, Dr. Cohen lists the records and reports he reviewed. The lists are not identical. In the 5/19 report he lists more than 40 items. In the 6/29 report he lists 60 items.

In the 5/19 peer review regarding the 4/24/17 injections, Dr. Cohen points out that "there is identification of a right foraminal herniation at L4-5 and L5-S1 with

impingement of the right L4 exiting root. However, Dr. Patel documents a left-sided lumbar transforaminal epidural steroid injection at L4-5 and L5-S1." But, Dr. Cohen does not explain why that is medically significant or why that might mean that the injections were not medically necessary.

Dr. Cohen states that "[t]here is no documentation by Dr. Patel of a failed course of conservative treatment prior to lumbar transforaminal epidural steroid injection" but the records Dr. Cohen reviewed included acupuncture examination and progress notes (2/13-4/7/17 and 4/11-4/28/17); chiropractic examination and SOAP notes (2/13-5/2/17); and physical therapy evaluation and SOAP notes 2/6-3/29/17. He does not discuss those.

In the 6/29/17 peer review, Dr. Cohen lists even more records that document Doe's ongoing physical therapy. He misstates the date of the initial injection procedure. He states that "the medical records presented for review documents incomplete and insufficient information to support the medical necessity" Dr. Cohn does not state what should be in the records, but is not. Of course, it appears that he failed to consider the records of conservative treatment (acupuncture, chiropractic, physical therapy) he states he reviewed.

Dr. Cohen contends that "[t]here is no proven efficacy to epidural steroid injection." Dr. Cohen quotes from authorities to support his opinion. But, the authorities appear to support his opinion only because of the way the quotations have been edited and taken out of context to distort their meaning. For example, he quotes from an article in the *New England Journal of Medicine*, Friedly, Janna L., et al. "A randomized trial of epidural glucocorticoid injections for spinal stenosis." *New England Journal of Medicine* 371.1 (2014): 11-21. But, that article merely concluded that "in the treatment of symptoms of lumbar spinal stenosis, epidural injections of glucocorticoids plus lidocaine offered minimal or no benefit over epidural injections of lidocaine alone at 6 weeks." It is not that all epidural injections are not effective, it is just that those that include glucocorticoids are not more effective than injections of lidocaine alone.

Similarly, he points to an article in the *International Journal of Technology Assessment in Health Care*, Choi, Hyun Jin, et al. "Epidural steroid injection therapy for low back pain: a meta-analysis." *International journal of technology assessment in health care* 29.3 (2013): 244-253. Again, the article did not state that there is no benefit to epidural steroid injections, but merely that there was no "long term benefit . . . for low back pain . . ." at 6 months or longer."

Dr. Cohen quotes at length from the ODG Integrated Treatment/Disability Duration Guidelines; Low Back-lumbar & Thoracic (Acute & Chronic) (updated 4/15/13). <https://www.nhp.org/provider/Documents/OPP/ODG-low-back-careand-procedures-April-25-2013.pdf>. He omits the beginning material which states that epidural steroid injections are "[r]ecommended as a possible option for short-term treatment of radicular pain (defined as pain in dermatomal distribution with corroborative findings of radiculopathy) with use in conjunction with active rehab efforts." And that "the American Academy of Neurology recently concluded that epidural steroid injections may lead to an improvement in radicular pain between 2 and

6 weeks following the injection, but they do not affect impairment of function or the need for surgery and do not provide long-term pain relief beyond 3 months. " And, "[e]pidural steroid injection can offer short-term pain relief and use should be in conjunction with other rehab efforts, including continuing a home exercise program."

These two peer review reports lack adequate factual bases or medical rationales why the injection procedures were not medically necessary. They are not credible or persuasive.

The peer reviews fail to provide sufficient bases to support Insurer's denials of Applicant's claims. Insurer has not met its initial burden of production and persuasion as to its lack of medical necessity defense.

Conclusion

Based on the submissions of the parties, their arguments, the relevant law, the regulations, and the weight of the credible evidence, I conclude that Insurer did not establish its lack of medical necessity defense. Applicant is entitled to payment on its claims.

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	Amount Amended	Status
	Northeastern Pain Management Of NJ	04/24/17 - 06/05/17	\$4,125.00	\$2,162.29	Awarded: \$2,162.29
Total			\$4,125.00		Awarded: \$2,162.29

- B. The insurer shall also compute and pay the applicant interest set forth below. 08/22/2018 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Insurer shall compute and pay interest from the accrual date noted above-the date Applicant requested arbitration by filing with the AAA-at a rate of 2% per month, simple interest, calculated on a pro-rata basis using a 30-day month and ending with the date of payment subject to the provisions of 11 NYCRR 65-3.9.

C. Attorney's Fees

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

Insurer shall pay Applicant's attorney a fee in an amount equal to 20% of the total amount of the benefits plus interest awarded in this arbitration, subject to the provisions of 11 NYCRR §65-4.6.

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

06/08/2020

(Dated)

Neal S. Dobshinsky

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:
efa4b8c3f11023700f3b689ee5272ad6

Electronically Signed

Your name: Neal S. Dobshinsky
Signed on: 06/08/2020