

American Arbitration Association  
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Rockaways ASC Development LLC d/b/a  
ASC of Rockaway Beach  
(Applicant)

- and -

AAA Case No.	17-20-1185-9653
Applicant's File No.	241861
Insurer's Claim File No.	01-078128-PIP01-001
NAIC No.	23060

Stillwater Property and Casualty Insurance  
Company f/k/a Tri-State Consumer  
Insurance Company  
(Respondent)

**ARBITRATION AWARD**

I, Kent Benziger, 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: J.J.

1. Hearing(s) held on 08/09/2021  
Declared closed by the arbitrator on 08/09/2021

Kurt Lundgren, Esq. from Thwaites, Lundgren & D'Arcy Esqs participated for the Applicant

Joseph Armao, Esq. from Stillwater Property and Casualty Insurance Company f/k/a Tri-State Consumer Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 5,342.93**, 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

On September 26, 2019, the Assignor/Eligible Injured Party, a 32-year-old female, was, by history, involved in a motor vehicle accident. On August 5, 2020, Dr. Kaisman performed an endoscopic lumbar discectomy at the L4-5 level with multiplanar fluoroscopy and a lumbar discogram. The pre and post-operative diagnosis was of a herniated disc L4-5 and lumbar radiculopathy. The Respondent denied reimbursement based on an independent medical examination (hereinafter referred to as an IME) by Dr. Anna Kroll. Dr. Kaisman has issued a rebuttal to the IME. Further, Applicant's counsel

notes that Dr. Kroll's listed positive findings in her IME and stated that a further IME should be conducted which did not occur.

This hearing was conducted using the electronic case folder maintained by the American Arbitration Association. All documents contained in that folder are made part of the records of this hearing. I have reviewed the documents contained in the electronic case folder as of the date of this award as well as any documents submitted upon continuance of the case. Any documents submitted after the hearing that have not been entered in the electronic case folder as of the date of this award will be listed immediately below and forwarded to the American Arbitration Association at the time this award is issued for inclusion in said case folder.

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

On September 26, 2019, the Assignor/Eligible Injured Party, a 32-year-old female, was, by history, involved in a motor vehicle accident. The Assignor initially treated for lower back pain with chiropractic care and acupuncture. An MRI performed on October 24, 2019 revealed disc bulges at L2-3 and L3-4, right foraminal herniations at L4-5 and dextrocurvature which could represent spasms.

On July 16, 2020, the Assignor was evaluated by Dr. Kaisman who noted the Assignor had persistent radiating back pain despite physical therapy. An exam revealed diminished sensation along the right L4 distribution, positive straight leg raising at 35 degrees indicative of nerve root compression as well as spasm.

On August 5, 2020, Dr. Kaisman performed an endoscopic lumbar discectomy at the L4-5 level with multiplanar fluoroscopy and a lumbar discogram. The pre and post-operative diagnosis was of a herniated disc L4-5 and lumbar radiculopathy.

Denial. The Respondent denied reimbursement for the discectomy based on an IME by Dr. Anna Kroll.

IME. On July 22, 2020, the Assignor was examined at the Respondent's request by Dr. Anna Kroll, a pain management specialist. At the time of the evaluation, the Assignor complained of pain in the neck, low back and "on and off" pain in the left knee. On examination, the Assignor had full range of motion in the cervical, thoracic and extremities including elbows, wrists, knees and ankles. In the lumbar spine, extension was slightly reduced 20/25. Straight leg raising in the supine position was 75/90 degrees. The Fabere-Patrick test was positive bilaterally. Minimal vertebral tenderness or moderate muscle spasm was noted throughout the paraspinal musculature. Trigger points were noted. The diagnoses were of cervical spine sprain - resolved, lumbar spine

sprain - resolving and left knee contusion - resolved. Dr. Kroll recommended one trigger point injection to the lumbar spine and stated that the Assignor should be re-evaluated in four weeks. A re-evaluation did not occur.

General Denial. Based on the examination, the Respondent issued a general denial on August 3, 2020. The NF-10 summarized Dr. Kroll's findings stating that further pain management treatment is limited to one trigger point injection with a re-evaluation in four weeks and with no need for physical therapy as the Assignor had reached a plateau. As of August 10, 2020, pain management benefits re "limited for all such expenses.

Addendum. Dr. Kroll then issued an addendum dated August 24, 2020 following her receipt of Dr. Kaisman's operative report. She noted that as of her exam on July 22, 2020, the Assignor did not complain of any radiating pain and the neurological exam was normal with no sensory deficits. Therefore, she found the lumbar discectomy was not medically necessary. Dr. Kroll then issued a further addendum dated September 21, 2020 with the same language as the July 22, 2020 addendum.

Rebuttal. Dr. Arden Kaisman has issued a rebuttal to Dr. Kroll's IME and addendum. He reviewed the Assignor's positive findings in the treatment report as well as Dr. Kroll's positive findings. He then cited the following authoritative sources:

According to multiple organizations including the *American Academy of Orthopaedic Surgeons*, *North American Spine Society*, and *International Society for the Advancement of Spine Surgery* surgery is considered for lumbar radiculopathy in cases where non-operative management of radicular pain fails to improve symptoms after more than 6 weeks

In the 2019 policy guideline of the *International Society for the Advancement of Spine Surgery* on surgical treatment of lumbar radiculopathy, it was stated that the current evidence is consistently in favor of discectomy, rather than continuing nonsurgical care, for greater and/or faster alleviation of pain. reduction of disability, and higher patient satisfaction.

A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms, and the burden then switches to the Respondent to demonstrate the lack of medical necessity. *Acupuncture Prime Care, P.C. v. State Farm Mutual Auto Ins.*, 2007 N.Y. Slip Op. 522273U; 2007 N.Y. Misc. LEXIS 7860 (Dist. Ct. Nassau Co. 12/3/2007); *A.B. Medical Services, PLLC v. N.Y. Central Mutual Fire Ins. Co.*, 7 Misc. 3d 1018(a), 801 N.Y.S.2d 229 (Civil Ct. Kings Co.

2005); *Citywide Social Work & Psychological Services v. Travelers Indemnity*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004). Respondent thus bears "both the burden of production and burden of persuasion with respect to the medical necessity of the treatment or testing for which payment is sought". See: *Bajaj v. Progressive Ins. Co.* 14 Misc.3d 1202(A) (N.Y.C. Civ. Ct 2006). The quantum of proof necessary to meet Respondent's burden, at the bare minimum, is to "establish a factual basis and medical rationale for the lack of medical necessity of Applicant's services. *Id.*

As a finding of fact, Dr. Kroll's IME is not persuasive to terminate benefits or find that the lumbar discectomy was not medically necessary. Dr. Kroll's IME did list positive, objective findings in the lumbar spine. She concluded that the lumbar injury was resolving - not resolved. She stated that a further IME should be performed - which never occurred and her statement as to termination of services did not include surgery. Further, the Assignor had roughly contemporaneous physical examinations with Dr. Kaisman, the treating surgeon, who noted radiating pain and positive orthopedic and neurologic findings. Further, Dr. Kaisman's findings are more persuasive. In addition, Dr. Kroll failed to effectively discuss the positive MRI findings or the operative report.

The reports from an independent medical examination must contain not only the results of a physical examination, but also incorporate, discuss and review the patient's medical history including all positive clinical and diagnostic findings. *Carle Place Chiropractic v. New York Central Mut. Fire Ins. Co.*, 19 Misc.3d 1139(A), (Dist. Ct. Nassau Co., Andrew M. Engle, J., May 29, 2008 Interestingly, the Assignor was also examined by a Dr. Andrew Miller, an orthopedic, on February 4, 2020 on the Respondent's behalf. However, his examination was not listed as a basis of the denial on any exchanged NF-10s. The Respondent has failed to sustain its burden of proof of lack of medical necessity. *Nir v. Allstate Insurance Company*, 7 Misc.3d 544, 546, 547 (2005). Applicant is awarded reimbursement for the treatment in dispute.

Pursuant to 11 NYCRR 65-4.5 (o)(1)(i)(ii), an arbitrator is the judge of the relevance and materiality of the evidence offered.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest (i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 11 NYCRR 65-3.9(c).

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: *LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co.*, 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

APPLICANT IS AWARDED REIMBURSEMENT OF \$5,342.93, TOGETHER WITH INTEREST AND ATTORNEYS' FEES.

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
	ASC of Rockaway Beach	08/05/20 - 08/05/20	\$5,342.93	Awarded: \$5,342.93
Total			\$5,342.93	Awarded: \$5,342.93

- B. The insurer shall also compute and pay the applicant interest set forth below. 11/23/2020 is the date that interest shall accrue from. This is a relevant date only to the extent set forth below.

Interest. The insurer shall compute and pay to the Applicant the amount of interest from the filing date of the Request for Arbitration, at a rate of 2% per month, simple interest

(i.e. not compounded) using a 30-day month and ending with the date of payment of the award, subject to the provisions of 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

Attorney's Fees. As said case was filed on or after February 4, 2015, Applicant is awarded attorney's fees for the total amount of first party benefits awarded. Pursuant to 11 NYCRR 65-4.6(d)(e), the Applicant is awarded 20 percent of the amount of the first party-benefits, with no minimum fee and a maximum \$1,360.00 which is the total amount awarded one Applicant in one action from one provider. See: LMK Psychological Services, P.C. v. State Farm Mut. Auto Ins. Co., 46 A.D.3d 1290; 849 N.Y.S.2d 310 (3 Dept. 2007).

- 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 Orange

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

08/20/2021

(Dated)

Kent Benziger

**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:**  
9854e3a83cd27f48695c62bbd4ee090e

### **Electronically Signed**

Your name: Kent Benziger  
Signed on: 08/20/2021