American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

McBride Surgical Center, LLC (Applicant)	AAA Case No.	17-19-1123-9493
	Applicant's File No.	2228764
- and -	Insurer's Claim File No.	272 PP IAN0090 003
Travelers Property Casualty Insurance Company (Respondent)	NAIC No.	36161

ARBITRATION AWARD

I, Eva Gaspari, 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: E.I.P and/or S.F.

1. Hearing(s) held on 01/28/2021
   Declared closed by the arbitrator on 01/28/2021

   Stacy Mandel-Kaplan from Israel, Israel & Purdy, LLP (Great Neck) participated by telephone for the Applicant

   Alla Perker 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, **$ 2,624.64**, was AMENDED and permitted by the arbitrator at the oral hearing.

   At the hearing Applicant amended its claim to $2024.64. As amended Applicant's claim for lumbar epidural injection on January 22, 2019 is reduced to $1012.32; its claim for lumbar epidural on February 16, 2019 is for $1012.32.

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

3. Summary of Issues in Dispute

This arbitration dispute arises from an automobile accident which occurred on November 10, 2018 in which the Assignor (S.F.), a 27-year-old male, was a driver. Following the accident, the assignor received lumbar epidural injections at applicant's facility, on January 22, 2019 and February 16, 2019. Applicant's claim for services on January 22, 2019 has been denied based upon the peer review by Dr. Sammy Dean which is dated February 27, 2019. Applicant's claim for February 16, 2019 has been denied based upon the peer review by Dr. Sammy Dean which is dated March 25, 2019. The question presented is whether the lumbar epidural injections were medically necessary.

4. Findings, Conclusions, and Basis Therefor

This matter was decided based upon the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association, as well as upon the oral arguments of the parties at the time of the hearing. All documents contained in the ADR folder are hereby incorporated into this hearing and in reaching my findings I have reviewed all relevant exhibits contained in the ADR Center. Only submissions which were uploaded into the ADR Center at the time of the hearing were considered in making the instant determination. All matters raised on oral argument at the time of the hearing have been addressed herein. Any further issues raised in the hearing record are held to be moot and/or waived insofar as not specifically raised at the time of the hearing.

As an initial matter, I find that Applicant has submitted credible evidence to establish a prima facie case of medical necessity. (a medical provider establishes a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that the prescribed statutory billing forms had been mailed and received and that payment of no fault benefits was overdue.) *See*, Mary Immaculate Hospital v. Allstate Insurance Company, 5 A.D.3d 742, 774 N.Y.S.2d 564 (2nd Dept.2004) Similarly, I find that the Respondent has proffered a timely denial which preserves the defense of fee schedule and medical necessity, pursuant to the peer review. As to the issue of fee schedule, this issue has been rendered moot by virtue of Applicant's amendment at the hearing. Accordingly, the sole remaining issue for adjudication is that of medical necessity.

Applicant, having established its prima facie case, the burden now shifts to the Respondent to demonstrate its defense of lack of medical necessity (Alvarez v. Prospect Hosp., 68 N.Y.S.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d [1986]; A.B.Medical Services v. Geico Ins. Co., 2 Misc 3d 26 [App Term 2d and 11th Jud Dists, 2003]). Respondent bears the burden of production in support of a 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 1 Dept. 2006).

PEER REVIEW

The respondent relies on the peer reviews by Dr. Sammy Dean. Applicant's claim for services on January 22, 2019 has been denied based upon the peer review by Dr. Sammy Dean which is dated February 27, 2019. Dr. Dean states that "the purpose of an ESI is to reduce pain and inflammation, thereby facilitating progress in more active treatment programs, reduction of medication use, and avoiding surgery, but this treatment alone offers no significant long-term functional benefit. In the therapeutic phase, an ESI should be repeated only as medically necessary. This includes acute exacerbation of pain, or new onset of radicular symptoms." He goes on to state:

> With regard to the foregoing and in reference to the lumbar ESI dated 12/26/18 under review, there is documentation of physical exam findings and symptomatology by the specialist performing the procedure supporting a diagnosis of radiculopathy for which epidural steroid injection may be indicated. However, said findings were found 1/2/19, prior to any conservative modalities and ongoing care. There is no follow-up on said care, indicating ongoing radicular complaints unresponsive to conservative modalities.

As for Applicant's claim for February 16, 2019 has been denied based upon the peer review by Dr. Sammy Dean which is dated March 25, 2019. In his peer report Dr. Dean states:

> With regard to the foregoing and in reference to the repeat lumbar epidural steroid injection dated 2/16/19, there is insufficient documentation of ongoing physical exam findings, symptomatology, and supporting documentation by the specialist performing the procedure to support a diagnosis of radiculopathy. No follow-up evaluation is available subsequent to the initial examination dated 1/2/19. There is no clear indication as to the necessity of the repeat procedure under review without clear follow-up, including functional benefit and a change in pain

scores from a prior dated 1/22/19, and no clear indication of an exacerbation of radicular symptoms. With regard to the injection procedure provided for the claimant's condition, there remains limited indication for the necessity of said procedure prior to a thorough regimen of conservative care

APPLICANT'S REBUTTAL

In rebuttal the Applicant has set forth the underlying treatment records along with the rebuttal opinion of Dr. Wael Elkholy. Dr. Elkholy states that per the treatment records, Dr. Dean has presented an inaccurate position, stating that the patient had more than 8 weeks of conservative treatment including physical therapy, massage, and nonsteroidal anti-inflammatory medication; had continued complaints of severe lower back with radiculopathy to the lower extremity; MRI shows lumbar discogenic disease; Straight Leg Raise is positive; and that the purpose of the injection was to provide short-term improvement with the goal of making conservative care more successful. The underlying medical treatment records indicate that the EIP initially presented to Pain Medicine of NY, P.C., on January 2, 2019 at which time he reported constant low back pain with intermittent numbness and tingling sensation over the right buttock area with pain increasing by standing and walking along with intermittent neck pain with radiating pain to the left shoulder which increases by moving, as well as with complaints of intermittent left shoulder pain. During the course of this evaluation there were various positive findings, including reduced range of motion in the cervical spine, positive Spurling test bilaterally, reduced range of motion in the lumbar spine with tenderness and spasm and right and left leg raising to 50 degrees. Review of the MRI of the lumbar and cervical spine showed multiple level discogenic disease and at this time Dr. Elkholy recommended lumbar epidural steroid injections, a baseline EMG of the lumbar and cervical regions and a program of physical therapy. On January 22, 2019 the assignor underwent the recommended lumbar epidural steroid injection which was performed by Dr. Wael Elkholy. On February 8, 2019 the EMG/NCV of the lower extremities was performed, which revealed a left L4-5 radiculopathy, and as a result of which a facet joint/nerve block injection at L4-5 was recommended. On February 16, 2019 the assignor underwent a lumbar epidural injection, which was performed by Dr. Elkholy.

LEGAL STANDARD

To support a defense that services were not medically necessary a peer report should set forth a factual basis and medical rationale for the opinion that services were not necessary. See, generally, AJS Chiropractic, PC v. Mercury Ins. Co, 22 Misc. 3d 133 (A), 880 NYS 2d 871 (App. Term 2d & 11 Jud Dist. 2009). A peer review report that does not provide specifics as to the claim at issue, is conclusory or vague will not be sufficient to meet the burden of proof. See generally, Nir v. Allstate, 7 Misc.3d 544 (N.Y. City Civ. Ct. Kings County, 2005). Moreover, to carry its burden, the opinion of the insurer's expert, standing, alone is insufficient to carry the insurer's burden of proving that the services were not medically necessary. See, Citywide Social Work & Psy. Serv. v. Travelers, Indem. Co., 3 Misc 3d 608 (N.Y. City Civ. Ct., Kings Co., 2004); A.R. Medical Art, P.C. v. State Farm Mutual Auto. Ins. Co., 11 Misc 3d 1057[A], 815 NYS2d 493, (N.Y. City Civ. Ct. Kings Co. 2006) "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 value that define its calling. A.R. Medical Art, P.C. v. State Farm Mutual Auto. Ins. Co., supra See also, Williamsbridge Radiology and Open Imaging v. Travelers Indemnity Company, 14 Misc. 3d 1231 (A), 836 NYS 2d 496. Assuming the insurer establishes its defense of a lack of medical necessity through competent evidence, the burden shifts to the applicant to prove, by a preponderance of the evidence, that the services were medically necessary. Applicant can do so through medical evidence which "meaningfully refer[s] to, or discuss[es], the determination of defendant's doctor" See, Pan Chiropractic, PC v. Mercury Insurance Co , 24 Misc. 3d 136 (A) (App. Term 2d, 11th and 13 Jud Dist. 2009). In evaluating the evidence, I have used the following standards for assessing medical necessity: Medically necessary care has been defined as "treatments or services which are appropriate, suitable, proper and conducive to the end sought by the professional health service in consultation with the patient. It means more than merely convenient or useful treatments or services, but treatments or services that are reasonable in light of the patient's injury, subjective and objective evidence of the patient's complaints of pain and the goals of evaluation and treating the patient." Fifth Avenue Pain Control Center v. Allstate Ins co, 196 Misc. 2d 801 (Civ. Ct Queens 2003). Put another way, "for an expense to be considered medically necessary, the treatment, procedure, or service ordered by a qualified physician must be based on an objectively reasonable belief that it will assist in the patient's diagnosis and treatment and cannot be reasonably dispensed with. Such treatment, procedure, or service must be warranted by the circumstances as verified by a preponderance of credible and reliable evidence, and must be reasonable in light of the

subjective and objective evidence of the patient's complaints." Nir v Travelers Ins. Co. 2005 NY Slip Op 50466(U) Decided on April 7, 2005 (Civil Court Of The City Of New York, Kings County)

FINDING OF FACT

Upon a review of the proffered peer review report I find that the Respondent has not presented evidence which persuasively supports its defense that the services were not medically necessary. I find, after careful deliberation that the peer review is conclusory, vague and does not sufficiently address the claim at issue. Nir v. Allstate, *Supra*. Notably, Dr. Dean fails to discuss patient specific findings such as the MRI of the lumbar spine which revealed multi level discogenic disease, and as for the February 16, 2019 epidural, he fails to discuss the February 8, 2019 EMG/NCV of the lower extremities which revealed radiculopathy and does not indicate a generally recognized standard of care for treatment of these patient specific injuries. In any event, even if the peer review is found to have satisfied its burden of proof, after reviewing all of the evidence contained the ADR for this matter, which includes taking the opinions by both the peer review doctor and the rebuttal physician into account, and weighing both against the medical records, based upon a careful review of the submissions by both parties to this action, I find that the Applicant has set forth sufficient evidence to demonstrate, by a preponderance of the evidence, that the lumbar epidurals which were provided on January 22, 2019 and February 16, 2019 were medically necessary. I find that the Applicant has meaningfully addressed the peer review and in doing so has presented sufficiently credible and persuasive evidence that the injections were warranted based upon objective findings on physical examination, MRI results, and the EIP's response to conservative care, and that based on these factors that the care was reasonable and medically necessary.

HOLDING

On a careful review of the record, I am faced with conflicting opinions concerning the medical necessity for the disputed treatment herein. After reviewing the totality of the evidence, and upon a review of all of the evidence, I find that Applicant has set forth a more persuasive and credible argument regarding the necessity of the underlying services. Accordingly, I find in favor of the Applicant and the claim is awarded.

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**
	McBride Surgical Center, LLC	**01/22/19 - 01/22/19**	**$1,612.32**	**$1,012.32**	**Awarded: $1,012.32**
	McBride Surgical Center, LLC	**02/16/19 - 02/16/19**	**$1,012.32**	**$1,012.32**	**Awarded: $1,012.32**
Total			**$2,624.64**		**Awarded: $2,024.64**

B. The insurer shall also compute and pay the applicant interest set forth below. 03/06/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

In the instant matter Applicant is awarded interest pursuant to the no-fault regulations. 11 NYCRR 65-3.9 (a) provides that Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30 day month." Pursuant to 11 NYCRR 65-3.9 (c) provides that "if an applicant does not request arbitration or institute a lawsuit within 30 days after the receipt of a denial of claim form or payment of benefits calculated pursuant to Department of Financial Services regulations, interest shall not accumulate on the disputed claim or element of claim until such action is taken." In the matter of LMK Psychological Servs. PC v. State Farm Mut. Auto. Ins. Co., 12 NY 3d. 217 (2009), the court addressed the issue of interest and found that pursuant to 11 NYCRR §65-3.9(c) interest shall be tolled upon the issuance of a denial whether it is timely or not when an applicant does not request arbitration or institute a lawsuit within thirty days after receipt of a denial form or payment of benefits calculated pursuant to Insurance Department regulations. Therefore, pursuant to N.Y. Comp. Codes R. & Regs. tit. 11, § 65-3.9 (2002), "Interest on overdue payments," the Respondent shall pay interest to the Applicant on the awarded overdue PIP benefit at a rate of two percent (2%) per month calculated on a pro rata basis using a thirty (30) day month as set forth herein:

As for the claim for services on January 22, 2019, this claim was submitted to arbitration on March 25, 2019, which shall be the date from which interest accrues. As for the claim for February 16, 2019, this claim was submitted to arbitration within 30 days of the denial and so interest does not toll. As to this claim interest shall accrue beginning 3/6/19.

C. Attorney's Fees

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

As this matter was filed 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 the attorney's fee, in accordance with the newly promulgated 11 NYCRR 65-4.6(d).

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

02/03/2021
(Dated)

Eva Gaspari

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:
7caa8bbea321fe7581392dffbca99f6d

Electronically Signed

Your name: Eva Gaspari
Signed on: 02/03/2021