

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.	17-19-1135-5397
- and -	Applicant's File No.	232590
	Insurer's Claim File No.	2018604683-0 180085812
New York Central Mutual Fire Insurance Company (Respondent)	NAIC No.	14834

ARBITRATION AWARD

I, Andrew Horn, 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, eligible injured person, EIP.

1. Hearing(s) held on 08/31/2020
Declared closed by the arbitrator on 08/31/2020

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

Cristina Carollo, Esq., from Gullo & Associates, LLP, participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,584.32**, was AMENDED and permitted by the arbitrator at the oral hearing.

The claim was amended without objection to \$1,423.90 in order to comport with the relevant fee schedule. Given the amendment, Respondent's attorney acknowledged that fee schedule excessiveness was no longer an issue.

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

3. Summary of Issues in Dispute

In dispute is Applicant Accelerated Surgical Center of North Jersey's amended claim as the assignee of a 19-year-old woman - a resident of Greenwood Lake, New York -- injured in a motor vehicle accident on February 14, 2018, for payment of ambulatory surgical facility fees incurred as a result of a right thoracic radiofrequency ablation (RFA) by Dr. Amit Goswami, a board-certified anesthesiologist, on May 11, 2019 in Paterson, New Jersey.

Respondent New York Central Mutual Fire Insurance Company timely denied the (amended) claim relying on an independent medical examination (IME) on March 13, 2019 by its anesthesiologist Dr. Dilip V. Suhedar, based upon which the insurer cut off benefits as of April 16, 2019.

To the extent that Respondent alleged that the provider's assignor has already nearly exhausted the benefits available under the terms of the subject automobile insurance policy, it has not submitted the applicable policy or otherwise established that No-Fault benefits were limited thereunder to \$50,000. See Friedman v. Progressive Direct Ins. Co., 100 A.D.3d 591 (2d Dept. 2012); Flushing Traditional Acupuncture, P.C. v. Infinity Group, 38 Misc.3d 21 (App Term 2d, 11th & 13th Dists. 2012); Crossbridge Diagnostic Radiology v. Encompass Ins., 24 Misc.3d 134(A) (App Term 2d, 11th & 13th Dists. 2009).

Instead of the policy in effect during the date of loss February 14, 2018, the insurer submitted the declaration page for the policy valid from February 1, 2019 through February 1, 2010. Even assuming *arguendo* that the terms of coverage were the same during the prior period, the policy uploaded by Respondent indicates that there is No-Fault coverage in the amount of \$100,000.

Consequently, the assertion of the exhaustion of available coverage is without any probative value.

4. Findings, Conclusions, and Basis Therefor

1.

In reviewing this matter and a series of nine related cases also heard by me involving the same provider and assignor, it appears that the injured person underwent the following treatments by Dr. Goswami: Cervical medial branch blocks on February 2, 2019; thoracic medial branch blocks on April 27, 2019; right-sided thoracic radiofrequency ablation (RFA) on May 11, 2019; left-sided thoracic RFA on May 28, 2019; thoracic transforaminal ESIs on June 29, 2019, July 13, 2019 and August 10, 2019; and lumbar transforaminal ESIs on November 16, 2019, January 4, 2020, and January 18, 2020.

According to the IME report, Dr. Goswami also performed ESIs on August 11, 2018, September 22, 2018 and October 6, 2018, lumbar facet joint injections and RFAs on November 15, 2018, November 17, and December 15, 2018, and cervical RFAs.

2.

Inasmuch as Dr. Subhedar noted the provider's assignor's statements that she had been the restrained driver of a vehicle, which was "rear-ended..., throwing her car into a spin" and "totaled," that she had "received several injections to her neck and ... lower back, which only helped her temporarily," and that she was "70% better after the treatment provided to her," as well as her complaint of continuing back pain, which was "axial, chronic, mild-to-moderate, ... dull and achy, intermittently going down her left leg, associated with tingling," but reported that she missed only one day from work following the accident; observed no tenderness or muscle spasm; found no neurological deficits and negative orthopedic testing; measured (with a goniometer and visual estimation) full range of motion of the cervical, thoracic and lumbar spine and left shoulder; characterized assignor's injuries (after also reviewing emergency room records, evaluation reports, treatment notes, and reports of magnetic resonance imaging and electromyography) as sprains of the neck and low back, which, in his opinion, had resolved; and determined that she had reached "an endpoint of therapeutic benefits and therefore did not require any more follow-up with her pain physician" or any additional spinal injections, I find that he "demonstrated a factual basis and a medical rationale for his determination that there was no medical necessity for the services at issue here," and, thus, "the burden shifted to (the provider) to present (its) own evidence of medical necessity." See Cappello v. Global Liberty Ins. Co. of N.Y., 57 Misc.3d 143(A) (App Term 1st Dept. 2017).

Given that Respondent's examiner determined that the underlying procedures were medically unnecessary, by extension there is a lack of medical necessity for the surgical facility fees incurred as a result of these services. See New Horizon Surgical Ctr., LLC v. Allstate Ins. Co., 52 Misc.3d 139(A) (App Term 2d, 11th & 13th Dists. 2016).

Consequently, the burden is on the provider "to present evidence as to why that additional treatment was needed either because ... assignor's condition had changed after the IME or because (the examiner's) opinion following the IME was erroneous." New Horizon Surgical Ctr., LLC v. Allstate Ins. Co., 52 Misc.3d 139(A) (App Term 2d, 11th & 13th Dists. 2016).

Standing alone, an injured person's "subjective complaints of pain cannot overcome objective medical tests." Arnica Acupuncture, P.C. v. Interboard Ins. Co., 137 A.D.3d 421(1st Dept. 2016). See Mingmen Acupuncture Servs., P.C. v. Global Liberty Ins. Co. of N.Y., 61 Misc.3d 128 (A) (App Term 1st Dept. 2018).

It is ultimately the provider who must prove, by a preponderance of the evidence, that the services were reasonable and necessary. See Dayan v. Allstate Ins. Co., 49 Misc.3d 151(A) (App Term 2d Dept. 2015); Park Slope Med. & Surgical Supply, Inc. v Travelers Ins. Co., 37 Misc.3d 19, 22 n (App Term 2d, 11th & 13th Dists. 2012).

To rebut the IME, Applicant relies principally upon a rebuttal from Dr. Goswami, a Diplomate of the American Board of Anesthesiology, who countered that "the absence of objective findings on examination does not rule-out pain," that a "patient's self-report is the most accurate and reliable evidence of the existence of pain," and that, in any event, "(f)indings from subsequent evaluations ... contradicted the IME doctor's conclusions." However, other than mentioning that, when "the patient returned on April 27, 2019," six weeks after the IME, "her middle back pain was at 8/10 VAS," and he arrived at a "preoperative diagnosis of thoracic facet syndrome," he did not refer to any observations or findings made on this date.

Nor does his office visit note dated March 25, 2019, a month before the disputed services, record any complaint of pain located in the mid-back. While Dr. Goswami noted that assignor informed him that NSAIDs had "not decreased (her) pain," muscle relaxants only "helped partially," and heat, massage, acupuncture and physical therapy had "not helped with pain," observed that she ambulated with a "wide based gait," found tenderness and positive facet loading of the cervical and lumbar spine bilaterally, and assessed lumbar disc herniation and lumbar radiculopathy, he made no mention of any condition related to the thoracic facet joints and performed a sacroiliac joint injection.

Moreover, while the March 25, 2019 office visit note recorded complaints of neck and low back, which radiated, respectively, into the right shoulder and legs bilaterally "all the way to (the feet)," his operative reports for dates of service April 27, 2019, May 11, 2019 and May 28, 2019 indicated, on the other hand, that she suffered from "back pain that (was) mostly axial in nature without radicular component," and that these services "will help in relieving pain if the pain is emanating from the facet joint."

According to Dr. Goswami, "(r)adiofrequency ablation/lesioning is a procedure to provide long term pain relief," with "(f)ull pain relief typically occur(ring) with 2 to 3 weeks after the procedure."

The operative reports for dates of service June 29, 2019, July 13, 2019 and August 10, 2019 noted that she "ha(d) been suffering from mid back pain" and that these "injection(s) (were) likely to help decrease inflammation and pain caused by disc herniation and/or impingement of the nerve root." (According to the aforementioned office note, Dr. Goswami indicated that the MRI of the lumbar spine performed on June 18, 2018 revealed disc bulges at L4-L5 and L5-S1).

In an addendum prepared after reviewing the rebuttal, Dr. Subhedar adhered to his prior determination because, when he evaluated the injured person on March 13, 2019, her "chief complaints were in the neck and lower back," and she "reported ... being 70% better and was on minimal pain medications." Although he conceded that he could not comment on whether "on April 27, 2019 she was in profound midback pain bad enough

to warrant thoracic facet blocks," Respondent's anesthesiologist concluded nonetheless that, given assignor's statement that "all the multiple injections performed by Dr. Goswami were of only partial and temporary benefit," she had "reached an end point of therapeutic benefit."

The conflicting medical expert opinions adduced by the parties sufficed to raise an issue as to the medical necessity of the treatment underlying the provider's first-party No-Fault claim. See Advanced Orthopedics, PLLC v. New York Cent. Mut. Fire Ins., 42 Misc.3d 150(A) (App Term 2d, 11th & Co. 13th Dists. 2014); Pomona Med. Diagnostics, P.C. v. Praetorian Ins. Co., 42 Misc.3d 126(A) (App Term 1st Dept. 2013).

After careful consideration of the record, I find the detailed IME report, which noted the lack of any objective evidence of injury, more persuasive than the (inconsistent) rebuttal evidence.

Accordingly, Respondent's denial is upheld and Applicant's amended claim is denied in its entirety.

This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

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 Bronx

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

10/04/2020
(Dated)

Andrew Horn

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:
8caf6a4fbeab88d83b980233bf3ac2c0

Electronically Signed

Your name: Andrew Horn
Signed on: 10/04/2020