

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

New Century Spine & Outpatient Surgical
Institute
(Applicant)

- and -

St. Paul Protective Insurance Company
(Respondent)

AAA Case No. 17-20-1155-6191

Applicant's File No. N/A

Insurer's Claim File No. 272 PP
HYZ9989 002

NAIC No. 19224

ARBITRATION AWARD

I, Bernadette Connor, 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

1. Hearing(s) held on 10/22/2020
Declared closed by the arbitrator on 10/22/2020

Brandon Fleischhacker, Esq. from Judd Shaw Injury Law P.A. participated by telephone for the Applicant

Gina Spiteri, Esq. from Law Offices Of Tina Newsome-Lee f/k/a Aloy O. Ibuzor participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 14,300.00**, 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 Assignor, a 37-year-old male, was the driver of a motor vehicle involved in an accident on April 12, 2016, sustaining injuries to the neck, back, and right knee. He did not experience any loss of consciousness. The Assignor sought medical treatment at a local hospital two days after the accident; he was evaluated and released.

Applicant seeks facility fees associated with the following services provided to the Assignor:

September 19, 2018: cervical epidural steroid injection with fluoroscopic guidance;

February 6, 2019: lumbar facet block injection;

August 28, 2019: lumbar radiofrequency ablation (RFA).

Respondent denied payment for services rendered on September 19, 2018, based on an IME report dated July 12, 2018 by Sammy Dean, M.D.; Respondent denied payment for services rendered on February 6, 2019, based on a peer report dated March 18, 2019 by Dr. Dean; the denial for services rendered on August 28, 2019 was predicated on an IME report April 17, 2019 by Dr. Dean.

The issue to be decided is whether the services rendered to the Assignor herein were medically necessary.

4. Findings, Conclusions, and Basis Therefor

I have carefully reviewed the submissions contained in the Modria ADR Center maintained by the American Arbitration Association. I have also considered the oral arguments of the parties presented at the hearing of this matter.

An arbitrator "shall be the judge of the relevance and the materiality of the evidence offered, strict conformity to the rules of evidence shall not be necessary. The arbitrator may question or examine any witness or party and independently raise any issue that arbitrator deems relevant to making an award that is consistent with the Insurance Law and Department regulations." 11 N.Y.C.R.R. 65-45 (o) (1). Additionally, as the trier of the facts and the law, an Arbitrator is authorized to review and take judicial notice of any rule, law, medical document or periodical or any other document which may impact and aid in making a decision, as long as it conforms to the Insurance laws and the New York State Insurance Department Regulations. *Matter of Medical Society v. Serio*, 100 NY2d 854, 768 NYS2d 423 (2003).

Dr. Dean performed an anesthesiology/pain management examination on July 10, 2018, and issued an IME report dated July 12, 2018, concluding that the Assignor was not in need of further treatment. Dr. Dean noted that at the time of the examination, the Assignor complained of stabbing neck pain, low back pain, and right knee pain. The pain was exacerbated by work activities and decreased with rest, medication, and injection. The Assignor reported experiencing numbness and tingling sensations of the right foot. Dr. Dean indicated findings upon examination included decreased range of motion of the lumbar spine in all directions; tenderness with palpation of the cervical and lumbar regions of the spine. Upon examining the Assignor, Dr. Dean concluded that the sprain/strains of the spine had not yet been resolved. He also recommended that the Assignor continue taking pain medication.

Dr. Dean reviewed the medical records and issued a report dated March 18, 2018, concluded that the lumbar facet block injection provided on February 6, 2019 was not

medically necessary. Dr. Dean opined that there limited findings of facet dysfunction of the lumbar spine. He also indicated that Applicant did not describe any clear plan of care for performing the procedure.

Dr. Dean performed a follow-up anesthesiology/pain management examination on April 17, 2019, and issued a report dated April 19, 2019, indicating that the Assignor was neither disabled nor in need of further treatment. He noted that the Assignor's complaints included pain in the neck, lower back, and right knee. Dr. Dean indicated that examination findings on April 17, 2019, revealed normal ranges of motion of the cervical spine and the lumbar spine. There were no complaints of tenderness on palpation of the spine. After examining the Assignor, Dr. Dean diagnosed him with resolved sprains/strains of cervical spine and the lumbar spine.

Rebuttal Reports by Thomas P. Ragukonis, M.D:

In response to Dr. Dean's reports, Dr. Ragukonis issued two rebuttal reports, disagreeing with Dr. Dean's opinion that the services rendered were not medically necessary and the findings that the Assignor was not in need of further treatment. Regarding the cervical epidural steroid injection performed on September 19, 2018, Dr. Ragukonis argued that the treatment was medically necessary as the Assignor was still experiencing back pain. [Dr. Ragukonis refers to a report by Dr. Sammy "Keen". This appears to be a typographical error as he cited the correct date of service at issue as September 19, 2018].

Dr. Ragukonis similarly disagreed with Dr. Dean's contention that the lumbar facet block injection performed on February 6, 2019 was not medically necessary. He noted that an MRI study of the lumbar spine performed on July 16, 2016 revealed left facet atrophy at the L4-L5 level. At a follow-up examination performed on February 4, 2019, two days before the performance of the injection, the Assignor presented with back pain and weakness. Examination of the lumbar spine on February 4, 2019 revealed decreased flexion, extension, and bilateral bending; facet line pain and pain on facet loading at L4-5 and L5-S1; tenderness to palpation at L4-5 and L5-S1.

Regarding the lumbar RFA performed on August 28, 2019, Dr. Ragukonis disagreed with Dr. Dean's assertion that the Assignor was not in need of further treatment as of April 17, 2019. He noted that at the time of an examination he performed on April 25, 2019, a week after Dr. Dean's examination, the Assignor's complaints included shooting pain from his right buttock to the hamstring and mid-thigh. Physical examination findings of the lumbar spine revealed decreased range of motion, tenderness and facet line pain, pain on facet loading at L4-L5 and L5-S1, and positive straight leg raising test. Dr. Ragukonis indicated that the Assignor presented for examination on August 8, 2019, complaining of stabbing and shooting low back pain that radiated to the right buttock, hip, and lower extremities, associated with numbness and tingling. Examination revealed decreased range of motion in flexion, extension, and lateral bending. Based upon examination findings, Dr. Ragukonis recommended that the Assignor undergo the lumbar RFA, which was performed on August 28, 2019.

Decision:

Applicant has established a prima facie entitlement to judgment as a matter of law by proof that it submitted a claim, setting forth the fact and amount of the loss sustained, and that the payment of No-Fault benefits was overdue. See *Viviane Etienne Med. Care v. Country-Wide Ins. Co.*, 25 NY3d 498 (2015); *Westchester Med. Ctr. v. Progressive Cas. Ins. Co.*, 89 AD3d 1081, 933 NYS2d 719, 2011 NY Slip Op. 8747 (N.Y. App. Div. 2d Dept. 2011); *New York Hosp. Med. Ctr. of Queens v. QBE Ins. Corp.*, 114 AD3d 648, 979 NYS2d 694, 2014 NY Slip Op 639 (NY App. Div. 2d Dept. 2014).

In order to refute Applicant's prima facie case of medical necessity, Respondent is required to produce a peer review or other competent medical evidence which sets forth a clear factual basis and medical rationale for denying the claim. *Healing Hands Chiropractic P.C. v. National Assurance Co.*, 5 Misc. 3d 975; *Citywide Social Work, et. al. v. Travelers Indemnity Co.*, 3 Misc. 3d 608. An insurer may use an IME report as a basis for determining whether the eligible injured person is entitled to additional treatment or other first-party benefits. See *Rowe v. Wahnnow*, 26 Misc. 3d 8, 11-12 (App. Term, 1 Dept.)

A report relied upon by an insurer to defend its denial for No-Fault benefits must demonstrate that the services rendered were not in agreement with generally accepted medical/professional practice. *Jacob Nir, M.D. Assignee of Josaphat Etienne v. Allstate Insurance Co.*, 796 N.Y.S2 857. "Generally accepted practice is that range of practice that the profession will follow in the diagnosis and treatment of patients in light of the standards and values that define its calling." *Citywide Social Work & Psych. Serv. P.L.L.C. v. Travelers Indemnity Co.*, 3 Misc. 3d. 608, 777 N.Y.S. 2d 241, 2004 NY Slip Op 20034 NY Slip Op 24034 [Civ. Ct. Kings County 2004].

Cervical Epidural Steroid Injection with Fluoroscopic Guidance Performed on September 19, 2018:

After carefully reviewing the evidence presented, I find that Dr. Dean has failed to set forth a clear factual basis and medical rationale for concluding that the Assignor was not in need of further treatment. See *Ying Eastern Acupuncture, P.C. v. Global Liberty Insurance*, 20 Misc. 3d 144 (A), 873 N.Y.S.2d 238, 2008 N.Y. Slip Op. 51863 (U), (App. Term 2 & 11 Dists., Sept.3, 2008). Dr. Dean opined that the Assignor was not disabled or in need of further treatment at the time of his examination on July 10, 2018. Nevertheless, the examination of the Assignor on July 10, 2018 revealed positive findings that contradicted Dr. Dean's opinion. He indicated that the Assignor complained of stabbing neck pain, right knee pain, and low back pain. The Assignor also reported experiencing numbness and tingling sensations. Dr. Dean's examination revealed decreased range of motion of the lumbar spine in all directions; tenderness with palpation of the cervical and lumbar regions of the spine. Upon examining the Assignor, Dr. Dean concluded that the sprain/strains of the spine had not yet been resolved. He also recommended that the Assignor continue taking pain medication.

Lumbar Facet Block Injection Performed on February 6, 2019:

I find that Dr. Dean has set forth a sufficient factual basis and medical rationale to support the conclusion that the lumbar facet block injection performed on February 6, 2019 was not medically necessary. Therefore, Respondent has successfully rebutted Applicant's prima facie case of medical necessity. See, *Exclusive Med. Supply, Inc. v Mercury Ins. Group*, 2009 52273 (U) (Appellant Term 2d Dept., Nov. 5, 2009); *Delta Diagnostic Radiology, P.C. v. Progressive Casualty Ins. Co.*, 2008 Slip Op 52450 (U), 21 Misc. 3d 142 (A) (App Term 2d Dept., 2008).

Having found that Respondent has successfully rebutted Applicant's prima facie case of medical necessity, the burden shifts back to Applicant to counter Respondent's consultant's report, and demonstrate the necessity of the services at issue. *CPT Med Services, P.C. v. New York Cent. Mut. Fire Ins. Co.*, 2007 New York Slip Op 27526, 18 Misc. 3d 87 (App Term 1st Dept.); *Eden Med., P.C. v. Progressive Cas. Ins. Co.*, 2008 NY Slip Op 51098 (U), 19 Misc.3d 143 (A) (App Term 2nd & 11th Jud Dists., 2008); *Bath Med. Supply, Inc.*

I find that Applicant has met its shifted burden of proof. Dr. Ragukonis' report persuasively demonstrated that the lumbar facet block injection was medically necessary. He noted that an MRI study of the lumbar spine performed on July 16, 2016 revealed left facet atrophy at the L4-L5 level. At a follow-up examination performed on February 4, 2019, two days before the performance of the injection, the Assignor presented with back pain and weakness. Examination of the lumbar spine on February 4, 2019 revealed decreased flexion, extension, and bilateral bending; facet line pain and pain on facet loading at L4-5 and L5-S1; tenderness to palpation at L4-5 and L5-S1.

Lumbar RFA Performed on August 28, 2019:

Dr. Dean indicated that his IME examination of April 17, 2019 revealed no positive findings. He concluded that the Assignor was not in need of further treatment. In rebuttal, Dr. Ragukonis indicated that the Assignor remained symptomatic at the time of an examination he performed on April 25, 2019, a week after Dr. Dean's examination. The Assignor presented with complaints of shooting pain from the right buttock to the hamstring and mid-thigh. Examination findings included decreased range of motion, tenderness, facet line pain and pain on facet loading at L4-L5 and L5-S1. Straight-leg raising test was positive.

I find that Dr. Ragukonis has successfully refuted Dr. Dean's findings.

Accordingly, I find that the facility fees for the services rendered herein were medically necessary.

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
	New Century Spine & Outpatient Surgical Institute	09/19/18 - 09/19/18	\$3,900.00	Awarded: \$3,900.00
	New Century Spine & Outpatient Surgical Institute	02/06/19 - 02/06/19	\$5,000.00	Awarded: \$5,000.00
	New Century Spine & Outpatient Surgical Institute	08/28/19 - 08/28/19	\$5,400.00	Awarded: \$5,400.00
Total			\$14,300.00	Awarded: \$14,300.00

- B. The insurer shall also compute and pay the applicant interest set forth below. 02/03/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest shall begin to accrue as of February 3, 2020, the date the claim is received by the American Arbitration Association, until payment is made. The interest shall be two percent per month, simple, not compounded, on a pro rata basis using a 30 day month.

C. Attorney's Fees

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

With respect to the claim for which compensation was awarded, Respondent shall pay Applicant an attorney's fee in accordance with 11 NYCRR 65-4.6 (e). Since the within arbitration request was filed on or after April 5, 2002, if the benefits and interest awarded thereon are equal to or less than Respondent's written offer during the conciliation process, then the attorney's fee shall be based upon the provisions of 11 NYCRR 65-4.6(b).

- 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 New York

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

11/22/2020
(Dated)

Bernadette Connor

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:
9c177ec4e544622c450a73435c103516

Electronically Signed

Your name: Bernadette Connor
Signed on: 11/22/2020