

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Accelerated Surgical Center of North Jersey (Applicant)	AAA Case No.	17-19-1123-3991
	Applicant's File No.	227984
- and -	Insurer's Claim File No.	0255187390101043
Geico Insurance Company (Respondent)	NAIC No.	22063

ARBITRATION AWARD

I, Kent Benziger, 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: G.H.

1. Hearing(s) held on 05/29/2020
Declared closed by the arbitrator on 05/29/2020

Kevin D'Arcy, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated by telephone for the Applicant

Marco Carvajal, Esq. from Geico Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,518.48**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has stipulated to amend the amount in dispute to \$976.38 pursuant to fee schedule.

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

3. Summary of Issues in Dispute

On March 24, 2018, the Assignor/Eligible Injured Party, a 59-year-old male, was, by history, involved in a motor vehicle accident. At issue is the facility fee for the Applicant, a New Jersey ambulatory surgical center, for a third follow-up lumbar

epidural steroid injection performed on January 2, 2019 and billed pursuant to CPT 62323. The Respondent denied reimbursement based on the peer review of Dr. Jason Cohen.

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 records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

4. Findings, Conclusions, and Basis Therefor

On March 24, 2018, the Assignor/Eligible Injured Party, a 59-year-old male, was, by history, involved in a motor vehicle accident. On March 26, 2018, the Assignor was evaluated by Dr. Alexander Zaitsev for complaints including lower back pain. The Assignor had marked tenderness, decreased patellar reflex, restricted ranges of motion and positive orthopedic tests. Physical therapy and chiropractic was commenced.

On April 2, 2018, a right shoulder MRI revealed a 4 x 2 mm focus of fluid signal on the undersurface of the distal anterior supraspinatus tendon with diffuse intrasubstance tears of the supraspinatus and infraspinatus tendon with anterior and superior labral SLAP tear with bicep tendon sheath tenosynovitis. On April 20, 2018, an MRI of the cervical spine was performed with an impression of C2-3 and C3-4 posterior central disc herniations and bilateral foraminal narrowing, C4-5 posterior right paracentral disc herniation with cord impingement and stenosis, C5-6 posterior central disc herniation and bilateral foraminal stenosis and C6-7 and C7-T posterior central disc herniation.

On April 19, 2018, an upper extremity EMG/NCV revealed evidence of left C7-C8 radiculopathy.

On April 21, 2018, a lumbar MRI was performed with an impression of levoscoliosis, multi-level broad-based posterior disc bulging and bilateral foraminal extension stenosis with abutment of the exiting nerve roots at L1-2 and L5-S1, superimposed posterior central disc herniations at L2-3, facet hypertrophy at L4-5 and L5-S1. On October 18, 2018, the Assignor was evaluated by Dr. Eugene Gorman for pain in the neck and low back radiating to the buttocks. On examination, the Assignor had tenderness and muscle spasm and decreased range of motion. The assessment included cervicgia, low back pain, muscle spasm, left shoulder pain and intervertebral disc disorder with

radiculopathy in the lumbar region. The treatment plan included outcome assessment testing and a lumbar epidural steroid injection.

On November 14, 2018, Dr. Weissman performed a lumbar epidural steroid injection L4-5 under fluoroscopy for a pre and post-operative diagnosis of lumbar disc displacement, lumbar radiculopathy myalgia. Prior to the procedure, the nursing assessment reported pain of 7 out of 10. The post-operative records does not have any specific VAS rating as to pain. The next instruction is for further epidural steroid injections in two weeks. The record contains a blank entry for a post-operative discharge call. Again, this is blank except for a notation of "Physician's Office to Call".

The second follow-up epidural steroid injections were administered on on November 28, 2018. On that date, Dr. Gorman performed a lumbar epidural steroid injection L4-5 under fluoroscopy for a pre and post-operative diagnosis of lumbar disc displacement, lumbar radiculopathy myalgia. Prior to the procedure, the Assignor's pain is listed at 7/10 although the circled notation is between 7-8/10. The re-evaluation record notes current pain 7/10 with a notation of improvement response to last visit was moderate and temporary. The printed checklist form has a pre-printed listing of "significant" which is not checked. There is a record for a post-operative discharge call which is blank except for stamp of "Physician's Office to Call", , and a special instruction of lumbar epidural steroid injection # 3 in two weeks.

The third set of lumbar epidural steroid injections were administered on January 2, 2019. The nursing assessment lists the Assignor's pain as 7/10. The box noting improvement since last visit is listed as moderate. The box noting significant improvement is not checked. There is a record for a post-operative discharge call which is blank except for stamp of "Physician's Office to Call"

Denial/Peer Review. The Respondent issued a denial for the November 28, 2018 epidural steroid injections based on the accompanying peer review of Dr. Jason Cohen. The peer review found no indication for the ambulator surgical center fees related to the repeat lumbar epidural steroid injection in that there was a no interval office follow-up re-evaluation following the prior tests or radiological studies. He cited the following:

"Epidural injections may be repeated only as medically necessary and with proof that: prior injection had a positive response by significantly decreasing pain; the patient continues to have ongoing pain or documented functional disability (6 on a scale of 0 to 10); AND The patient is actively engaged in other forms of conservative non-operative treatment (unless pain prevents the patient from participating in conservative therapy); AND Injections meet the following criteria: There must be at

least 14 days between injections; No more than 3 procedures in a 12- week period of time per region ;Limited to a maximum total of 6 procedures per region per 12 months. Course of treatment, three epidural injections, regardless of approach must provide at least 0 > 50% pain relief obtained for a minimum of 6 weeks to be considered a positive and effective response." (2014 NIA Standard Clinical Guidelines)

Dr. Cohen found no interval office follow-up re-evaluation by Dr. Weissman or Dr. Gorman documenting any positive response by significantly decreasing pain status post prior lumbar epidural injections on November 14, 2018 and November 28, 2018 He then cited numerous sources that questioned the effectiveness of the treatment.

"Despite a rapid increase in the use of epidural glucocorticoid injections for lumbar spinal stenosis, there is little evidence of effectiveness from clinical trials. There is no evidence of a treatment effect at 6 weeks with fluoroscopically guided epidural injections of glucocorticoids." (N Engl J Med 2014; 371:11-21)

This review investigated the long-term benefits of epidural steroid injections for patients with low back pain. A long-term benefit of epidural steroid injection for low back pain was not suggested at six months or longer."

(Int J Technol Assess Health Care. 2013 Jul;29(3):244-53.)

There is insufficient evidence to support the use of injection therapy in subacute and chronic low back pain.

(Spine (Phila Pa 1976). 2009 Jan 1;34(1):49-59)

Dr. Cohen recommended against reimbursement based on incomplete and insufficient information to support the medical necessity for the treatment.

Rebuttal. Dr. Weissman has issued a rebuttal to the peer review. Dr. Weissman reviewed the positive clinical findings prior to the treatment which included radiating pain to the buttocks, diminished patellar reflex, and positive straight leg raising. He cited the New York Workers' Compensation Board Mid and Low Back Injury Treatment Guidelines (Third Edition) that ESI is recommended for patients with symptoms of lumbar radicular syndrome. Contrary to the peer review, Dr. Weissman noted that the Assignor had radiating pain, associated weakness and positive straight leg raising indicative of nerve root compression. These findings were further supported by the MRI study which showed disc bulging with abutment of the exiting nerve roots.

Further, Dr. Weissman stated that the medical records established a significant and sustained improvement, as well as decrease in the patient's pain following the lumbar epidural steroid injection to necessitate the subsequent ESIs.

Dr. Weissman found that the articles cited by the peer review were not quoted in their full context. Dr. Weissman noted the following:

On the contrary, in a review of literature by Manchikanti, L., et al., the analysis of epidural injections showed the potential superiority of steroids compared with local anesthetic alone a 2-year follow-up, based on the average relief per procedure.¹ A study entitled, Efficacy of Epidural Steroid Injection in Management of Lumbar Prolapsed intervertebral Disc: A Comparison of Caudal, Transforaminal and interlaminar Routes ² , 2016 also indicated, "At one year after injecting the steroid, all three routes were found to be effective in improving the JOA Score." Therefore, contrary to Dr. Cohen's belief, there is long-term benefit of epidural steroid injections for low back pain.

....

Epidural steroid injections (ESIs) have been endorsed by the North American Spine Society and the Agency for Healthcare Research and Quality (formerly, the Agency for Health Care Policy and Research) of the Department of Health and Human Services as an integral part of nonsurgical management of radicular pain from lumbar spine disorders.

Dr. Weissman then discussed along with the citation of authoritative sources, the importance of fluoroscopy and epidurograms with the epidural steroid injections.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. The Respondent then bears the burden to prove that the treatment was not medically necessary *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." *Williamsbridge Radiology v. Travelers*, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. *Acupuncture Prima Care v. State Farm*

Mut. Auto Ins. Co. 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was not medically necessary. See: CityWide Social Work & Psychological Services v. Travelers Idem. Co., 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, the peer review is persuasive. The peer review has cited an authoritative source that a patient must have a positive response to the injection with a significant decrease in pain with a further notation of a 0 to 50 percent relief of pain for a six week period. Through his rebuttal, the treating provider has not disputed these standards. The Assignor was scheduled for three injections on the date of the first procedure. The Assignor had a pain level of 7/10 at the date of the first injection. There was no interval examination between the first and second procedure or third procedure to determine the effectiveness of the injections. Further, the Physician's follow-up call sheet is blank indicating there was no follow-up phone call after the first procedure and prior to the second procedure to determine the effectiveness of the treatment. At the second procedure, the Assignor had the same pain level of 7/10. The pain relief was noted as "temporary" and the box noting significant pain relief was not checked. Through the rebuttal, Dr Weissman stated the pain relief was significant with sustained improvement. He does note one listing of a 6-7/10 pain scale on the third date of injection, but a look at the records from the three dates of treatment all show nursing notations of 7/10 pain rating.. Clearly, a view of the entire records shows no significant decrease in the level of pain and certainly there were no interval examinations between the three treatment sessions. The follow-up sessions were scheduled without consideration of an evaluation of the effectiveness of the treatment. Dr. Weissman did note a pain level of 8/10 in October 2018, but that was prior to the first epidural session when the pain level was down to 7/10. The peer review is more credible.

In sum, the Respondent has cited a standard for the follow-up epidural steroid injections including a significant and sustained decrease in pain as well as an intervening examination to make that determination. The operative records document that this standard was not met, and this second session was scheduled on the date of the first session. The Applicant has failed to rebut the peer review with specific findings of fact or the authoritative sources. Khodadadi Radiology v. Gomez, 16 Misc.3d 131 (2007). The ultimate burden of proof on issues of medical necessity lies with the plaintiff. Dayan v. Allstate Ins. Co., 2015 N.Y. Slip Op. 51751(U), 2015 WL 7900115 (App. Term 2d, 11th & 13th Dists. Nov. 30, 2015). Once Respondent satisfied its burden of proof establishing a lack of medical necessity, "plaintiff must rebut it or succumb." Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 N.Y. Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). Applicant's claim is denied in its entirety.

APPLICANT'S 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 Orange

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

06/14/2020
(Dated)

Kent Benziger

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:
30da4f570f4d894388ce570f57c66116

Electronically Signed

Your name: Kent Benziger
Signed on: 06/14/2020