

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Mulberry Ambulatory Surgical Center
(Applicant)

- and -

Maya Assurance Company
(Respondent)

AAA Case No. 17-19-1137-0387

Applicant's File No. N/A

Insurer's Claim File No. 170668-01

NAIC No. 36030

ARBITRATION AWARD

I, Meryem Toksoy, 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 (LH)

1. Hearing(s) held on 05/19/2021
Declared closed by the arbitrator on 05/19/2021

Rajesh Barua, Esq. from The Law Offices of Hillary Blumenthal P.C. (Melville)
participated in person for the Applicant

Christine Lee, Esq. from De Martini & Yi, LLP participated in person for the
Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,452.70**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant's counsel withdrew - with prejudice - that portion of the claim which refers to anesthesia and epidurography. As a result, the amount in dispute was amended to \$1012.32.

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

3. Summary of Issues in Dispute

In dispute is a claim by the Applicant, Mulberry Ambulatory Surgical Center, as the assignee of a 61-year-old female who was injured in a motor vehicle accident on 07-24-17.

Applicant seeks to be reimbursed **\$1012.32** for **facility fees relating to a lumbar epidural steroid injection (at the L5-S1 level, left side)**. The record shows that the procedure was performed by Shailesh Pathare, MD on 12-08-17 at Applicant's facility, which is located in Newark, New Jersey.

With regard to the claim, Respondent asserts the **defense of lack of medical necessity** and relies upon the **peer review** of Douglas Petroski, MD to uphold its denial.

In opposition, Applicant has submitted a rebuttal statement by Dr. Pathare.

During the hearing, no arguments were presented with respect to Applicant's prima facie case or the timeliness and/or propriety of Respondent's denial.

The parties agreed that the only issue for me to resolve is medical necessity.

4. Findings, Conclusions, and Basis Therefor

The case was decided on the submissions of the parties as contained in the electronic file maintained by the American Arbitration Association and the oral arguments of the parties' representatives.

There were no witnesses.

LEGAL FRAMEWORK:

A presumption of medical necessity attaches to an applicant's properly-submitted claim form and upon its receipt, the burden shifts to the insurer to demonstrate lack of medical necessity. Amaze Med. Supply v. Eagle Ins. Co., 2 Misc.3d 128(A), 2003 NY Slip Op 51701(U)(App Term, 2nd Dept, 2nd and 11th Jud Dists., 2003).

To succeed on this defense, the insurer is required to "set forth with sufficient particularity the factual basis and medical rationale underlying that determination." Elmont Open MRI & Diagnostic Radiology, P.C. v. Geico Ins. Co., 2006 NY Slip Op 51185(U)(App Term, 2nd Dept, 9th and 10th Jud Dists., 2006).

Further, defending a denial of first-party benefits on the ground that the billed-for services were not medically necessary requires the insurer to establish that the services were "inconsistent with generally accepted medical/professional practice[s]." CityWide Social Work & Psy. Serv., P.L.L.C. v. Travelers Indemnity Co., 3 Misc.3d 608 at 609, 777 N.Y.S.2d 241 Civ. Ct. Kings Co. 2004).

If the insurer can establish that the services were not medically necessary, "the burden shifts to the plaintiff which must then present its own evidence of medical necessity." West Tremont Medical Diagnostic, P.C. v. Geico Ins. Co., 13 Misc.3d 131(A), 2006 N.Y. Slip Op. 5187(U) (App Term, 2nd Dept, 2nd & 11th Jud Dists., 2006).

To prevail on this issue, the claimant must put forward evidence that meaningfully refers to and rebuts the conclusion(s) set forth in the peer review report. High Quality Medical, P.C. v. Mercury Ins. Co., 26 Misc.3d 145(A), 2010 N.Y. Slip Op.50447(U)(App. Term, 2nd Dept, 2nd, 11th & 13th Jud. Dists, 2010).

In the absence of any persuasive evidence to rebut an insurer's showing of a lack of medical necessity, the denials must be upheld. Quality Health Prods., Inc., v. Geico Ins. Co., 44 Misc 3d 139(A), 2014 NY Slip Op 51268(U)(App Term, 2nd Dept., 2nd, 11th & 13th Jud. Dists., 2014).

DECISION:

Having carefully reviewed the evidence, I find as a matter of fact that the injection administered on 12-08-17 was medically necessary. The rebuttal statement by Dr. Pathare sets forth examination findings, and it explains the significance of those findings in relation to the claimed service. Furthermore, it cites to supporting literature and meaningfully addresses the arguments that were raised by Dr. Petroski.

In balancing the two positions, I find that the more persuasive proof on the issue of medical necessity resides with the Applicant. Accordingly, the claim is hereby granted in full.

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
	Mulberry Ambulatory Surgical Center	12/08/17 - 12/08/17	\$1,050.00	\$0.00	Withdrawn with prejudice
	Mulberry Ambulatory Surgical Center	12/08/17 - 12/08/17	\$1,402.70	\$1,012.32	Awarded: \$1,012.32
Total			\$2,452.70		Awarded: \$1,012.32

B. The insurer shall also compute and pay the applicant interest set forth below. 07/31/2019 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.

With respect to the interest accrual date (when arbitration was requested), see specifically, 11 NYCRR §65-3.9(c).

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. "If an applicant does not request arbitration or institute a lawsuit within 30 days after 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." 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 particular denial at issue was timely. LMK Psychological Servs., P.C. v. State Farm Mut. Auto. Ins. Co., 12 N.Y.3d 217 (2009).

C. Attorney's Fees

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

As the claim was filed subsequent to the Sixth Amendment to 11 NYCRR §65-4 (Insurance Regulation 68-D) which took effect on February 4, 2015, Attorney's Fees shall be calculated pursuant to the amended terms, as follows:

20 percent of the amount of first-party benefits, plus interest thereon, subject to a maximum fee of \$1,360. [11 NYCRR §65-4.6(d)]. There is no minimum fee.

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

06/18/2021

(Dated)

Meryem Toksoy

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:
2227d666edfd1083df47ece76021af1f

Electronically Signed

Your name: Meryem Toksoy
Signed on: 06/18/2021