

American Arbitration Association
New York No-Fault Arbitration Tribunal

In the Matter of the Arbitration between:

Manalapan Surgery Center
(Applicant)

- and -

Geico Insurance Company
(Respondent)

| | |
|--------------------------|------------------|
| AAA Case No. | 17-20-1181-4054 |
| Applicant's File No. | 241141 |
| Insurer's Claim File No. | 0416780920101131 |
| NAIC No. | 35882 |

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: C.H.

1. Hearing(s) held on 07/12/2021, 08/16/2021
Declared closed by the arbitrator on 08/16/2021

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

Jerry Marino, Esq. from Geico Insurance Company participated for the Respondent

2. The amount claimed in the Arbitration Request, **\$ 2,817.00**, was AMENDED and permitted by the arbitrator at the oral hearing.

Applicant has stipulated to amend the amount in dispute to \$1,874.40 for the facility fee for this ambulatory surgical procedure.

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

3. Summary of Issues in Dispute

On July 23, 2019, the Assignor/Eligible Injured Party, a 27-year-old female, was, by history, involved in a motor vehicle accident when a bus struck the Assignor's parked car and dragged the vehicle. In dispute is the facility fee for the performance of a bilateral L4-5, L5-S1 transforaminal epidural steroid injections under fluoroscopic guidance on November 8, 2019. The Respondent denied reimbursement based on a peer

review of Dr. Mitchell Ehrlich while Dr. Serge Menkin, the treating provider, issued a rebuttal to the peer review. The Respondent also contends that a Confidential Settlement Agreement pertaining to Dr. Herschel Kotkes applies to this claim. Applicant contends that this "walkaway agreement" is not binding on procedures performed by Dr. Serge Menkin.

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 July 23, 2019, the Assignor/Eligible Injured Party, a 27-year-old female, was, by history, involved in a motor vehicle accident when a bus struck the Assignor's parked car and dragged the vehicle. On October 22, 2019, the Assignor was evaluated by Dr. Serge Menkin for lumbar pain radiating to the lower extremity. An MRI was interpreted as revealing a L5-S1 disc herniation and L4-5 disc bulge and L3-4 bilateral facet inflammation. An EMG/NCV was interpreted as revealing left L5 and S1 radiculopathy and L4, L5 posterior rami denervation. The impression was of lumbago, lumbar central stenosis and lumbar radiculopathy.

On November 8, 2019, Dr. Menkin performed bilateral L4-5, L5-S1 transforaminal epidural steroid injections under fluoroscopic guidance. The pre and post-procedure diagnosis was of HNP L4-5, L5-S1, bilateral L4/5 radiculopathy.

Denial/Peer Review. The Respondent issued a denial for the procedure based on the peer review of Dr. Mitchell Ehrlich. From his review of the medical records, Dr. Ehrlich found the physical examinations had not revealed significant and multi-level bilateral radiculopathy and the MRI failed to reveal correlative and post-traumatic lateralizing disc pathology. Dr. Ehrlich opined that without those "key indicator" the epidural injection was not medically necessary. He cited a 2010 source that found a lack of well-designed placebo-controlled studies to define specific indications and techniques for the procedures. He then listed a 2012 article in Pain Physician and stated:

In summary, the evidence is good for radiculitis secondary to disc herniation with local anesthetics and

steroids and fair with local anesthetic only; it is fair for radiculitis secondary to spinal stenosis with local anesthetic and steroids; and limited for axial pain and post-surgery syndrome using local anesthetic with or without steroids.

Rebuttal. Dr. Menkin issued a rebuttal to the peer review. He found the Assignor had positive findings on both examinations and diagnostic studies that correlated with the diagnoses including disc herniations at L5-S1 disc bulges and the EMG/NCV studies that were consistent with bilateral L4-L5 and S1 radiculopathy. He cited the following:

According to, *New York Mid and Low Back Injury Medical Treatment Guidelines*, September 15, 2014, ESI is **useful in patients with symptoms of lumbar radicular pain** syndromes. Epidural Steroid Injections (ESIs) have been endorsed by the *North American Spine Society (NASS)* as an integral part of nonsurgical management of radicular pain from lumbar spine disorders. The *American Society of Interventional Pain Physicians*, which developed evidence-based clinical practice guidelines for interventional techniques in the diagnosis and treatment of chronic spinal pain, stated that the evidence is good in managing disc herniation or radiculitis for caudal, interlaminar, and transforaminal epidural injections

...

Studies indicate that the epidural with fluoroscopy, as an alternative to surgery, or as an adjunct to physical therapy, offers the potential for significant improvement in pain. Studies vary in the effectiveness of this technique, with reports varying between 50-90% of patients showing significant improvement. The AHCPR guidelines recommend epidural steroids as an option for short-term relief of radicular pain after failure of conservative treatment and as a means of avoiding surgery.

Dr. Menkin found the peer review failed to discuss the specific of the Assignor's findings He stated that the injection was performed with the recommendation of the *New York State Workers' Compensation Board, New York Mid and Low Back Injury Medical Treatment Guidelines*, Third Edition, September 15, 2014. He then cited extensive sources that supported the necessity of the procedure.

Manchikanti, Laxmaiah, et al. *Effectiveness of therapeutic lumbar transforaminal epi- dural steroid injections in managing lumbar spinal pain*. (2012): E199-245-which I would like to highlight concluded that the evidence is good for radiculitis secondary to disc herniation with local anesthetics.

As documented, the patient's lumbar spine MRI revealed the presence of disc herniation at L5-S1 level.

The *American Society of Interventional Pain Physicians*, which developed evidence- based clinical practice guidelines for interventional techniques in the diagnosis and treatment of chronic spinal pain, stated that the evidence is good in managing disc herniation or radiculitis for caudal, interlaminar, and transforaminal epidural injections.

Analysis. A presumption of medical necessity attaches to a Respondent's admission of the Applicant's timely submission of proper claim forms. The Respondent then bears the burden to prove that the treatment was not medically necessary *Kings Med. Supply Inc. v. Country-Wide Ins.*, 5 Misc.3d 767 (2004); *Behavioral Diagnostics v. Allstate Ins. Co.*, 3 Misc.3d 246 (2004); *A.B. Med. Servs v. Geico Ins.* 2 Misc.3d 16 (App. Term 2d Dept. 2003). In this case, the peer review must submit "objective testimony or evidence to establish that his opinion is what is generally accepted in the medical profession." *Williamsbridge Radiology v. Travelers*, 14 Misc.3d 1231(a) (Civ. Ct Kings Co. 2007). When a carrier uses a peer review as basis for the denial, the report must contain evidence of the applicable generally accepted medical/professional standards as well as the provider's departure from those standards. *Acupuncture Prima Care v. State Farm Mut. Auto Ins. Co.* 17 Misc. 3d 1135 (Civ. Ct. Nassau, 12/03/07). Therefore, a peer reviewer must thoroughly review the relevant medical records and give evidence of generally accepted medical standards. Then, through careful analysis, the peer reviewer must apply those standards to the facts to document that the treatment in question was not medically necessary. See: *CityWide Social Work & Psychological Services v. Travelers Idem. Co.*, 3 Misc.3d 608, 609 (Civil Ct. Kings Co. 2004).

As a finding of fact, the peer review is not persuasive. Dr. Ehrlich discusses the medical findings in a conclusory manner while citing sources that found studies on the procedure were not thorough. In response, Dr. Menkin has specifically discussed how the MRI and EMG studies correlated with the diagnoses and then cited guidelines and more recent sources that found the studies medically necessary under the facts presented. 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.

Walkaway Affidavit/Agreement. The Respondent has submitted what is referred to as a "Walkaway Affidavit" in which a Dr Herschel Kotkes, M.D., P.C. states that he withdraws all claims without prejudice against Geico. It is signed July 24, 2020. Both parties appear to agree that Dr. Kotkes and Dr. Menkin are shareholders in Manalapan Surgery Center. The Respondent has also included a Confidential Settlement Agreement

executed by Felix Kogan on July 21 2020 on behalf of New Horizon Surgical Center, LLC, Surgicare of Jersey City, LLC, Manalapan Surgery Center and All City Family Healthcare Center which states in pertinent part:

Surgicare ASCs have submitted claims to GEICO seeking payment for facility fees, goods, and/or services associated with healthcare services allegedly provided to GEICO Insureds at its New York and New Jersey ambulatory surgical centers/ambulatory care facilities prior to the execution of this Agreement as a result of professional services allegedly performed on Insureds by or through Herschel Kotkes, M.D. and/or Herchel Kotkes, M.D., P.C. (the "Kotkes Services"). By and through this Agreement, the Parties intend to settle and resolve, by way of compromise and accord, all claims by and between them relating to facility fees resulting from the Kotkes Services, unrelated to the Parties respective positions on the merits, in order to avoid disputes, litigation, or arbitrations regarding claims that GEICO and Surgicare ASCs may have against one another.

In sum, a plain reading of both the affidavit and the Confidential Settlement Agreement only applies to procedures performed by Dr. Kotkes at various facilities - not Dr. Menkin. Applicant is awarded reimbursement for 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 \$1,874.40, 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 | Amount Amended | Status |
|---------|--------------------------|---------------------|--------------|----------------|---------------------|
| | Manalapan Surgery Center | 11/08/19 - 11/08/19 | \$2,817.00 | \$1,874.40 | Awarded: \$1,874.40 |
| Total | | | \$2,817.00 | | Awarded: \$1,874.40 |

- B. The insurer shall also compute and pay the applicant interest set forth below. 10/11/2020 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.

08/22/2021

(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:
f1d254c826fce375e281773863dbeb0f

Electronically Signed

Your name: Kent Benziger
Signed on: 08/22/2021