

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

NYEEQASC, LLC d/b/a North Queens  
Surgical Center  
(Applicant)

- and -

Country-Wide Insurance Company  
(Respondent)

AAA Case No.	17-19-1147-5039
Applicant's File No.	GTLXQN012219.094
Insurer's Claim File No.	307467-001
NAIC No.	10839

**ARBITRATION AWARD**

I, Ioannis Gloumis, 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: EIP.

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

George T. Lewis, Jr., Esq. from Law Offices of George T. Lewis, Jr., PC participated by telephone for the Applicant

Cody Robar, Esq. from Jaffe & Velazquez, LLP participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 17,437.58**, was AMENDED and permitted by the arbitrator at the oral hearing.

The Applicant amended the amount in dispute to \$4,827.26 to reflect the proper reimbursable amount in accordance with the applicable fee schedule.

Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated to the amended amount in dispute; to the timeliness of the Respondent's denial of the claim in dispute; and, that the issue to be determined is whether the Respondent's defense of lack of medical necessity should be upheld.

3. Summary of Issues in Dispute

According to the evidence submitted and contained in the electronic case folder for this matter, the subject of this dispute arises from the underlying automobile accident of July 22, 2015 in which the EIP, then a 58-year-old female, was reportedly injured.

The Applicant seeks No-Fault reimbursement in the amount of \$4,827.26 for the Surgicenter's facility fees in connection with spine surgery performed by upon the EIP on December 8, 2015. The Respondent received the billing for the claim and timely denied the claim based upon the peer review report of Dr. Mitchell Ehrlich dated February 4, 2016. Therefore, the issue to be determined is whether the Respondent's defense of lack of medical necessity should be upheld.

#### 4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions documents contained in the American Arbitration Association's Electronic Case Folder, said submissions constituting the record in this case. This award is rendered upon the oral arguments of the parties at the arbitration hearing date and the documentary evidence submitted by the parties. There were no witnesses that testified during the arbitration hearing for this matter.

A prima facie case of entitlement to No-Fault compensation is made out by submitting evidence that the prescribed statutory billing form has been mailed and received, and that the defendant failed to either pay or deny the claim within the requisite 30-day period. *Westchester Medical Center v. Lincoln General Ins. Co.*, 60 A.D.3d 1045, 877 N.Y.S.2d 340 (2d Dept. 2009); *Westchester Medical Center v. Clarendon National Ins. Co.*, 57 A.D.3d 659, 868 N.Y.S.2d 759 (2d Dept. 2008); *New York and Presbyterian Hosp. v. Allstate Ins. Co.*, 31 A.D.3d 512, 818 N.Y.S.2d 583 (2d Dept. 2006).

An insurer's denial of claim form indicating the date on which it was received adequately establishes that the claimant sent, and that the defendant received the claim. *Ultra Diagnostics Imaging v. Liberty Mutual Ins. Co.*, 9 Misc.3d 97, 804 N.Y.S.2d 532 (App. Term 9th & 10th Dists. 2005).

After reviewing the evidence presented, I find that Applicant has submitted sufficient credible evidence to establish its prima facie case. Additionally, I find that the Respondent timely denied the claim in dispute based upon the defense of lack of medical necessity.

The insurer bears the burden of proof of proving lack of medical necessity as a defense; the claimant does not have to prove the existence of medical necessity. *Fifth Avenue Pain Control Center v. Allstate Ins. Co.*, 196 Misc.2d 801, 803, 766 N.Y.S.2d 748, 751 (Civ Ct. Queens Co. 2003). However, the insurer may rebut the inference of medical

necessity through a peer review and, if the peer review is not rebutted, the insurer is entitled to denial of the claim. 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. Slip Op. 51342(U), 2007 WL 1989432 (App. Term 2d & 11th Dists. July 3, 2007).

In linked and related AAA Case Number 17-16-1032-4741, Arbitrator Gerry Wendrovsky, Esq. issued an arbitration award in an arbitration involving a no-fault claim for the spine surgeon's professional service fees for the spine surgery of December 8, 2015, which was also denied by the Respondent based upon the very same peer review performed by Dr. Ehrlich. In AAA Case Number 17-16-1032-4741, Arbitrator Wendrovsky held the following, in relevant part:

*"... Contending the surgery, a percutaneous lumbar discectomy with thermal ablation discography, was not medically necessary, respondent relied upon the peer review of Dr. Ehrlich, a physiatrist, who reported reviewing the EIP's medical records, and stated, in pertinent part:*

*".... the (EIP) came under the treatment of Dr. Jones on 12/08/2015. She was complaining of pain in the neck and back radiating to the left upper and lower extremities...MRI of the lumbar spine reported disc bulging L3-4 and L5-S1 with disc herniation L4-5. She had undergone a lumbar epidural steroid injection with Dr. Jones on 09/29/2015. Symptoms had returned after four weeks. Examination reported tenderness and decreased range of motion in the neck and back. There was a complaint of weakness of the left EHL and ankle. Sensation and reflex were normal...."*

*Dr. Ehrlich then opined the surgery was not medically unnecessary:*

*".... the standard of care for (the surgery) has not been met...This procedure is not efficacious in terms of low success rate and high rate of complications. [WCB Guidelines] are not recommended as treatment for any back or radicular pain syndrome..."*

#### **Rebuttal**

*Applicant submitted the rebuttal of Dr. William Jones, dated 10/15/17, which in pertinent part, stated:*

*"... (The EIP) was an appropriate candidate for this procedure based on the lumbar spine MRI showing disc pathology at L4-L5 and L5-S1, and her radicular symptoms - including radiating lower back pain, numbness, tingling, muscle weakness, and positive Straight Leg Raising - which were refractory to conservative treatment including physical therapy, chiropractic manipulation,*

acupuncture, and lumbar epidural steroid injection. I made the decision to proceed with this procedure more than four months after the motor vehicle accident... (WCB) Guidelines were taken from the American College of Occupational and Environmental Medicine (ACOEM) which is not a medical society ..."

***Percutaneous discectomy for lumbar disc herniation is a well-established, low-risk procedure effective in 70% to 80% of appropriately selected patients. Advantages include the use of local anesthesia, minimal tissue disruption, no epidural fibrosis or scarring, and negligible biomechanical effect." [Cite] "A decrease of the pain of more than 70% was observed in 72% of cases." [Cites]-***  
***"Observational studies suggest that nucleoplasty is a potentially effective minimally invasive treatment for patients with symptomatic disc herniations who are refractory to conservative therapy.... strongly supporting the therapeutic efficacy of this procedure." [Cite] "Automated percutaneous discectomy may be considered for the treatment of lumbar disc herniation with radiculopathy."***  
***Criteria are radiculopathy from disc abnormalities supported by the diagnostic studies and 6-12 weeks of nonoperative care. [Cites] - recommend percutaneous disc decompression as well. The Guidelines state, "percutaneous disc decompression provides effective pain relief for back and radicular pain for assessment periods ranging from 2 weeks to 12 months.... Minimally invasive spinal procedures should be performed." [Cite].... These procedures are faster, safer, require less recovery time, and reduce the trauma to the muscles and soft tissues as compared against open surgery.... [Cites]...."***

At the hearing, respondent argued the MRI does not lead to this type of surgery; applicant argued the consent to this surgery was specifically discussed with the EIP, the peer review did not satisfy the standard articulated in Nir, supra, the treatment with Dr. Jones included other DOS (9/21/15, 10/26/15, 11/23/15), and the WCB Guidelines are not dispositive.

### *Findings*

At the outset, I observe the medical treatment guidelines implemented by the WCB have not been adopted by NYS DFS for usage herein. Pursuant to DFS opinion issued 3/7/3 [Ops. Ins. Dept. 03-03-26], a deviation from the WCB treatment guidelines does not establish a deviation from generally accepted medical practice. I observe the uploaded records of the DOS prior to the surgery (9/21/15, 10/26/15, 11/23/15), which were plainly not reviewed by Dr. Ehrlich.

For this reason, I find respondent has not presented a sufficient defense of lack of medical necessity to shift the burden back to applicant; the peer review, upon which respondent issued its denial, failed to review the pre-surgical DOS records [See, All Boro Psychological Servs., supra; Nir, supra], and did not comply with the requirement

*that as a medical opinion, it address the specifics, correlating the EIP's condition to a determination whether the surgery was medically necessary, setting forth a factual basis for its expert opinion. Provvedere, supra. A peer review's medical rationale is plainly insufficient if not in accordance with generally accepted practice (which includes reviewing the relevant records). Forest Rehabilitation Medicine PC v. Allstate Ins. Co., 44 Misc. 3d 476, 481 (Civ. Ct. 2014).*

*Additionally, I find the rebuttal to be persuasive, as it provided a sufficient medical rationale; demonstrated the surgery was within generally accepted medical standards, and detailed the EIP's need for the surgery.*

*Applicant is awarded the amended sum of \$7,745.91... "*

I agree with the detailed and well-reasoned award of Arbitrator Wendrovsky. I too agree that the peer review is insufficient to establish the Respondent's prima facie burden of lack of medical necessity to establish its defense. Moreover, Arbitrator Wendrovsky considered and cited to the rebuttal of Dr. William Jones, the spine surgeon who performed the procedure, which was also submitted to the ECF in this case. Dr. Jones set forth when a lumbar percutaneous discectomy procedure may be considered and that the EIP was an appropriate candidate for this procedure based on the lumbar spine MRI showing disc pathology at L4-L5 and L5-S1, along with persistent radicular symptoms that remain unresolved. Following a complete review of the evidence presented, I find that in favor of the Applicant.

Accordingly, the Applicant's claim is hereby granted 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Amount Amended	Status
	NYEEQAS C, LLC	12/08/15 - 12/08/15	\$17,437.58	\$4,827.26	Awarded: \$4,827.26
Total			\$17,437.58		Awarded: \$4,827.26

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/07/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Since the claim(s) in question arose from an accident that occurred on or after April 5, 2002, the insurer shall compute and pay the Applicant the amount of interest computed from the date of filing, at the rate of 2% per month, simple, and ending with the date of payment of the award, subject to the provisions of *11 NYCRR 65-3.9(c)*(stay of interest).

C. Attorney's Fees

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

The Respondent shall also pay the Applicant an attorney's fee in accordance with *11 NYCRR 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, Ioannis Gloumis, do hereby affirm upon my oath as arbitrator that I am the individual described in and who executed this instrument, which is my award.

07/09/2020  
(Dated)

Ioannis Gloumis

### **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:**  
745f6ce57856178ab44c07c33df1e729

### **Electronically Signed**

Your name: Ioannis Gloumis  
Signed on: 07/09/2020