

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

LR Medical PLLC
(Applicant)

- and -

LM General Insurance Company
(Respondent)

AAA Case No. 17-19-1124-2978
Applicant's File No. 00035359
Insurer's Claim File No. LA000-035378809-06
NAIC No. 36447

ARBITRATION AWARD

I, Nancy S. Linden, 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: YC

1. Hearing(s) held on 11/17/2020
Declared closed by the arbitrator on 11/17/2020

Mikhail Guseynov, Esq. from Drachman Katz, LLP participated by telephone for the Applicant

John Iaria from LM General Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 518.77**, 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, YC, a 28-year old female, was a restrained front-seat passenger in a motor vehicle involved in a motor vehicle accident on April 16, 2017. Following the accident, YC sought and received treatment including bilateral lumbar paravertebral facet joint injections administered on September 5, 2018. Applicant billed Respondent for charges related to the aforementioned service. Thereafter, Respondent timely denied Applicant's claim based upon the October 3, 2018 peer review of Vijay Sidwhani, MD. The issue presented is whether Respondent properly denied Applicant's bill based upon a lack of medical necessity.

4. Findings, Conclusions, and Basis Therefor

The case was decided based upon the submissions of the parties contained in the electronic file maintained by the American Arbitration Association, and the oral arguments of the parties' representatives made at the arbitration hearing. There were no witnesses.

Applicant established its prima facie entitlement to reimbursement for no fault benefits based upon the submission of a properly completed claim form setting forth the amount of the loss sustained and that payment is overdue. Mary Immaculate Hospital v. Allstate Ins. Co., 5 AD 3d 742, (2d Dept. 2004). Westchester Medical Center v. Lincoln General Ins. Co., 60 AD 3d 1045 (2d Dept. 2009). Therefore, the burden now shifts to Respondent to prove its defense that services were not medically necessary. A.B. Medical Servs., PLLC v. Lumbermens Mut. Cas. Co., 4 Misc.3d 86, 87 (App. Term, 2nd Dep't 2004); King's Med. Supply, Inc. v. Country-Wide Ins. Co., 5 Misc.3d 767, 771 (Civ. Ct. Kings Co. 2004); Amaze Med. Supply, Inc. v. Eagle Ins. Co., 2 Misc.3d 128(A) (App Term 2nd and 11th Jud. Dists. 2003).

In order to support a lack of medical necessity defense Respondent must "set forth a factual basis and medical rationale for the peer reviewer's determination that there was a lack of medical necessity for the services rendered." See, Provvedere, Inc. v. Republic Western Ins. Co., 2014 NY Slip Op 50219(U) (App. Term 2nd, 11th and 13th Jud. Dists. 2014). Respondent bears the burden of production in support of its lack of medical necessity defense, which if established shifts the burden of persuasion to Applicant. See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006).

In support of its contention that the bilateral lumbar paravertebral facet joint injections were not medically necessary Respondent relies on the peer review of Vijay Sidwhani, MD. Dr. Sidwhani asserts that, based on the medical records reviewed and medical authority cited, the injections were not necessary as "I can find no evidence based on a careful review of multiple examination reports, testing, and Therapy notes, to document any evidence of facet syndrome to suggest that this claimant was a candidate for this procedure". Furthermore, "the injections took place approximately 10 months following the last physical therapy and chiropractic treatment" and "I can find no evidence that the claimant's complaints or examination findings as reported at the time were at all related to the soft tissue injury sustained as a result of the motor vehicle accident on 04/16/17". Based on the foregoing, Respondent has set forth a cogent medical rationale in support of its lack of medical necessity defense.

Respondent has factually demonstrated that the services rendered were not medically necessary. Accordingly, the burden now shifts to Applicant, who bears the ultimate burden of persuasion. See, Bronx Expert, supra. In order to meet the burden of persuasion with regard to medical necessity Applicant must submit a rebuttal which

meaningfully refers to and rebuts the assertions set forth in the peer review report. See generally, Pan Chiropractic, P.C. v Mercury Ins. Co., 24 Misc 3d 136[A], 2009 NY Slip Op 51495[U] [App Term, 2d, 11th & 13th Jud Dists 2009].

In opposition to the peer review report of Dr. Sidwhani, Applicant submits a rebuttal letter prepared by Vitaliy Zhivotenko, DO, YC's treating physician who administered the injections at issue herein. Dr. Zhivotenko asserts that "the patient had experienced ongoing pain since the motor vehicle accident on 4/16/17". Notably, a review of the March 12, 2018 evaluation of YC by Karen Avanesov, DO of Total Orthopaedics and Sports Med reveals that on said date YC complained of "back pain as 9 on 0-10 pain scale" and "pain is the same since the accident". YC explained that she "had treatment with physical therapy for 8 months but no longer treating due to NF being exhausted". Presumably, her physical therapy benefits were cut off based upon an independent medical examination. Nonetheless, Dr. Avanesov's examination elicited "tenderness posteriorly entire lumbar spine-moderate" with "spasm", "restricted" ranges of motion, and "Straight leg raising positive bilaterally at 50 degrees; producing back pain", and she referred YC for a pain management evaluation. However, YC did not seek any pain management treatment until August 27, 2018...over 5 months later. At that time, Leon Reyfman MD notes complaints of "lower back pain with numbness/tingling in feet/toes. VAS 8/10, intermittent, dull, aching, sharp" and YC's "interim treatment consisted of medication, physical therapy". Dr. Reyfman's examination revealed "limited range of motion...tenderness...muscle spasm...lumbar facet loading + b/l", and he chose to "proceed with Facet (Medial Branch Nerve) injection to rule out facetogenic dysfunction vs. other pain generators". As explained by Dr. Zhivotenko, YC "next presented to my office on 9/5/19 with complaints of continued severe (8/10) lower back pain" and physical examination of the lower back elicited "tenderness...muscle spasm...limited range of motion...decreased motor strength...positive Lumbar Facet Loading test, bilaterally". Dr. Zhivotenko notes that, following the injections, "positive preliminary diagnosis of lumbar facet syndrome was established with lidocaine blocks with more than 80% pain relief and the ability to perform painful maneuvers in both regions". He concludes that "the 9/5/18 facet injections were medically necessary" because "despite 8 months of (failed) conservative treatment, the patient continued to experience most severe lower back pain and her ability to conduct daily functioning was impacted".

In response to the rebuttal by Dr. Zhivotenko, Dr. Sidawhani interposes an addendum to his peer review wherein he asserts that Dr. Zhivotenko "has failed to provide any additional clinical or medical based evidence that is relevant to this case", explaining that "this rebuttal is based upon examinations conducted...in August and September 2018" and "my decision was based on the file in its entirety" in which "there was no evidence of any facet pain". He thus argues that "the findings suggested by Dr. Vitaliy Zhivotenko have no bearing with regard to the accident of 04/16/17 as it appears the claimant had resolved the sprain/strain injury sustained and with no clinical evidence of facet pain prior to August 2018 as reported by Dr. Leon Reyfman". Indeed, Dr. Avanesov makes no mention of any facet pain elicited during her March 12, 2018 examination of YC. Of further interest is the fact that at her June 5, 2017 initial visit with Dr. Timothy Morley, YC's complaint of pain with respect to the lumbosacral spine is rated at "5/10" and the straight leg raise test performed by Dr. Morley elicited a negative response.

Based upon the foregoing, Applicant has not refuted the findings of Dr. Sidwhani. Notably, I reached the same conclusion in the linked award of 17-18-1111-7386 pertaining to the facility fees for this procedure.

As such, upon a preponderance of the evidence in the electronic case file and following consideration of the arguments raised at the hearing, I find that Respondent has established its defense on this record. Applicant's claim is, therefore, denied.

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 Nassau

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

11/28/2020
(Dated)

Nancy S. Linden

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:
9bf09041a118a3fb38644b2d29c23186

Electronically Signed

Your name: Nancy S. Linden
Signed on: 11/28/2020