

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Health Plus Surgery Center, LLC  
(Applicant)

- and -

American Transit Insurance Company  
(Respondent)

AAA Case No. 17-19-1127-1658

Applicant's File No. FL19-44829

Insurer's Claim File No. 1027962-01

NAIC No. 16616

**ARBITRATION AWARD**

I, Eileen Hennessy, 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-G.E.

1. Hearing(s) held on 02/03/2021  
Declared closed by the arbitrator on 02/03/2021

Nancy Orłowski from Field Law Group, P.C. participated by telephone for the Applicant

Erisa Ahmedi from American Transit Insurance Company participated by telephone for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 1,012.32**, was NOT AMENDED at the oral hearing.  
Stipulations WERE made by the parties regarding the issues to be determined.

The parties stipulated and agreed that (i) Applicant has met its prima facie burden by submitting evidence that payment of no-fault benefits is overdue, and proof of its claim was mailed to and received by Respondent; (ii) Respondent's denial of the subject claim was timely issued; and (iii) the amount claimed does not exceed the maximum permissible charges under the fee schedule applicable to the disputed service.

3. Summary of Issues in Dispute

The record reveals that the Assignor-G.E., a 22-year-old female, claimed injuries as the driver of a motor vehicle involved in an accident that occurred on 4/17/2018. Applicant seeks reimbursement for the facility fee billed in relation to a lumbar epidural steroid

injection (LESI) conducted on 11/17/2018. Respondent denied the claim based on a lack of medical necessity per the results of the peer review by Dr. Peter Chiu, M.D., dated 1/14/2019. The issue to be determined is whether the services are medically necessary?

#### 4. Findings, Conclusions, and Basis Therefor

Applicant seeks reimbursement for the facility fee billed in relation to an LESI. This hearing was conducted using the documents contained in the Electronic Case Folders (ECF) for the two linked cases maintained by the American Arbitration Association. All documents contained in the ECFs are made part of the record of this hearing and my decision was made after a review of all relevant documents found in the ECFs as well as the arguments presented by the parties during the hearing.

In accordance with 11 NYCRR 65-4.5(o) (1), an arbitrator shall be the judge of the relevance and materiality of the evidence and strict conformity of the legal rules of evidence shall not be necessary. Further, the arbitrator may question or examine any witnesses and independently raise any issue that Arbitrator deems relevant to making an award that is consistent with the Insurance Law and the Department Regulations.

#### **WORKER'S COMPENSATION DEFENSE WITHDRAWN**

Respondent withdrew their Worker's Compensation defense premised on the decision in *State of New York - Workers' Compensation Board In regard to [Assignor-G.E.]*, WCB Case #G214 7253, which found "At the Workers' Compensation hearing held on 05/07/2019 involving the claim of [Assignor-G.E.] at the Manhattan hearing location, Judge Barry Hermelee made the following decision, findings and directions: DECISION: Claim is disallowed. The claimant was not involved in a "covered service"; and was not within the scope and/or course of his employment at the time of the accident in issue. The case is closed". Respondent is defending the claim premised on lack of medical necessity.

#### **Legal Standards for Determining Medical Necessity**

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).

The issue of whether treatment is medically unnecessary cannot be resolved without resort to meaningful medical assessment, Kingsbrook Jewish Medical Center v. Allstate Ins. Co., 61 A.D.3d 13, 871 N.Y.S.2d 680 (2d Dept. 2009), such as by a qualified expert performing an independent medical examination or conducting a peer review of the

injured person's treatment. See Rockaway Boulevard Medical P.C. v. Travelers Property Casualty Corp., 2003 N.Y. Slip Op. 50842(U), 2003 WL 21049583 (App. Term 2d & 11th Dists. Apr. 1, 2003). The appellate courts have not clearly defined what satisfies the insurer's evidentiary standard except to the extent that "bald assertions" are insufficient. Amherst Medical Supply, LLC v. A Central Ins. Co., 41 Misc.3d 133(A), 981 N.Y.S.2d 633 (Table), 2013 NY Slip Op 51800(U), 2013 WL 5861523 (App. Term 1st Dept. Oct. 30, 2013). However, there are myriad civil court decisions tackling the issue of what constitutes a "factual basis and medical rationale" sufficient to establish a lack of medical necessity. The trial courts have held that a peer review report's medical rationale will be insufficient to meet respondent's burden of proof if: 1) the medical rationale of its expert witness is not supported by evidence of a deviation from "generally accepted medical" standards; 2) the expert fails to cite to medical authority, standard, or generally accepted medical practice as a medical rationale for his findings; and 3) the peer review report fails to provide specifics as to the claim at issue, is conclusory or vague. See generally Nir v. Allstate Ins. Co., 7 Misc.3d 544, 547, 796 N.Y.S.2d 857, 860 (Civ. Ct. Kings Co. 2005); See also, All Boro Psychological Servs. P.C. v. GEICO, 2012 NY Slip Op 50137(U) (N.Y. City Civ. Ct. 2012).

Where a respondent meets its burden, it becomes incumbent on the claimant to rebut the peer review. Be Well Medical Supply, Inc. v. New York Cent. Mut. Fire Ins. Co., 18 Misc.3d 139(A), 2008 WL 506180 (App. Term 2d & 11 Dists. Feb. 21, 2008); A Khodadadi Radiology, P.C. v. NY Central Mutual Fire Ins. Co., 16 Misc.3d 131(A), 2007 WL 1989432 (App. Term 2d & 11 Dists July 3, 2007). "[T]he insured/provider bears the burden of persuasion on the question of medical necessity. Specifically, once the insurer makes a sufficient showing to carry its burden of coming forward with evidence of lack of medical necessity, 'plaintiff must rebut it or succumb.'" Bedford Park Medical Practice, P.C. v. American Transit Ins. Co., 8 Misc.3d 1025(A), 2005 WL 1936346 at 3 (Civ. Ct. Kings Co., Jack M. Battaglia, J., Aug. 12, 2005). "Where the defendant insurer presents sufficient evidence to establish a defense based on the lack of medical necessity, the burden shifts to the plaintiff which must then present its own evidence of medical necessity (*see* Prince, Richardson on Evidence §§ 3-104, 3-202 [Farrell 11 ed])." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip. Op. 5187(U) at 2, 2006 WL 2829826 (App. Term 2d & 11 Dists. Sept. 29, 2006).

### **Application of Legal Standards**

Applicant seeks reimbursement for the facility fee billed in relation to the LESI conducted on 11/17/2018. In support of its contention that the services were not medically necessary, Respondent relies upon the peer review of Peter Chiu, M.D., dated 1/14/2019. Applicant submitted a formal rebuttal by Alexander Zhuravkov, M.D., dated 8/16/2019.

In a linked case involving Assignor-G.E., heard on 7/28/2020, *Metro Pain Specialists v. ATIC*, AAA Case No.: 17-19-1126-7930, I determined the LESI and epidurography conducted on 11/17/2018, which was denied premised on the same peer review of Peter Chiu, M.D., dated 1/14/2019, was medically necessary. Specifically, my award held in pertinent part:

### *Summary of Issues in Dispute*

*The record reveals that the Assignor-G.E., a 22-year-old female, claimed injuries as the driver of a motor vehicle involved in an accident on 4/17/2018. Applicant seeks reimbursement for office visits, outcome assessment tests, lumbar facet injections, and epidurography conducted from 5/24/2018 through 11/17/2018, which were denied based on the claimant was in the course of his employment at the time of the accident and Worker's Compensation benefits are primary and fee schedule. Applicant billed for an office visit, lumbar epidural steroid injection (LESI), and epidurography on 11/17/2018 and an office visit and lumbar medial branch block injections on 12/1/2018. Respondent denied the claims based on a lack of medical necessity per the results of the peer review by Dr. Peter Chiu, M.D., dated 1/14/2019 and 1/17/2019. The issues to be determined are 1) whether the Respondent has sustained its defense that Worker's Compensation benefits are primary 2) whether the services are medically necessary, and 3) whether the services were billed in accordance with the applicable fee schedule?*

### *Findings, Conclusions, and Basis Therefor*

*Applicant seeks reimbursement for office visits, outcome assessment testing, LESI, epidurography, and lumbar facet injections...*

*...*

### **Application of Legal Standards**

#### **Date of Service 11/17/2018**

*The Assignor was seen for an office visit and underwent an LESI and epidurography on 11/17/2018. In support of its contention that the services were not medically necessary, Respondent relies upon the peer review of Peter Chiu, M.D., dated 1/14/2019. Applicant submitted a formal rebuttal by Alexander Zhuravkov, M.D., dated 6/9/2020.*

*I find Dr. Chiu's peer review to be sufficient for the purpose of establishing the defense of lack of medical necessity for the LESI and epidurography. Dr. Chiu adequately sets forth the factual basis and medical rationale to support his conclusion that the LESI and epidurography was not indicated for the Assignor. That being so, the burden shifts to the Applicant to counter Respondent's showing.*

*I am faced with conflicting opinions concerning the medical necessity for the disputed services herein. There are no legal issues to resolve. This dispute involves solely an issue of fact, that is, whether the services were medically necessary. Resolution of that fact is determined by which opinion is accepted by the trier of fact.*

*Having carefully reviewed the evidence, including the rebuttal statement, dated 6/9/2020, the examination reports, dated 10/3/2018, 11/17/2018, and 12/1/2018 by Dr. Zhuravkov, and the LESI report, dated 11/17/2018, I find, as a matter of fact, that the LESI and epidurography in dispute were*

medically necessary. The rebuttal and examination reports set forth the medical necessity for the LESI and epidurography that was performed based on the clinical findings of the Assignor. I find the reports and rebuttal sufficiently address the arguments that were raised in the peer review. Dr. Chiu indicates that the standard of care for an LESI includes neurological deficit, failed conservative care, MRI evidence of herniated disc, and nerve testing, which indicates radiculopathy. Dr. Zhurakov establishes in the rebuttal that the Assignor meets the standard of care. The Assignor underwent extensive conservative care prior to the LESI. The examination indicates radiating pain down the leg, associated with numbness and tingling and a positive Straight Leg Test, which is indicative of radiculopathy. The 5/18/2018 lumbar MRI indicates nerve root impingement and disc herniations. Having carefully considered the entire record, I find that the more credible and persuasive proof resides with the Applicant. Therefore, the issue to be determined is whether the LESI and epidurography were billed in accordance with the applicable fee schedule. I further find that Respondent failed to sustain its burden on the defense of medical necessity for the office visit. The sole basis of Dr. Chiu's determination that the office visit is not medically necessary is because the injection was not medically necessary. Dr. Chiu does not satisfactorily establish a generally accepted standard of medical practice from which Dr. Zhurakov deviated by prescribing examining the patient on 11/17/2018. The peer is conclusory as to the office visit. See generally Nir v. Allstate Ins. Co., supra. Respondent failed to satisfactorily "support its lack of medical necessity defense" and the "burden of persuasion" did not therefore shift to Applicant. See generally, Bronx Expert Radiology, P.C. v. Travelers Ins. Co., 2006 NY Slip Op 52116 (App. Term 1st Dept. 2006). Therefore, the office visit is granted in the reduced amount of \$64.07 in accordance with the applicable fee schedule (5.83 RVUs x 10.99 CF).

#### **FEE SCHEDULE**

...

Respondent has not submitted any competent evidence in support of a fee schedule defense for the bills for dates of service 5/24/2018 through 10/3/2018 for the office visits and outcome assessment tests and those bills are granted in their entirety.

Respondent relies on the fee audit of Elisha Jones, fee audit specialist, which indicates that the bill for the LESI and epidurography on 11/17/2018 should be reduced from \$1,146.76 to \$554.27. Code 99213 is reduced to \$64.07; code 62311 is reduced to \$343.56; and code 72275 is reduced to \$146.64 in accordance with the fee schedule. Respondent satisfied its burden to establish proper fee schedule reductions. Applicant did not submit any competent evidence in response. Therefore, the claim for date of service 11/17/2018 is granted in the reduced amount of \$554.27.

#### **CONCLUSION**

Accordingly, Applicant's claim is granted in the reduced amount of \$1,886.68. The remainder of the claim is denied. This award is in full disposition of all No-Fault benefit claims submitted to this Arbitrator.

This case involves the facility fee for the same LESI conducted on 11/17/2018, which was addressed in AAA Case No.: 17-19-1126-7930. The parties presented identical evidence, which was reviewed and considered, including the peer review of Peter Chiu, M.D., dated 1/14/2019, and rebuttal of Alexander Zhuravkov, M.D., dated 8/16/2019 (The rebuttal was dated 6/9/2020 in the linked case).

I concur with my prior decision in its entirety and find that the standard for Collateral Estoppel is met in this case. There is an identity of issues between the cases, namely, whether the underlying LESI, for which the facility fee in dispute was provided, was medically necessary. Considering my prior award, it would be inconsistent for me to find Respondent's denial in this case can be sustained. Respondent had a full and fair opportunity to contest the prior decision, prosecuted the claims on the merits, and a decision was made on the merits, which was not appealed. I find that Respondent's counsel has not sufficiently satisfied its burden to show the absence of a full and fair opportunity to litigate the issue of medical necessity of the underlying LESI and related services denied based on the peer review of Peter Chiu, M.D., dated 1/14/2019.

Since I previously determined that the Respondent failed to sustain its burden of demonstrating that the subject treatment and related services were not medically necessary, I am bound by the doctrine of collateral estoppel, and I concur with my decision. Notably, in the instant case Applicant relies on the same rebuttal by Dr. Zhuravkov, dated 8/16/2019 (dated 6/9/2020 in the linked case), the examination reports, dated 10/3/2018, 11/17/2018, and 12/1/2018 by Dr. Zhuravkov, and the LESI report, dated 11/17/2018, submitted in the linked case before me. I concur with my earlier award that Applicant was able to persuasively rebut the peer and establish that the services in dispute, including the underlying LESI and facility fee, were medically necessary. I find that, were my prior decision not entitled to collateral estoppel effect, Applicant's rebuttal and medical records are sufficient to rebut the Respondent's peer review and establish the medical necessity of the services.

Therefore, I find that the Respondent has not met its burden of proving that the medical care in dispute was not medically necessary for the subject patient.

No fee schedule or policy exhaustion arguments were raised at the hearing or in the record.

Accordingly, Applicant's claim is granted 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 applicant is AWARDED the following:

A.

Medical		From/To	Claim Amount	Status
	Health Plus Surgery Center, LLC	11/17/18 - 11/17/18	\$1,012.32	Awarded: \$1,012.32
Total			\$1,012.32	Awarded: \$1,012.32

- B. The insurer shall also compute and pay the applicant interest set forth below. 04/30/2019 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Applicant is awarded interest pursuant to the no-fault regulations. *See generally*, 11 NYCRR §65-3.9. Interest shall be calculated "at a rate of two percent per month, calculated on a pro rata basis using a 30-day month." 11 NYCRR §65-3.9(a). A claim becomes overdue when it is not paid within 30 days after a proper demand is made for its payment. However, the regulations toll the accrual of interest when 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 Insurance Department regulations." *See*, 11 NYCRR 65-3.9(c). The Superintendent and the New York Court of Appeals has interpreted this provision to apply regardless of whether the denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009). Based on the regulations, interest shall accrue from the date the applicant requested arbitration in this matter. *See*, 11 NYCRR 65-3.9(c).

C. Attorney's Fees

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

Applicant is entitled to an attorney's fee pursuant to Insurance Law §5106(a). After calculating the sum total of the first-party (No-Fault) benefits awarded in this arbitration plus interest thereon, Respondent shall pay Applicant an attorney's fee equal to 20 percent of that sum total, subject to the following limitations: In the event the above filing date was prior to Feb. 4, 2015, the attorney's fee is subject to a minimum of \$60.00 and a maximum of \$850.00, per 11 NYCRR 65-4.6(e). In the event the above filing date was on or after Feb. 4, 2015, the attorney's fee is subject to a maximum of \$1,360.00, per 11 NYCRR 65-4.6(d). In the event the above filing date was on or after Feb. 4, 2015 and first-party (No-Fault) benefits are awarded to more than one Applicant herein, the attorney's fee shall be calculated separately for each Applicant, each Applicant's attorney fee being subject to the \$1,360.00 maximum.

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

03/05/2021  
(Dated)

Eileen Hennessy

**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:**  
61d6b5b6827b324b6b690c10d3572167

### **Electronically Signed**

Your name: Eileen Hennessy  
Signed on: 03/05/2021