American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

JSJ Anesthesia & Pain Management PLLC (Applicant)	AAA Case No.	17-19-1132-8128
	Applicant's File No.	GTLJA061119.002
- and -	Insurer's Claim File No.	0439739532 2AD
	NAIC No.	29688
Allstate Fire & Casualty Insurance Company (Respondent)		

ARBITRATION AWARD

I, Gregory Watford, 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: Assignor (SD)

1. Hearing(s) held on 07/13/2020
   Declared closed by the arbitrator on 07/13/2020

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

   Sharon Basiratmand from Allstate Fire & Casualty Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **$ 297.11**, was NOT AMENDED at the oral hearing.
   Stipulations WERE NOT made by the parties regarding the issues to be determined.

3. Summary of Issues in Dispute

   The dispute arises from the underlying automobile accident of December 19, 2016, in which the Assignor, a 55-year old female, was injured. As a result of the impact, she complained of injuries to her neck, back, shoulders, left hand, and right knee. Thereafter, she sought private medical attention where she began conservative care treatments including pain management therapy.

   On May 15, 2017, Assignor underwent an orthopedic IME conducted by Dr. Frank Oliveto who concluded that Assignor's injuries had resolved. As a result of the IME, Respondent cut off no-fault benefits effective May 15, 2017.

On May 23, 2017, Assignor underwent a neurological independent medical examination (IME) conducted by Dr. Chandra Sharma who concluded that Assignor's injuries had resolved. As a result of the IME, Respondent cut off no-fault benefits effective 5/29/17.

On May 29, 2018, Assignor received cervical facet injections. In dispute in this claim are the related anesthesia services provided during the pain management procedure. Applicant submitted the bills to Respondent for payment. Respondent denied payment based upon the IMEs of Dr. Oliveto and Dr. Sharma.

At the hearing, when asked, Respondent did not raise any fee schedule objections to the amount billed by Applicant.

The issues to be decided in this case:

Whether Applicant established entitlement to No-Fault compensation for the pain management injections services provided to Assignor.

Whether Respondent made out a prima facie case of lack of medical necessity and, if so, whether Applicant rebutted it.

4. Findings, Conclusions, and Basis Therefor

I have reviewed the submissions and documents contained in the American Arbitration Association's ADR Center Electronic Case File (ECF). These submissions constitute the record in this case. This case was decided on the submissions of the parties as contained in the ECF and the oral arguments of the parties' representatives. There were no witnesses.

After reviewing the records contained in the ECF, I find that Applicant established its prima facie case of entitlement to No-Fault compensation. See Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (N.Y. App. Div. 2nd Dept. 2004). Since Respondent has the burden of coming forward with competent evidentiary proof to support its fee schedule defenses. Continental Medical PC v. Travelers Indemnity Co ., 11 Misc.3d 145A, 819 N.Y.S.2d 847, (N.Y. App. Term, 1st Dep't, 2006); Robert Physical Therapy PC v. State Farm Mutual Auto Ins. Co., 13 Misc.3d 172, 822 N.Y.S.2d 378, (Civil Ct, Kings Co. 2006).

IME Cut Off - Medical Necessity

A denial premised on a lack of medical necessity must be supported by competent evidence such as an independent medical examination (IME), a peer review or other proof which sets forth a factual basis and a medical rationale for denying the claim. See, Amaze Med. Supply Inc. v Eagle Ins. Co., 2 Misc. 3d 128[A], 2003 NY Slip Op

51701[U] [N.Y. App Term, 2nd& 11th Jud Dists 2003]; King's Med. Supply Inc. v Country-Wide Ins. Co., 5 Misc. 3d 767, 771 (Civ. Ct Kings Cty 2004).

An IME doctor must establish a factual basis and medical rationale for his asserted lack of medical necessity of further health care services. E.g., Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance, 20 Misc.3d 144(A), 2008 NY Slip Op 51863(U), 2008 WL 4222084 (App. Term 2d & 11th Dists. Sept. 3, 2008). If he does so, it becomes incumbent on the claimant to rebut the IME review, see AJS Chiropractic, P.C. v. Mercury Ins. Co., 22 Misc.3d 133(A), 2009 NY Slip Op 50208(U), 2009 WL 323421 (N.Y. App. Term 2nd& 11th Dist. Feb. 9, 2002), because the ultimate burden of proof on the issue of medical necessity lies with the claimant. See Insurance Law § 5102; Shtarkman v. Allstate Insurance Co., 2002 NY Slip Op 50568(U), 2002 WL 32001277 (N.Y. App. Term 9th& 10th Jud. Dists. 2002) (burden of establishing whether a medical test performed by a medical provider was medically necessary is on the latter, not the insurance company). The insured or the provider bears the burden of persuasion on the question of medical necessity. Bedford Park Medical Practice P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 806 N.Y.S.2d 443 (Table), 2005 NY Slip Op. 51282(U), 2005 WL 1936346 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). This burden of proof is properly placed on a claimant health care provider because presumably it is in possession of the injured party's medical records.

It should be noted that the issue of medical necessity of post services was previously addressed by Arbitrator Walter Winning in several linked awards under AAA case ## 17-18-1111-6923, 17-18-1091-5891, 17-18-1091-5862, 17-17-1077-9173. In the linked cases, Arbitrator Winning found in favor of Applicant.

Addressing the IME reports of Dr. Sharma and Dr. Oliveto in the linked case #17-17-1077-9173, Arbitrator Winning opined:

The claims for the evaluation of May 25, 2017, and for epidurals administered on June 5, 2017, June 19, 2017, and June 26, 2017 were addressed by timely denial letters. That letter indicated that all benefits were terminated as of May 15, 2017 and was based upon an IME performed by F. Oliveto, M.D. on April 25, 2017. Dr. Oliveto noted that the Assignor complained of lower back, middle back, neck, right knee, left hand, and bilateral shoulder pain. He found all neurological signs to be normal but found range of motion significantly reduced as a result of voluntary guarding. He found that there was no need for additional physical therapy or diagnostic testing. (He did not include epidural injections, and there is an argument that these were never included in the IME-Dr. Oliveto performed an orthopedic IME, while injections should be dealt with in a P M & R evaluation). An IME rebuttal was submitted by Dr. Haftel. He argues that the treatment by Dr. DiStasio was necessary, and he does not agree with the analysis of Dr. Oliveto. He indicates that Dr. Oliveto saw reduced range of motion, and the Assignor had not reached pre-injury status. I find that the IME report has been rebutted by the post-IME reports of Dr. DiStasio, and the IME rebuttal. Applicant is awarded $1,668.94. The claims for the evaluation of July 27, 2017, and for epidurals administered on July 5, 2017, and July 17, 2017 were addressed by timely denial letters. Those letters indicated that all benefits were terminated as of May 15, 2017, and was

based upon IMEs performed by F. Oliveto, M.D. on April 25, 2017, and upon a Neurological IME performed by C. Sharma, M.D. on May 23, 2017. (The cut-off of benefits for the Sharma IME was on June 23, 2017). Dr. Sharma found no neurological conditions and terminated benefits. (Dr. Sharma reiterated his findings in a rebuttal statement). An IME rebuttal was submitted by Dr. Haftel. He argues that the treatment by Dr. DiStasio was necessary, and he does not agree with the analysis of Dr. Sharma. He indicates that Dr. Sharma saw reduced range of motion, and the Assignor had not reached pre-injury status. I find that the IME reports of both Doctors Oliveto and Sharma have been rebutted by the post-IME reports of Dr. DiStasio, and the IME rebuttal. Applicant is awarded $1,061.93, and the total award is $3,221.07.

Arbitrator Winning also addressed the same IMEs in the other linked cases under AAA case ## 17-18-1111-6923, 17-18-1091-5891, 17-18-1091-5862, and reached the same conclusion and upheld his prior award.

I find that the prior awards of Arbitrator Winning are well reasoned awards where he analyzed the facts and evidence and applied the no-fault regulations and laws. Respondent relied on the IME and Applicant relied upon the same rebuttal in the linked cases which was uploaded in the instant matter.

Based upon the foregoing, I uphold the prior awards of Arbitrator Winning and his findings of fact and conclusions of law therein and I adopt them in the instant matter. Moreover, I find that Applicant has sufficiently rebutted the lack of medical necessity for the 8/29/18 cervical facet injections and the related anesthesia. Accordingly, I am persuaded that Applicant's injuries were not fully resolved at the time of the IMEs.

Applicant is entitled to be reimbursed and billed.

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, without merit, and/or waived insofar as not 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**
	JSJ Anesthesia & Pain Management PLLC	**08/29/18 - 08/29/18**	**$297.11**	**Awarded: $297.11**
Total			**$297.11**	**Awarded: $297.11**

B. The insurer shall also compute and pay the applicant interest set forth below. 06/20/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant's award shall bear interest at a rate of two percent per month, calculated on a pro rata basis using a 30-day month from the date payment became overdue to the date of the payment of the award pursuant to 11 NYCRR 65-3.9. The end date for the calculation of the period of interest shall be the date of payment of the claim. General Construction Law § 20 ("The day from which any specified period of time is reckoned shall be excluded in making the reckoning.")

Where a claim is timely denied, interest shall begin to accrue as of the date arbitration is requested by the claimant, i.e., the date the American Arbitration Association deems the arbitration claim to have been filed (the initiation letter date), unless arbitration is commenced within 30 days after receipt of the denial, in which event interest shall begin to accrue as of the 30th day after proof of claim was received by the insurer. 11 NYCRR 65-4.5(s)(3), 65-3.9(c); Canarsie Medical Health, P.C. v. National Grange Mut. Ins. Co., 21 Misc.3d 791, 797 (Sup. Ct. New York Co. 2008) ("The regulation provides that where the insurer timely denies, then the applicant is to seek redress within 30 days, after which interest will accrue.")

C. Attorney's Fees

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

Respondent shall pay Applicant a separate attorney's fee, in accordance with 11 NYCRR 65-4.6(d). Since the within arbitration request was filed on or after February 4, 2015, this case is subject to the provisions promulgated by the Department of Financial Services in the Sixth Amendment to 11 NYCRR 65-4 (Insurance Regulation 68-D). Accordingly, the insurer shall pay the applicant an attorney's fee, in accordance with 11 NYCRR 65-4.6(d) subject to a maximum fee of $1,360.

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

07/14/2020
(Dated)

Gregory Watford

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:
b52740c8d5b82db1d55aadb36f2a4e6c

Electronically Signed

Your name: Gregory Watford
Signed on: 07/14/2020